BRB No. 08-0756 BLA

S.B. Claimant-Petitioner v. BIG ELK CREEK COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/22/2009 DECISION and ORDER

Appeal of the Decision and Order – Denying Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Modification (05-BLA-5712) of Administrative Law Judge Joseph E. Kane rendered on a claim filed 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 involves claimant's second request

for modification of the denial of a claim that he filed on August 9, 1995.[1] The administrative law judge accepted the parties' stipulation to twenty-seven years of coal mine employment.[2] He found that the medical evidence did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b). The administrative law judge therefore found that claimant did not establish a basis to modify the prior denial pursuant to 20 C.F.R. §725.310 (2000).[3] Accordingly, the administrative law judge denied benefits.

---

[1] An administrative law judge first denied the claim on February 7, 1998, because claimant did not establish that he had pneumoconiosis or was totally disabled. Director's Exhibit 86. Pursuant to claimant's appeal, the Board affirmed the denial. Director's Exhibit 93; [*S.B.*] *v. Big Elk Creek Coal Co.*, BRB No. 98-0738 BLA (Mar. 2, 1999)(unpub.). Claimant timely requested modification, which an administrative law judge denied on September 29, 2000, because claimant did not establish either pneumoconiosis or total disability. Director's Exhibit 117; *see* 20 C.F.R. §725.310 (2000). Pursuant to claimant's appeal, the Board again affirmed the denial of benefits. Director's Exhibit 128; [*S.B.*] *v. Big Elk Creek Coal Co.*, BRB No. 01-0175 BLA (Oct. 23, 2001)(unpub.). On January 30, 2002, claimant requested permission from the district director to withdraw his claim. Director's Exhibits 129, 132. While his withdrawal request was pending, claimant filed a new application for benefits on April 18, 2002. Director's Exhibit 138. The district director granted claimant's request to withdraw his 1995 claim, and employer requested a hearing on that issue. On September 24, 2002, Administrative Law Judge Joseph E. Kane denied claimant's request to withdraw his 1995 claim, because the request was untimely in that a decision denying the claim had already become effective. Director's Exhibit 160a; *see Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-200 (2002)(*en banc*). Because claimant's April 18, 2002 benefits application was submitted within one year of the Board's October 23, 2001 decision denying his 1995 claim, the district director considered the new application as a timely request for modification of the denial of that claim. Director's Exhibit 169. Neither party objected to this characterization. Decision and Order at 2.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. Director's Exhibits 2, 4, 139, 143; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to

On appeal, claimant asserts that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis or total disability. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[4]

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 (1965).

To establish entitlement to benefits in a living miner's claim under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 725.310 (2000), modification of the denial of benefits may be granted if claimant establishes that there are changed conditions or if there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a)(2000). When a request for modification is filed, "[t]he fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact or change in conditions," *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997), including whether "the ultimate fact (disability due to pneumoconiosis) was wrongly decided . . . ." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Pursuant to Section 718.202(a)(1), the administrative law judge considered four readings of three new x-rays submitted with claimant's second request for modification, and considered the readers' radiological qualifications. Decision and Order at 4, 8. The administrative law judge accurately noted that one reading, by a physician who lacked

---

the 2000 version of the Code of Federal Regulations. The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims such as this one, that were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c).

[4] We affirm the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

radiological qualifications, was positive, and that the remaining readings, by physicians qualified as either B readers or as Board-certified radiologists and B readers, were negative for pneumoconiosis.[5] In this context, the administrative law judge found that "the overwhelming majority" of the new x-ray readings were negative for pneumoconiosis. Decision and Order at 8. Further, the administrative law judge found no mistake of fact in the prior administrative law judge's determination that the weight of the previously submitted x-ray evidence, viewed in light of the readers' radiological credentials, was negative for pneumoconiosis.[6] *Id*. The administrative law judge therefore found that the entirety of the x-ray evidence did not establish a mistake of fact or change in conditions. Decision and Order at 8, 12.

Claimant contends that the administrative law judge "need not defer to a doctor with superior qualifications," and "need not accept as conclusive the numerical superiority of x-ray interpretations." Claimant's Brief at 3. Claimant further suggests that the administrative law judge "may have 'selectively analyzed'" the x-ray evidence of record. *Id*. We find no merit in these assertions. The administrative law judge rationally found that the existence of pneumoconiosis was not established by a preponderance of the old and new x-ray evidence, viewed both qualitatively and quantitatively. Decision and Order at 4, 8; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4 (2004). In addition, we reject claimant's assertion that the administrative law judge "may have 'selectively analyzed'" the x-ray evidence. Claimant's Brief at 3. Claimant has not provided any support for this assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. *See White*, 23 BLR at 1-5. Therefore, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

[5] Specifically, Dr. Simpao, with no radiological qualifications, read a July 1, 2002 x-ray as positive for pneumoconiosis, while Dr. Wiot, a B reader and Board-certified radiologist read the same x-ray as negative. Director's Exhibit 155; Employer's Exhibit 5. Drs. Fino and Dahhan, both B readers, read the April 7, 2005 and December 2, 2006 x-rays as negative for pneumoconiosis, respectively. Employer's Exhibits 6, 8. In addition, Dr. Barrett reviewed the July 1, 2002 x-ray for quality purposes only. Director's Exhibit 158.

[6] The administrative law judge agreed with Administrative Law Judge Thomas F. Phalen, Jr.'s 2000 determination that, of forty-six readings of several x-rays taken between 1992 and 1999, the readings that were rendered by the more-highly qualified readers were predominantly negative, and therefore, those x-rays did not establish the existence of pneumoconiosis. Director's Exhibit 117 at 4-5, 8.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four new medical opinions submitted in connection with claimant's second modification request. Drs. Chaney and Simpao diagnosed claimant with pneumoconiosis, and Drs. Dahhan and Fino concluded that claimant has neither clinical nor legal pneumoconiosis.[7] Director's Exhibit 155, 156; Employer's Exhibit 6-8. The administrative law judge found that, although Drs. Chaney and Simpao generally did not explain how the objective evidence supported their diagnoses, their opinions were "adequately" reasoned and documented. Decision and Order at 9. The administrative law judge found that, by contrast, the opinions of Drs. Dahhan and Fino, that clinical pneumoconiosis was absent, merited "great weight," in light of the administrative law judge's determination that the best-qualified readers established that claimant's x-rays are negative for clinical pneumoconiosis. *Id*. The administrative law judge further found that the doctors' opinions, that claimant does not have legal pneumoconiosis, were based on findings of the absence of any significant impairment on claimant's pulmonary function or blood gas studies. Finding the opinions of Drs. Dahhan and Fino to be "supported by their objective testing," and noting the "superior qualifications" of Drs. Dahhan and Fino,[8] the administrative law judge accorded their opinions greater weight. *Id*. He therefore found that the new opinions from Drs. Chaney and Simpao were "outweighed by the contrary opinions. . . ." Decision and Order at 9. The administrative law judge further found no mistake of fact in the prior determination that the weight of the previously submitted medical opinion evidence did not establish the existence of pneumoconiosis.[9] *Id*.

Claimant asserts that Dr. Simpao's opinion diagnosing pneumoconiosis is well-reasoned and documented and the administrative law judge should not have rejected it.

---

[7] Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2)(b).

[8] Drs. Dahhan, Fino, and Simpao are Board-certified in Internal Medicine and Pulmonary Disease, and Dr. Chaney is Board-certified in Internal Medicine. Decision and Order at 5-6; Director's Exhibit 156; Employer's Exhibit 6-8; Claimant's Exhibit 1.

[9] In 2000, Judge Phalen found that the better-reasoned and supported opinions by Drs. Dahhan, Westerfield, Branscomb, and Fino did not establish the existence of pneumoconiosis. Director's Exhibit 117 at 8-9.

However, the determination of the degree to which a physician's opinion is reasoned and documented is committed to the discretion of the administrative law judge. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. In this case, the administrative law judge permissibly found that although Dr. Simpao's opinion was adequately reasoned, the opinions of Drs. Dahhan and Fino were essentially better supported and merited greater weight. *See Rowe,* 710 F.2d at 255, 5 BLR at 2-103. Claimant provides no support for his additional assertion that the administrative law judge "appears to have" interpreted medical tests and substituted his own judgment for that of a physician. Claimant's Brief at 5. That assertion is therefore rejected. Thus, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

We therefore affirm the administrative law judge's finding that no mistake in a determination of fact was made previously, and no change in conditions was established, regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 725.310 (2000). Decision and Order at 8-9, 12. Because the existence of pneumoconiosis is a necessary element of entitlement under 20 C.F.R. Part 718, we need not address the administrative law judge's additional finding that claimant did not establish total disability. *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order – Denying Modification is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge