

BRB No. 03-0173 BLA

OSCAR MORRISON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/25/2003
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Geary P. Dillon, Jr., Whitwell, Tennessee, for claimant.

Jeffrey S. Goldberg (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Claimant<sup>1</sup> appeals the Decision and Order (01-BLA-0229) of Administrative Law Judge Mollie W. Neal denying benefits on modification of 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).<sup>2</sup> The administrative law judge credited the miner with

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<sup>1</sup>Claimant is the miner, Oscar Morrison, who died on September 15, 2000 while the claim was pending. Consequently, the miner's widow, Louise Morrison, is pursuing the claim on his behalf.

<sup>2</sup>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

seven years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.<sup>3</sup> Although the administrative law judge noted that the Director, Office of Workers' Compensation Programs (the Director), previously conceded the existence of pneumoconiosis, she found the newly submitted evidence insufficient to establish that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).<sup>4</sup> Further, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's finding of only seven years of coal mine employment. Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c). In addition, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2). The Director responds, urging affirmance of the administrative

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on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup>The miner filed a claim on August 20, 1974. Director's Exhibit 1. On July 18, 1984, Administrative Law Judge David A. Clarke issued a Decision and Order denying benefits, Director's Exhibit 41, which the Board affirmed in part and vacated in part, and remanded for further consideration, *Morrison v. Director, OWCP*, BRB No. 84-0127 BLA (July 31, 1989)(unpub.). On December 3, 1991, Administrative Law Judge E. Earl Thomas issued a Decision and Order denying benefits, Director's Exhibit 70, which the Board affirmed in part and vacated in part, and remanded for further consideration, *Morrison v. Director, OWCP*, BRB No. 92-0653 BLA (Nov. 30, 1994)(unpub.). On September 5, 1995, Judge Thomas issued a Decision and Order denying benefits. Director's Exhibit 88. The miner filed a request for modification on November 28, 1995. Director's Exhibit 93. On April 4, 1997, Administrative Law Judge Jeffrey Tureck issued a Decision and Order denying benefits. Director's Exhibit 113. The miner filed another request for modification on December 15, 1997. Director's Exhibit 122. On June 14, 1999, Administrative Law Judge Mollie W. Neal (the administrative law judge) issued a Decision and Order denying benefits. Director's Exhibit 132. The miner filed the most recent request for modification on June 8, 2000. Director's Exhibit 141.

<sup>4</sup>The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

law judge's length of coal mine employment finding, but contending that the administrative law judge erred in finding that he is bound by his prior concession that the miner suffered from pneumoconiosis. The Director further contends that the administrative law judge erred in failing to weigh together the conflicting evidence at 20 C.F.R. §718.204(b)(2). Lastly, the Director contends that the case should be remanded to the district director to provide a complete and credible pulmonary evaluation addressing each element of entitlement.<sup>5</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, claimant generally contends the administrative law judge erred in finding only seven years of coal mine employment. However, claimant does not delineate how the administrative law judge erred in her analysis of the evidence relevant to the length of coal mine employment determination. Claimant merely asserts that he has met his burden of establishing at least ten years of coal mine employment. Thus, claimant has failed to allege any specific error in the administrative law judge's findings or legal conclusions, and as such, claimant fails to provide a basis upon which the Board may review the administrative law judge's findings. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we affirm the administrative law judge's finding of seven years of coal mine employment.<sup>6</sup>

Next, we address the issues raised on appeal with respect to claimant's request for modification at 20 C.F.R. §725.310 (2000). The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), an

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<sup>5</sup>Since the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000) is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>6</sup>Furthermore, the administrative law judge's length of coal mine employment finding is supported by substantial evidence. The administrative law judge credited the miner with seven years of coal mine employment after considering the relevant evidence of record, including the miner's testimony, May 5, 1983 Hearing Transcript at 7, 9, 15-17; October 10, 1996 Hearing Transcript at 16-21; February 25, 1999 Hearing Transcript at 15-23, affidavits of fellow workers, Director's Exhibits 4-8, and the Social Security Itemized Statement of Earnings, Director's Exhibit 3. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the instant case, the administrative law judge found that the prior denial was based on claimant's failure to establish that pneumoconiosis arose out of coal mine employment and that total disability was due to pneumoconiosis. Decision and Order at 5. The administrative law judge specifically stated:

In my previous Decision, I found that a new qualifying blood gas study was sufficient to establish a change in the miner's condition since the time of the previous denial. Therefore, I reviewed all evidence of record to determine whether [the miner] had established entitlement to benefits, on the merits. Nevertheless, my final determination was that [the miner] could not show his pneumoconiosis had arisen out of coal mine employment or that he was totally disabled due to pneumoconiosis. Therefore, his claim for benefits was denied.

*Id.*

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c). Specifically, claimant asserts that the administrative law judge should have invoked the rebuttable presumption that pneumoconiosis arose out of coal mine employment since, claimant argues, more than ten years of coal mine employment was established. The pertinent regulation provides that "[i]f a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship. 20 C.F.R. §718.203(c). The administrative law judge stated:

Although [c]laimant now argues that he is entitled to the presumption based on evidence that he worked over 10 years in the mines, his allegation surrounding length of coal mine employment was rejected for the reasons stated, above. Claimant presents no other medical evidence or other documentation showing that his pneumoconiosis arose out of his coal mine work.

Decision and Order at 6. Inasmuch as we have affirmed the administrative law judge's finding of seven years of coal mine employment, and since there is no newly submitted evidence that the miner's pneumoconiosis arose out of coal mine employment, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to

establish that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203.

Claimant also contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Specifically, claimant asserts that the administrative law judge erred in discrediting Dr. Heinsohn's opinion.<sup>7</sup> Dr. Heinsohn, in a report dated August 13, 1999, opined that "[the miner] has multiple medical problems including evidence of mild to moderate pulmonary hypertension with secondary edema." Claimant's Unmarked Exhibit. Dr. Heinsohn also opined that "[the miner] has significant tricuspid regurgitation with dilation of the right-sided cardiac chambers and moderately elevated right-sided pressures." *Id.* Further, Dr. Heinsohn opined that "[t]here are findings of cor pulmonale." *Id.* Dr. Heinsohn also opined that "[t]his finding may be partially explained on the basis of lung injury related to occupational coal mine exposure." *Id.* In a subsequent report dated July 12, 2000, however, Dr. Heinsohn did not mention cor pulmonale. *Id.* In considering the newly submitted medical evidence, the administrative law judge stated:

In support of his current request for modification, [c]laimant submitted two letters composed by [Dr. Heinsohn], who apparently treated the miner for his cardiac problems. In an August 1999 letter "To Whom It May Concern," Dr. Heinsohn wrote that [the miner] had "multiple medical problems including evidence of mild to moderate pulmonary hypertension with secondary edema." He also said that there was evidence of cor pulmonale, which he believed "may be partially explained on the basis of lung injury related to occupational coal mine exposure."

Decision and Order at 5. The administrative law judge further stated:

In a second letter to [c]laimant's attorney, dated July 12, 2000, Dr. Heinsohn wrote that the miner had pulmonary hypertension and that his coal mine exposure "contributed to his shortness of breath and pulmonary abnormalities." This doctor concluded that [the miner] was "unable to return to work in the coal mine or any type of employment due to his medical problems."

*Id.* The administrative law judge permissibly discredited the opinion of Dr. Heinsohn

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<sup>7</sup>In the Petition for Review, claimant asserts that the administrative law judge erred in failing to consider Dr. Rodriguez's September 16, 1991 report in her weighing of the newly submitted medical opinion evidence at 20 C.F.R. §718.204(b)(2). Petition for Review at 2-3. Contrary to claimant's assertion, Dr. Rodriguez's opinion was submitted into the record prior to claimant's most recent request for modification. Director's Exhibit 72.

because it is not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). With regard to Dr. Heinsohn's August 13, 1999 report, the administrative law judge stated that "Dr. Heinsohn provided no basis or explanation for this diagnosis or for his conclusions." Decision and Order at 5. Similarly, with regard to Dr. Heinsohn's July 12, 2000 report, the administrative law judge stated, "[a]gain, these statements were not supported by reference to any medical data or by any other personal observations by this physician." *Id.* Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Heinsohn's opinion.

Claimant further asserts that the administrative law judge mischaracterized Dr. Heinsohn's opinion. Claimant's assertion is based on the premise that Dr. Heinsohn opined that the miner had right-sided heart problems that were caused by coal mine employment. Since the administrative law judge permissibly discredited Dr. Heinsohn's opinion because it is not reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294, we hold that any error by the administrative law judge with regard to her characterization of Dr. Heinsohn's opinion is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant additionally asserts that the administrative law judge should have accorded dispositive weight to the opinion of Dr. Heinsohn based on Dr. Heinsohn's status as the miner's treating physician.<sup>8</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has held that in black lung litigation, the opinions of treating physicians are not presumptively correct nor are they afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 510-513, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 277 F.3d at 513. In the instant case, the administrative law judge acknowledged that Dr. Heinsohn was the miner's treating physician. Nonetheless, the administrative law judge permissibly discredited Dr. Heinsohn's opinion because it is not reasoned. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. Thus, we reject claimant's assertion that the administrative law judge should have accorded dispositive weight to the opinion of Dr. Heinsohn based on Dr. Heinsohn's status as the miner's treating physician and further affirm the administrative law judge's finding that the newly submitted evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

The Director contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2). Specifically, the

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<sup>8</sup>The revised regulation at 20 C.F.R. §718.104(d) applies only to claims filed after January 19, 2001.

Director asserts that the administrative law judge violated the Administrative Procedure Act (APA) by failing to weigh together all of the evidence relevant to total disability and explain her finding that the miner did not suffer from a totally disabling respiratory impairment. The Director's assertion is based on the premise that the newly submitted evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). The Director stated, "we acknowledge that the most recent arterial blood gas study produced qualifying values (DX 118)." Director's Brief at 24. However, the qualifying arterial blood gas study noted by the Director was submitted into the record prior to claimant's most recent request for modification. Director's Exhibit 118. As noted by the administrative law judge with respect to the arterial blood gas study evidence, "no additional evidence of this type has been submitted." Decision and Order at 7. Since there is no credible newly submitted evidence that could establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv),<sup>9</sup> we reject the Director's assertion that the administrative law judge violated the APA by failing to weigh together all of the evidence relevant to total disability and explain her finding that the miner did not suffer from a totally disabling respiratory impairment.

The Director also contends that he has not fulfilled his statutory obligation to provide a complete and credible pulmonary evaluation of the miner. The Director specifically asserts that the record contains no medical opinion submitted by the Director that satisfies his burden of providing a complete and credible pulmonary evaluation of the miner, as required by Section 413(b) of the Act, 30 U.S.C. §923(b). *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Inasmuch as the Director conceded that he has not fulfilled his statutory obligation to provide a complete and credible pulmonary evaluation of the miner, *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101; *Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges*, 18 BLR at 1-89-90; *Petry v. Director, OWCP*; 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990), we remand the case to the district director to allow for a complete pulmonary evaluation and for reconsideration of this claim in light of the new evidence.<sup>10</sup> *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Eastern*

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<sup>9</sup>The newly submitted evidence at 20 C.F.R. §718.204(b)(2) consists only of Dr. Heinsohn's August 13, 1999 and July 12, 2000 reports.

<sup>10</sup>The Director also contends that the administrative law judge erred in finding that he conceded that the miner suffered from pneumoconiosis. In light of our remand of the case to the district director to provide a complete and credible pulmonary evaluation addressing each element of entitlement, we decline to address the Director's argument that he is not bound by his prior concession that the miner suffered from pneumoconiosis.

Notwithstanding our consideration of the issues raised by the parties on appeal, the fact-finder, on remand, must reconsider the entire case with the newly submitted evidence after the Director has been permitted to provide a complete and credible pulmonary

*Associated Coal Corp.*, 12 BLR 1-49 (1988); *Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986); *see also* 20 C.F.R. §725.405(c).

Finally, we reject claimant's assertion of bias by the administrative law judge because there is no evidence in the record to support this assertion. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the district director to allow for a complete pulmonary evaluation, at no expense to claimant, and for reconsideration of the merits of this claim in light of our Decision and Order and all the evidence of record.

SO ORDERED.

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evaluation addressing each element of entitlement.



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