BRB No 00-0282 BLA

JOHNNY CAUDILL	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
HOLBROOK MINING COMPANY, INCORPORATED	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Stumbo, Moak & Nunnery), Prestonburg, Kentucky, for claimant.

John T. Chafin (Kazee, Kinner, Chafin, Heaberlin & Patton), Prestonburg, Kentucky, for employer.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-BLA-1976) of Administrative Law Judge Donald W. Mosser denying benefits 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 is before the Board for the fourth time. Previously, the Board discussed fully this claim's procedural history. *Caudill v. Holbrook Mining Co., Inc.*, BRB No. 97-1814 BLA at 2-3 (Sep. 22, 1998)(unpub.). We now focus only on those procedural aspects relevant to the issues raised in this appeal of the administrative law judge's decision to grant employer's request for modification.

In a Decision and Order on Remand issued on March 12, 1993, the administrative law judge found that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204. Director's Exhibit 61. Accordingly, the administrative law judge awarded benefits.

Thereafter, employer filed a timely request for modification with the district director pursuant to 20 C.F.R. §725.310, alleging that a mistake in a determination of fact was made in the Decision and Order awarding benefits, and that a change in conditions had occurred. Director's Exhibit 69. Both employer and claimant developed and submitted additional medical evidence. The district director denied employer's request for modification, and, pursuant to employer's request, forwarded the case to the administrative law judge for a decision. Director's Exhibits 131, 132.

The administrative law judge found that the new evidence submitted on modification demonstrated that he made a mistake in a determination of fact when he found that claimant was entitled to benefits. The administrative law judge therefore granted employer's request for modification and denied benefits.

Upon consideration of claimant's appeal, the Board rejected claimant's contention that employer did not have the right to request modification, but held that the administrative law judge improperly restricted his modification analysis to the newly submitted evidence, rather than conducting a *de novo* review of the record. [1998] *Caudill*, slip op. at 6-7; *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994). Consequently, the Board vacated the administrative law judge's Decision and Order and remanded the case for him to consider all of the evidence of record for any mistake of fact or change in conditions. The Board further instructed the administrative law judge that if he found a mistake of fact established, he

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[1] The parties waived their right to a hearing on modification and requested a decision on the documentary record. Director's Exhibit 134; *see* 20 C.F.R. §725.461(a); *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir., 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-71-72 (2000).

should explain how the evidence demonstrated that his previous factual findings were in error, and he should determine whether modifying the prior award of benefits would render justice. *Id.*

On remand, the administrative law judge considered all of the evidence of record and found that it did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). In finding a mistake of fact established, the administrative law judge explained that the medical evidence at the time of his earlier decision "appeared to be following a pattern consistent with the progressive nature of pneumoconiosis," whereas on modification, the "more complete picture of the claimant's medical condition" presented by the record did not demonstrate such a pattern. Decision and Order on Remand at 3-4. The administrative law judge further found that the weight of all the relevant evidence did not establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), (b). The administrative law judge found that the preponderance of all the objective medical data was consistent with the reasoned opinions of highly qualified physicians, and presented a more complete picture of claimant's health than was available previously. Decision and Order on Remand at 5-6. Finally, the administrative law judge found that granting modification would render justice under the Act. Accordingly, he concluded that "a mistake in fact was made in my previous determination that claimant was eligible for benefits," and denied benefits. Decision and Order on Remand at 7.

On appeal, claimant contends that the administrative law judge erred in finding that employer demonstrated a mistake in a determination of fact pursuant to Section 725.310. Claimant further asserts that the administrative law judge did not adequately explain his findings, and erred in his weighing of the medical evidence pursuant to Sections 718.202(a)(1) and 718.204(a)(4). Additionally, claimant argues that the administrative law judge abused his discretion in determining that granting modification would render justice. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject claimant's contention that modification based on a mistake of fact was unavailable to employer in this case, and to affirm the administrative law judge's finding that granting modification would render justice under the Act.

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

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922 (the statute underlying 20 C.F.R. §725.310), provides in part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation . . . .

"The purpose of this section is to permit a[n] [administrative law judge] to modify an award where there has been 'a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the [A]ct.'" *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982), quoting *Banks v. Chicago Grain Trimmers Association, Inc*., 390 U.S. 459, 464 (1968). Section 22 vests the administrative law judge with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971); *Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82 (1998)(McGranery, J., dissenting). The administrative law judge's authority to correct mistakes is not limited to any particular kind of factual mistake, but rather, extends to "any mistake of fact," including "the ultimate fact" of entitlement. *Worrell*, 27 F.3d at 230, 18 BLR at 2-296. "Once a request for modification is filed, no matter the grounds stated, if any, the [administrative law judge] has the authority, if not the duty, to reconsider all the evidence for any mistake of fact . . . ." *Id*.

With the foregoing principles in mind, we turn to claimant's contentions on appeal. Claimant alleges that the administrative law judge erred in finding that employer demonstrated a

mistake in a determination of fact pursuant to Section 725.310. Claimant argues that modification based on a mistake of fact is available "only when the mistaken fact pertains to matters other than medical eligibility or when there is a distinct and consequential flaw in the original fact-finding process." Claimant's Brief at 42. As we have just stated, however, the administrative law judge is authorized to correct any mistake of fact, including the ultimate fact of entitlement. *Worrell, supra*. Additionally, because the administrative law judge has the authority, if not the duty, to reconsider all the evidence for any mistake of fact, there is no merit in claimant's contention that the administrative law judge erred in conducting a *de novo* review of the record. *Id*. Therefore, we reject claimant's contention that the administrative law judge exceeded the scope of his authority on modification.

Claimant next contends that the administrative law judge's findings on modification do not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Claimant's Brief at 57. Based on our review of the administrative law judge's decision, we hold that he referred sufficiently to the evidence and explained his reasoning adequately to permit review. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803-04, 21 BLR 2-302, 2-310-12 (4th Cir. 1998). Therefore, we reject claimant's contention that the administrative law judge violated the APA.

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge erred in his analysis of the x-ray evidence. Claimant's Brief at 54-55. Claimant alleges no specific error in the administrative law judge's weighing of the x-ray readings, but rather, asserts incorrectly that the administrative law judge should have weighed only the x-rays considered in the initial award of benefits. *See Worrell, supra*. Substantial evidence supports the administrative law judge's finding that the weight of the x-ray readings by physicians qualified as both Board-certified Radiologists and B-readers was negative for the existence of pneumoconiosis. Decision and Order on Remand at 4; *see Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Additionally, the administrative law judge provided a reasonable explanation for why he found that his previous finding at Section 718.202(a)(1) was mistaken. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician, Dr. Breeding. Claimant's Brief at 55-56. An administrative law judge may, but is not required to, accord greater weight to the opinion of a treating physician. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir.1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Berta v. Peabody Coal Co.*, 16 BLR 1-69, 1-70 (1992). Here, the administrative

law judge considered Dr. Breeding's deposition testimony that claimant has pneumoconiosis, Claimant's Exhibit 7, but permissibly accorded greater weight to the contrary opinions of Drs. Broudy, Dahhan, and Fino in view of their high qualifications in Pulmonary Medicine. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-154 (1989)(*en banc*). Additionally, the administrative law judge was impressed with the fact that Dr. Dahhan based his opinion on both an examination of claimant and a review of the medical evidence of record. Director's Exhibit 86; Employer's Exhibits 4, 6; *see Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Under these circumstances, the administrative law judge was not required to accord greatest weight to Dr. Breeding's opinion. *See Griffith, supra*; *Berta, supra*.

Claimant argues that the administrative law judge should have discounted the opinions of employer's medical experts as biased. Claimant's Brief at 56-57. The Board has held that, without specific evidence indicating that a report prepared for one party is unreliable, an administrative law judge should consider that report as equally reliable as the other reports of record. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991)(*en banc*). As claimant points to no specific record evidence of bias, the administrative law judge did not err in considering the opinions submitted by employer to be reliable. *See Melnick, supra*.

Claimant challenges the administrative law judge's determination that granting modification renders justice in this case. Claimant contends that the administrative law judge simply allowed employer to relitigate the case and shift the balance of the medical evidence. Claimant's Brief at 46-50. Whether reopening the claim renders justice is a determination committed to the administrative law judge's discretion, based on all the facts and circumstances of the case. *Kinlaw v. Stevens Shipping and Terminal Co*., 33 BRBS 68, 72 (1999); *Branham*, 21 BLR at 1-83. Here, the administrative law judge found that employer's evidence on modification was not cumulative or unduly repetitious, and he explained that the numerical superiority of x-ray readings and medical reports was not a determinative factor in his analysis. *See Woodward, supra*. Because the administrative law judge believed that the record now provided a more complete picture of claimant's medical condition, he found that it would be unjust to require employer to pay benefits to a miner who does not meet the requirements of the Act. *See Branham*, 21 BLR at 1-84. Claimant points to no evidence of any impropriety by employer in its litigation of this case. Under the

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[2] The administrative law judge noted correctly that Dr. Breeding's expertise lies in Family Practice. Claimant's Exhibit 7 at 3-4. In contrast to Dr. Breeding, Drs. Broudy, Dahhan, and Fino opined that claimant has no respiratory impairment related to coal mine dust exposure but does have a mild respiratory impairment due to smoking. Director's Exhibits 32, 34, 72, 86, 100, 111, 115; Employer's Exhibits 4, 6.

circumstances of this case, we conclude that the administrative law judge properly exercised his discretion in determining that reopening the case would render justice under the Act. Accordingly, we affirm the administrative law judge's finding that employer met its burden to establish a mistake in fact pursuant to Section 725.310, and his finding that granting modification renders justice.

Claimant argues that even if employer's request for modification is granted, claimant is entitled to benefits from the time of the administrative law judge's March 12, 1993 decision awarding benefits commencing October 1, 1985, until the administrative law judge's August 29, 1997 decision granting employer's request for modification. Claimant's Brief at 53. Contrary to claimant's contention, the administrative law judge found that the ultimate fact of entitlement was wrongly decided in the March 12, 1993 decision. *See Worrell, supra*. Therefore, there is no time period for which claimant is entitled to benefits. Because there is no liability for benefits, we likewise reject claimant's contention that liability must be transferred to the Black Lung Disability Trust Fund. Claimant's Brief at 52.

In sum, we affirm the administrative law judge's finding that the evidence of record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement under Part 718. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Therefore, we also affirm the administrative law judge's finding that employer carried its burden to demonstrate a mistake in a determination of fact pursuant to Section 725.310. *See Branham, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge