BRB No. 06-0810 BLA

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| EUGENE PAUL OSBORNE | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| PEACH TREE COAL, INCORPORATED | ) | |
| | ) | |
| and | ) | DATE ISSUED: 05/30/2007 |
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| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand - Denial of Modification Request of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Modification Request (03-BLA-0224) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) rendered pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). This case has been before the Board previously.[1] In its most recent Decision and Order, the Board affirmed the administrative law judge's findings that the newly-submitted x-ray evidence was insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] The Board further held, however, that the administrative law judge did not perform his own weighing of the medical opinions of Drs. Rasmussen and Zaldivar when determining whether Administrative Law Judge Jeffrey Tureck made a mistake in a determination of fact in finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, the Board vacated the administrative law judge's denial of claimant's modification request and remanded the case for consideration of the medical opinions of Drs. Zaldivar and Rasmussen. *Osborne v. Peach Tree Coal, Inc.*, BRB No. 05-0203 BLA (Sept. 30, 2005)(unpub.)(Smith, J., concurring and dissenting). The Board instructed the administrative law judge to determine whether Dr. Zaldivar's opinion regarding the presence of legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2), was contrary

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[1] Claimant submitted his application for benefits on May 13, 1999. Director's Exhibit 1. When the district director made an initial finding of entitlement, employer requested a hearing. In a Decision and Order dated September 25, 2000, Administrative Law Judge Jeffrey Tureck found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)(2000), and he denied benefits. Director's Exhibit 37. By Decision and Order dated September 14, 2001, the Board affirmed Judge Tureck's findings pursuant to Section 718.202(a)(1)-(4), and also affirmed the denial of benefits. *Osborne v. Teays Inc.*, BRB No. 01-0117 BLA (Sept. 14, 2001)(unpub.). Claimant filed a request for modification on October 26, 2001 and submitted new x-ray evidence. Director's Exhibit 51. On November 4, 2004, Administrative Law Judge Richard T. Stansell-Gamm denied claimant's request for modification because claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Claimant appealed to the Board.

[2] The amended version of 20 C.F.R. §725.310, which became effective on January 19, 2001, does not apply in this case, as the claim was pending on the effective date of the new regulation. 20 C.F.R. §725.2.

to the Act and whether Dr. Rasmussen's opinion was sufficient to establish the existence of either legal or clinical pneumoconiosis.

On remand, the administrative law judge credited Dr. Zaldivar's determination that claimant does not have clinical pneumoconiosis, but determined that Dr. Zaldivar's opinion was not probative of the issue of legal pneumoconiosis. The administrative law judge further found that Dr. Rasmussen's diagnoses of both clinical and legal pneumoconiosis were insufficient to establish that claimant is suffering from either disease. The administrative law judge concluded, therefore, that claimant failed to establish a mistake in a determination of fact under Section 725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant alleges that the administrative law judge erred in failing to properly analyze the evidence relevant to the existence of pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond unless specifically requested to do so.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). A party may seek to alter the disposition of a claim by filing a request for modification within one year of the issuance of the disposition. 20 C.F.R. §725.310(a)(2000). When a request for modification is filed, upon showing a "change in conditions" or a "mistake in a determination of fact," the terms of an award or the decision to deny benefits may be reconsidered. *Id.* A mistake of fact may be "demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Upon review, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B.*

*Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).[3]

In his Decision and Order on Remand, the administrative law judge reviewed the record to determine whether the denial of claimant's 1999 claim contained a mistake in the determination that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The record contains the medical opinions of Drs. Rasmussen and Zaldivar.

Dr. Rasmussen's report reflects that he examined claimant on August 2, 1999 and that claimant informed the doctor that he had begun smoking in 1976, when he was seventeen years old, and had averaged one pack per day until he stopped smoking in 1994. Director's Exhibits 11, 12. Claimant reported that he had worked in coal mining for seventeen years and has experienced shortness of breath for the past five to six years. *Id.* Dr. Rasmussen obtained a chest x-ray that was interpreted as positive for pneumoconiosis and a pulmonary function study that the doctor indicated revealed a moderate, irreversible, obstructive insufficiency. Director's Exhibits 10, 16. The arterial blood gas study reflected a non-qualifying value at rest, but yielded a qualifying value on exercise which, according to Dr. Rasmussen, demonstrated that claimant has a significant impairment in oxygen transfer. Director's Exhibits 12, 13. Based upon claimant's history of coal mine employment and the positive chest x-ray, Dr. Rasmussen diagnosed coal workers' pneumoconiosis. Director's Exhibits 11, 12. He also diagnosed chronic obstructive pulmonary disease and emphysema, and attributed these conditions to both cigarette smoking and coal dust exposure. Director's Exhibit 11. Dr. Rasmussen opined that claimant's severe pulmonary insufficiency, including his reduced diffusing capacity, rendered claimant totally disabled and precluded his return to coal mining. Director's Exhibit 12.

Dr. Zaldivar's report reflects that he examined claimant on January 5, 2000 and that claimant stated that he had been engaged in coal mine employment for seventeen years, and that he has experienced shortness of breath for the past five or six years. Director's Exhibit 35. The pulmonary function study produced non-qualifying values, but Dr. Zaldivar indicated that the study disclosed the presence of a mild, irreversible airways obstruction and a moderate diffusion impairment. *Id.* Dr. Zaldivar stated that the arterial blood gas study indicated a mild drop in oxygenation upon exercise and he

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was last employed in the coal mine industry in West Virginia. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200, 202 (1989)(*en banc*).

interpreted the x-ray as negative for pneumoconiosis. *Id.* When asked about his smoking history, claimant told Dr. Zaldivar that he started smoking a pack of cigarettes per day at age seventeen, and had stopped smoking in 1994. *Id*. However, Dr. Zaldivar conducted a carboxyhemoglobin test on January 5, 2000, that revealed a carbon monoxide level of 10%, indicating that at that time claimant was smoking one and a half packs of cigarettes per day. *Id.* Based upon this information, Dr. Zaldivar stated that claimant had a moderate pulmonary impairment attributable to smoking and did not have pneumoconiosis. *Id*. Dr. Zaldivar further stated that even if claimant had early simple pneumoconiosis, the cause of claimant's pulmonary impairment was his "very intense smoking habit." *Id.* Noting that the lack of a positive chest x-ray does not preclude a diagnosis of pneumoconiosis, Dr. Zaldivar nonetheless stated that the absence of radiographic evidence means that "no lung damage is expected to have occurred due to reaction to coal dust." *Id.* Because there was an absence of radiological evidence of a reaction to coal dust in this case, Dr. Zaldivar opined that "the damage to the airways must have been caused by another agent, which in this case is smoking." *Id*.

The administrative law judge assessed the relative probative value of the conflicting medical opinions and found that Dr. Zaldivar's determination that claimant did not have clinical pneumoconiosis had a firm documentary basis and was consistent with the preponderance of radiological evidence. Decision and Order on Remand at 9. Conversely, the administrative law judge found that, although Dr. Rasmussen's opinion was reasoned, the physician's diagnosis of clinical pneumoconiosis rested on two factors: claimant's seventeen years of coal mine employment and a positive reading of a chest x-ray dated August 2, 1999. *Id*. at 10. Because the administrative law judge determined that both the August 2, 1999 x-ray and the preponderance of radiological evidence were negative for pneumoconiosis, the administrative law judge concluded that Dr. Rasmussen's clinical pneumoconiosis diagnosis was based upon inaccurate documentation. *Id.* Therefore, the administrative law judge accorded Dr. Rasmussen's diagnosis of clinical pneumoconiosis diminished probative value. *Id.* Based upon these determinations, the administrative law judge found that the medical opinion evidence was insufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4). *Id.*

The administrative law judge also considered the physicians' opinions regarding legal pneumoconiosis. The administrative law judge interpreted Dr. Zaldivar's opinion as requiring a positive chest x-ray prior to attributing claimant's pulmonary obstruction to coal dust. The administrative law judge determined that such a requirement essentially turns the consideration of whether legal pneumoconiosis is present into an evaluation of whether clinical pneumoconiosis is present. Decision and Order on Remand at 9-10. The administrative law judge concluded, therefore, that Dr. Zaldivar's opinion was of limited probative value in determining whether claimant had legal pneumoconiosis. *Id*. at 10.

In addressing Dr. Rasmussen's opinion regarding legal pneumoconiosis, the administrative law judge determined that the physician cited unreliable documentation concerning claimant's smoking history. *Id.* The administrative law judge explained that, based on claimant's representation during his physical examination on August 2, 1999, Dr. Rasmussen believed claimant stopped smoking in 1994. *Id.* However, the administrative law judge noted that the result from the carboxyhemoglobin blood test conducted on January 5, 2000 by Dr. Zaldivar indicated that claimant was currently smoking a pack and a half of cigarettes per day. *Id*. The administrative law judge observed that "Dr. Rasmussen was not aware that a substantial discrepancy existed between [claimant's] stated cigarette smoking history and the objective medical evidence." *Id*. Acknowledging that an awareness of the January 2000 carboxyhemoglobin test result might not have changed Dr. Rasmussen's conclusion regarding the role coal dust played in claimant's airways obstruction, the administrative law judge observed that the doctor's opinion had been formulated without the benefit of significant information. *Id*. Because the carboxyhemoglobin test result undermined the stated smoking history relied upon by Dr. Rasmussen, the administrative law judge accorded the physician's diagnosis of legal pneumoconiosis diminished weight. *Id.* Accordingly, the administrative law judge found that claimant did not establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4). *Id*. In addition, upon weighing all of the evidence relevant to Section 718.202(a) together in accordance with the holding in *Island Creek Coal Co. v Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000), the administrative law judge concluded that claimant did not satisfy his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order on Remand at 11. The administrative law judge found, therefore, that claimant did not establish a mistake in a determination of fact in the denial of his 1999 claim.

Claimant alleges that the administrative law judge erred in discrediting Dr. Rasmussen's diagnosis of legal pneumoconiosis on the ground that he relied upon an understated smoking history. Claimant states that:

> There is some question about the extent of the claimant's cigarette smoking history but Dr. Rasmussen had already concluded that cigarette smoking had played a role in the claimant's totally disabling respiratory impairment. The mere fact that the claimant suffers from conditions other than pneumoconiosis which contribute to his disabling respiratory impairment does not bar his entitlement to benefits. He must simply show that pneumoconiosis contributed to that totally disabling respiratory impairment. Since Dr. Rasmussen had concluded that cigarette smoking had affected the claimant's breathing, even with a lesser history of smoking than that obtained from Dr. Zaldivar, his report is the only well reasoned

> opinion of record addressing the cause of the claimant's pulmonary impairment[.]

Claimant's Brief at 4-5 (unpaginated)(citation omitted). Claimant's contentions are without merit.

As an initial matter, we note that much of claimant's argument is couched in language that is relevant to the issue of total disability causation, which the administrative law judge did not reach, rather than the existence of legal pneumoconiosis. Pursuant to 20 C.F.R. §718.201(a)(2), in order to prove that he has legal pneumoconiosis, claimant is required to establish that his pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2). The administrative law judge acknowledged the point argued by claimant – that Dr. Rasmussen's diagnoses may have remained the same even if he was aware of the results of the carboxyhemoglobin test – but rationally determined that the probative value of Dr. Rasmussen's opinion attributing claimant's pulmonary condition to smoking and coal dust was diminished by the fact that the doctor was not apprised of information indicating that claimant's exposure to one of the causal factors, cigarette smoking, was more extensive than that upon which he relied. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); Decision and Order on Remand at 10. Thus, we affirm the administrative law judge's determination that the medical opinion evidence was insufficient to establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4), as it is rational and supported by substantial evidence.[4]

Claimant also argues that the administrative law judge did not properly weigh all of the evidence relevant to the existence of pneumoconiosis together in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Compton*, 211 F.3d at 213, 22 BLR at 2-178. Claimant asserts that the administrative law judge was required to "initially weigh all of the evidence together regarding the presence of coal worker's pneumoconiosis," and "not simply consider a *Compton* analysis after

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[4] We need not specifically address whether the administrative law judge acted properly in discrediting Dr. Zaldivar's opinion, that claimant's pulmonary impairment was caused solely by his cigarette smoking. Because the administrative law judge acted within his discretion as fact-finder in determining that Dr. Rasmussen's opinion, the only opinion supportive of claimant's burden under 20 C.F.R. §718.202(a)(4), was insufficient to establish that claimant is suffering from either legal or clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), error, if any, in his consideration of Dr. Zaldivar's opinion is harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

determining the weight of x-ray evidence does not establish pneumoconiosis." Claimant's Brief at 4 (unpaginated). Claimant's argument is not supported by the Act or the case cited.

The Act provides that "[i]n determining the validity of claims ... all relevant evidence shall be considered." 30 U.S.C. §924(b). In *Compton*, the United States Court of Appeals for the Fourth Circuit held that this means that "all relevant evidence is to be considered together rather than merely within discrete subsections of §718.202(a)." *Compton*, 211 F.3d at 213, 22 BLR at 2-178. Contrary to claimant's assertion, however, the court did not indicate that an administrative law judge is required to initially weigh all of the evidence together. Moreover, claimant has not explained how the application of the analysis that he advocates would alter the result in this case. We hold, therefore, that the administrative law judge did not err in weighing the evidence relevant to the existence of pneumoconiosis together, after he determined that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 30 U.S.C. §923 (b); *Compton*, 211 F.3d at 213, 22 BLR at 2-178. We also affirm the substance of the administrative law judge's finding, as the administrative law judge reasonably concluded that when considered together, the x-ray evidence and the medical opinion evidence are insufficient to establish the presence of pneumoconiosis under Section 718.202(a). *See* 30 U.S.C. §923 (b); *Compton*, 211 F.3d at 213, 22 BLR at 2-178.

In light of our disposition of claimant's arguments on appeal, we affirm the administrative law judge's finding that claimant did not establish a mistake of fact in the prior denial of benefits under Section 725.310 (2000). We must also affirm, therefore, the denial of benefits. *Stanley*, 194 F.3d at 497, 22 BLR at 2-1.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Modification Request is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge