BRB No. 12-0402 BLA

BETTY L. KEENE o/b/o CECIL KEENE	)	
Claimant-Respondent	)	
v.	)	
BEATRICE POCAHONTAS COMPANY	)	
and	)	
WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 05/24/2013
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Granting Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder and Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits (2009-BLA-5334) of Administrative Law Judge Alan L. Bergstrom rendered on a request for modification of the denial of a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This subsequent claim is before the Board for the second time.

In a Decision and Order dated June 29, 2005, Administrative Law Judge Richard T. Stansell-Gamm determined that employer was the properly designated responsible operator herein; accepted the parties' stipulation to at least thirty years of coal mine employment; and adjudicated the claim pursuant to the provisions at 20 C.F.R. Parts 718 and 725. Considering the newly submitted evidence, Judge Stansell-Gamm determined that it was insufficient to establish that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c) and, consequently, was insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

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[1] Claimant is the widow of the miner who died on October 10, 2005, and is pursuing the miner's claim on his behalf. The miner's initial claim for benefits, filed on June 29, 1973, was denied by the district director on August 28, 1981. Claimant's Exhibit 1; Director's Exhibit 1.

The miner's second claim, filed on January 5, 1983, was denied on April 20, 1992 by Administrative Law Judge Robert D. Kaplan, on the ground that the miner failed to establish a totally disabling respiratory impairment. Judge Kaplan's decision was affirmed by the Board on May 19, 1994. *Keene v. Beatrice Pocahontas Coal Co*., BRB No. 92-1685 BLA (May 19, 1994)(unpub.). The miner filed a request for modification, Director's Exhibit 60, which was denied by Judge Kaplan on July 24, 1996, because the miner failed to establish that his totally disabling respiratory impairment was due to pneumoconiosis. The Board affirmed Judge Kaplan's decision on February 25, 1997. *Keene v. Beatrice Pocahontas Coal Co*., BRB No. 96-1449 BLA (Feb. 25, 1997) (unpub.). Subsequently, the miner filed several requests for modification that were denied by the district director on April 14, 1999; November 16, 1999; and January 19, 2001. Director's Exhibit 2.

The miner's current claim for benefits was filed on April 22, 2002. The district director awarded benefits, and employer requested a hearing, which was held on June 9, 2004. Director's Exhibit 3.

Upon claimant's *pro se* appeal, the Board vacated Judge Stansell-Gamm's findings at 20 C.F.R. §§718.204(c) and 725.309(d), and remanded the claim for further consideration. *Keene v. Beatrice Pocahontas Coal Co*., BRB No. 05-0882 BLA (Apr. 19, 2006)(unpub.).

On remand, Judge Stansell-Gamm determined, in a Decision and Order dated June 22, 2007, that the new evidence was sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c), thereby establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Considering the entire record, Judge Stansell-Gamm found that the evidence was insufficient to establish the existence of clinical or legal pneumoconiosis[2] at 20 C.F.R. §718.202(a), and denied benefits.

Upon claimant's request for modification, filed on June 19, 2008, Director's Exhibit 66, the case was assigned to Judge Bergstrom (the administrative law judge), whose Decision and Order, issued on April 10, 2012, is the subject of this appeal. The administrative law judge admitted Claimant's Exhibits 1 through 7 into the record and determined that the request for modification was timely filed. The administrative law judge found that a preponderance of the evidence submitted in support of modification, considered in conjunction with the previously submitted evidence, established the existence of clinical and legal pneumoconiosis arising out of coal mine employment, total respiratory disability due to pneumoconiosis, and a mistake in a determination of fact and a basis for modification pursuant to 20 C.F.R. §725.310. The administrative law judge further determined that granting modification would render justice under the Act. Accordingly, the administrative law judge granted claimant's request for modification and awarded benefits, commencing as of June 2002.

In the present appeal, employer challenges the administrative law judge's decision on both procedural and substantive grounds. On procedural grounds, employer contends that the request for modification was untimely filed, and that the administrative law judge erred in admitting Claimant's Exhibits 2 through 6 into the record. On the merits of entitlement, employer challenges the administrative law judge's weighing of the medical opinion evidence in finding that pneumoconiosis contributed to the miner's disabling respiratory impairment, and alleges that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a)(the APA) by failing to

[2] Judge Stansell-Gamm noted that once claimant established a change in an applicable condition of entitlement by establishing disability causation at 20 C.F.R. §718.204(c), the regulations provide that "no findings made in connection with the prior claim . . . shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309; 2007 Decision and Order at 3.

adequately consider and explain the weight he attributed to the physicians' qualifications. Lastly, employer contends that the administrative law judge failed to weigh all relevant factors in determining that the interests of justice are served in reopening the prior decisions. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to address the merits of the case, but asserts that claimant's modification request was timely; that claimant was diligent in pursuing the miner's claim; and that claimant's evidence was properly admitted into the record. Employer has filed a combined reply brief in support of its position.[3]

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.[4] 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).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake 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); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings of the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a), and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Absent specific allegations of error, we reject employer's contention that, by challenging the administrative law judge's weighing of the medical opinions relevant to the issue of disability causation on appeal, employer has also challenged the finding of legal pneumoconiosis. Employer's Reply Brief at 1-2.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

contains no reversible error. We first address employer's argument that the administrative law judge erred in finding that claimant's request for modification was timely filed pursuant to 20 C.F.R. §725.310. Employer asserts that the miner's claim should have been dismissed following the miner's death on October 10, 2005, because claimant did not notify the Department of Labor of her husband's death, nor did she submit any documentation showing that she was the executrix of the miner's estate, or move to be named as a substitute party while Judge Stansell-Gamm's June 29, 2005 denial of benefits was pending on appeal before the Board. Thus, employer maintains that the June 29, 2005 decision and order denying benefits constitutes the final decision in this case, and claimant's June 19, 2008 request for modification was untimely filed more than one year thereafter. Employer's Brief at 7-8. We disagree. The regulations specifically provide that the Director is a party to all black lung claims; that the Secretary of Labor may, as appropriate, exercise subrogation rights in any case where benefit payments have been made by the Black Lung Disability Trust Fund (Trust Fund); and that a claim in which a miner has been paid interim benefits from the Trust Fund cannot be dismissed absent the Director's motion or written agreement. *See* 20 C.F.R. §§725.360(a), 725.465(d), 725.602(b); *Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-66 (1992). In the instant case, the miner received interim benefits from the Trust Fund, and the Director did not file a motion requesting dismissal of the claim or provide his written consent for such a dismissal. Thus, claimant's modification request, dated June 19, 2008, was timely filed within one year of Judge Stansell-Gamm's most recent decision of June 22, 2007. We therefore reject employer's arguments to the contrary.

Turning next to the evidentiary issue raised in this appeal, employer contends that the administrative law judge erred in admitting Claimant's Exhibits 2 through 6 into the record.[5] Employer argues that because the evidence submitted on modification was in existence at the time Judge Stansell-Gamm issued his 2007 decision and was available to claimant, the administrative law judge erred in admitting and considering the "stale" evidence. Employer asserts that allowing modification based on this stale evidence amounts to a litigation "do-over." Employer's Brief at 15-19. We disagree. In determining that this evidence was admissible into the record, the administrative law judge noted that Judge Stansell-Gamm allowed the admission of evidence into the record prior to the issuance of his June 29, 2005 decision; however, prior to the issuance of his 2007 decision on remand, he "only allowed submission of briefs on the issues remanded by the Board, and did not accept any additional evidence in the case." Decision and

[5] Claimant's Exhibit 2 is the autopsy prosector's report dated October 12, 2005. Claimant's Exhibit 3 is a medical report from Dr. Perper dated May 20, 2009, that contains his pathology report of the autopsy slides. Claimant's Exhibits 4, 5, and 6 are hospitalization records from August 8, 2005 to October 7, 2005; June 6, 2000 to April 10, 2005; and July 21, 1997 to October 2, 2005, respectively.

Order at 11. The administrative law judge further noted that "Claimant's Exhibits 1, 2, 3, 4, and 7 all involve material events which did not occur until after Judge Stansell-Gamm ceased acceptance of evidence in the miner's claim," and that Claimant's Exhibits 5 and 6 are the miner's treatment records. Decision and Order at 11-12. The administrative law judge concluded that the evidence was relevant and did not exceed the evidentiary limitations pursuant to 20 C.F.R. §725.414 and §725.310(b). As the administrative law judge has broad discretion in procedural matters, and a modification request cannot be denied solely on the basis that the evidence could have been presented at an earlier date, we affirm the administrative law judge's ruling in this regard. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-63 (2004)(en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc).

Turning to the merits of entitlement, employer challenges the administrative law judge's weighing of the medical opinion evidence at Section 718.204(c), contending that the administrative law judge erred in crediting of the opinions of Drs. Perper and Thakkar over those of Drs. Oesterling and Ghio, as supported by the opinions of Drs. Castle and Rosenberg.[6] Employer maintains that the administrative law judge engaged in a selective analysis of the evidence and did not comply with the requirements of the APA, because he did not adequately consider and explain the weight he gave to the physicians' qualifications. Employer's Brief at 20-30. Employer's arguments are without merit. The administrative law judge accurately summarized the conflicting medical opinions of record, noting their underlying documentation, the relative qualifications of the physicians, and the physicians' explanations for their respective conclusions. Decision and Order at 16-26. The administrative law judge acted within his discretion in finding

[6] The record also contains the opinions of Drs. Emory and Forehand. The administrative law judge determined that the report of Dr. Emory, the autopsy prosector, who found "anthracosis throughout both lungs," and "hilar lymph nodes show[ing] hyalinized anthrasilicotic nodules and changes consistent with mild cwp," was entitled to no weight, because it did not include Dr. Emory's microscopic examination of the tissues harvested and did not include a documented, well-reasoned analysis to support her diagnosis. Dr. Emory prepared nine slides of the lungs, two slides of the lymph nodes, and six slides of the heart. Decision and Order at 31; Claimant's Exhibit 2; *see* 20 C.F.R. §718.106. The administrative law judge also determined that Dr. Forehand's opinion dated May 31, 2002, that the miner's clinical pneumoconiosis significantly contributed to his disabling respiratory impairment, "was documented and well-reasoned for the snap-shot of the miner's condition on May 31, 2002." Decision and Order at 47; Director's Exhibits 13, 14, 15, 17.

that Dr. Perper's[7] review of the autopsy slides and his determination that the miner's significant pulmonary impairment was due to both the miner's clinical coal workers' pneumoconiosis and his emphysema resulting from coal dust exposure, was documented and reasoned, and entitled to probative weight. The administrative law judge, in his discretion, found that Dr. Perper's pathology report, which contained a description of each of the eight slides he reviewed, and his medical report, which was based on record review, contained a detailed explanation of medical findings and patterns that were consistent with referenced medical studies and the hospital treatment records of the miner. Decision and Order at 40; Claimant's Exhibit 3; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003). In evaluating the opinion of Dr. Thakkar,[8] the miner's treating physician, the administrative law judge properly considered the nature and extent of the doctor's treatment of the miner, noting that the doctor's conclusion, that the miner had a disabling respiratory impairment due in whole or in part to his pneumoconiosis, did not change from 2002, and that the doctor continued medical treatment for the respiratory decline of the miner until his death. The administrative law judge permissibly determined that Dr. Thakkar's opinion was consistent with Dr. Perper's pathology report and represented a well-reasoned and documented opinion, as it was based on clinical, smoking and employment history, medical examination, and his treatment of the miner over several decades. Decision and Order at 40, 43; Director's Exhibit 28; Claimant's Exhibits 4, 5, 6. In light of the record as a whole, the administrative law judge permissibly accorded the opinion great weight. Decision and Order at 43; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Clark*, 12 BLR at

[7] Dr. Perper is Board-certified in anatomical, surgical, and forensic pathology. He reviewed the miner's medical records and performed a microscopic examination on eight of the autopsy slides. He diagnosed "the presence of severe pulmonary interstitial fibrosis with presence of anthracotic pigment and presence of birefringent silica crystals, consistent with the pattern of interstitial type of coal workers' pneumoconiosis." Dr. Perper also diagnosed severe anthraco-silicotic pneumoconiotic nodules in pulmonary lumph nodes, marked centrilobular and panlobular emphysema, pulmonary hypertension and cor pulmonale, acute bronchopneumonia, severe coronary arteriosclerosis, and remote myocardial infarction, and further opined that the miner's pneumoconiosis was a contributing factor in his disabling pulmonary impairment and in his heart disease. Claimant's Exhibit 3.

[8] Dr. Thakkar is Board-certified in internal medicine and cardiology. He started treating the miner in 1981. Director's Exhibit 28. Dr. Thakkar treated the miner during various hospitalizations between August 12, 2004 and October 2, 2005 related to respiratory issues. Claimant's Exhibit 6.

1-155. The administrative law judge rationally accorded little weight to Dr. Oesterling's opinion,[9] that the minimal clinical pneumoconiosis shown on autopsy was not a contributing cause of the miner's disabling respiratory impairment, because the doctor failed to provide a reasonable explanation for why he did not include a microscopic description of more than half of the autopsy slides that he reviewed, and testified that he could not remember the results of the unreported slides. The administrative law judge determined that this was particularly troublesome in light of the fact that the doctor failed to report on any findings in the right lower lung lobe, when two slides were provided from that area by the autopsy prosector and a CT scan revealed a 1.1 cm pleural based nodule in the right lung base. Decision and Order at 32, 43; Employer's Exhibits 5, 8; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge also permissibly found that Dr. Ghio's opinion,[10] that the miner had mild clinical

[9] Dr. Oesterling is Board-certified in anatomical and clinical pathology and nuclear medicine. Dr. Oesterling provided a microscopic description of seven of the seventeen slides he reviewed. He found minimal micronodular coal workers' pneumoconiosis, predominately pleural based, which, he stated, is a very low level of the disease process, and do not produce pulmonary disability. Employer's Exhibit 5 at 2. He diagnosed lung diseases of acute bronchopneumonia, emphysematous changes, and moderate anthracosis with small anthracotic nodules, but he did not think that the coal dust related disease was significant or that it produced any respiratory impairment, which he attributed to smoking. Employer's Exhibit 5; 8 at 18, 26, 45. Dr. Oesterling agreed that the miner had moderate centrilobular and panlobular emphysema, and that coal dust was a very minor contributory cause to some of the centrilobular emphysema. Employer's Exhibit 8 at 32-33, 45. Dr. Oesterling believed that the miner's cardiac disease was very significant, and that a lot of the miner's respiratory impairment was due to the passive congestion from heart failure. Employer's Exhibits 6, 8 at 27, 35, 45.

[10] Dr. Ghio is Board certified in internal and pulmonary medicine. Employer's Exhibit 4. Dr. Ghio provided a consulting opinion, and noted that the pathologists identified significant emphysema, but opined that the emphysema would not be associated with coal dust exposure because coal dust is associated with focal emphysema. Employer's Exhibit 7 at 27-28. While acknowledging that the miner was repeatedly hospitalized for chronic obstructive pulmonary disease, which could be related to coal dust exposure, Employer's Exhibit 7 at 19-20, Dr. Ghio determined that the pulmonary function study results show a lack of obstruction or restriction, and that the miner's decrease in diffusing capacity and hypoxemia are consistent with, and supportive of, injury following cigarette smoking. Employer's Exhibit 7 at 29-31. Dr. Ghio eliminated coal dust as a cause of the miner's reduced diffusing capacity because Drs. Oesterling and Emory found only a mild form of coal workers' pneumoconiosis, not diffuse coal workers' pneumoconiosis. Employer's Exhibit 7 at 31.

coal workers' pneumoconiosis, but that his disabling respiratory impairment was due entirely to smoking, was entitled to diminished weight, as the doctor failed to explain why he did not rely on the pathology findings of Dr. Perper, yet relied on those of Drs. Emory and Oesterling, which the administrative law judge discredited, to eliminate coal dust as a cause of the miner's reduced diffusing capacity. Decision and Order at 43; Employer's Exhibits 3, 7; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). Lastly, the administrative law judge rationally determined that the 2002 and 2004 opinions of Drs. Castle and Rosenberg, that the miner's disabling respiratory impairment was due to an interstitial lung disease of unknown cause, were "appropriate" when they were made, because they were based on clinical signs, tests and observations available at the time, but that the doctors did not have the benefit of the later, credited pathology findings of Dr. Perper, which indicated diffuse emphysematous changes and interstitial fibro-anthracosis consistent with lung disease from the combined effects of smoking, coal dust inhalation, and coal workers' pneumoconiosis. Decision and Order at 47-48; Employer's Exhibits 2-6, 2-7. The administrative law judge noted that Drs. Castle and Rosenberg found pulmonary fibrosis in the same areas identified by Dr. Perper, but they had reported it as idiopathic, or of unknown origin, because the miner had been too sick to undergo a lung biopsy that would have provided a microscopic examination of the lung tissue at that time. Decision and Order at 48. Thus, a review of the evidence and the administrative law judge's Decision and Order does not reveal selective analysis of the evidence, and we reject employer's argument to the contrary. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant established that pneumoconiosis substantially contributed to the miner's totally disabling respiratory impairment, beginning in June 2002.

Lastly, we reject employer's contention that the administrative law judge erred in finding that granting modification would render justice under the Act. Citing *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), the administrative law judge discussed the relevant factors to be considered, and addressed employer's specific arguments opposing a reopening of the case. Decision and Order at 4, 45. The administrative law judge determined that the evidence submitted in support of the request for modification, which had been precluded from consideration by Judge Stansell-Gamm, was sufficient to establish entitlement to benefits and a mistake in a determination of fact. Thus, the administrative law judge rejected employer's arguments, and concluded that the interest of finality was not a valid basis for objection to reopening this case. Decision and Order at 45. Because we discern no abuse of discretion in the administrative law judge's determinations, that claimant established a ground for modification pursuant to Section 725.310, and that granting modification would render justice under the Act, they are affirmed. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order – Granting Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge