BRB Nos. 08-0387 BLA
and 08-0387 BLA-A

M.D. (Widow of H.D.) Claimant-Petitioner Cross-Respondent v. RAY COAL COMPANY Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/25/2008 DECISION and ORDER

Appeal of the Decision and Order of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals and employer cross-appeals the Decision and Order (06-BLA-0002) of Administrative Law Judge William S. Colwell (the administrative law judge) denying benefits on modification in a survivor's 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).[2] The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[3] The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[4] Consequently, the administrative law judge found that the evidence did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[5] Accordingly, the administrative law judge denied benefits.

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[1] Claimant is the widow of the miner, who died on January 7, 1999. Director's Exhibits 1, 10. She filed her survivor's claim on June 22, 1999. Director's Exhibit 1. On April 16, 2003, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order denying benefits. Director's Exhibit 37. Judge Roketenetz's denial was based on his findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or death due to pneumoconiosis at 20 C.F.R. §718.205(c). *Id*. The Board affirmed Judge Roketenetz's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, thereby, his denial of benefits. [*M.D.*] *v. Ray Coal Co.*, BRB No. 03-0542 BLA (Mar. 31, 2004)(unpub.). Claimant filed a request for modification on August 10, 2004. Director's Exhibits 48, 51.

[2] 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The record indicates that the miner was last employed in the coal mining industry in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The administrative law judge further noted that the issue of death due to pneumoconiosis was rendered moot by his findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, thereby, a mistake in a determination of fact at 20 C.F.R. §725.310 (2000).

[5] The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2, and thus do not apply to this claim.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant, therefore, challenges the administrative law judge's finding that the evidence did not establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000).[6] Employer responds, urging affirmance of the administrative law judge's Decision and Order. On cross-appeal, employer argues that the administrative law judge erred in failing to render a determination of whether modification proceedings were in the interest of justice before he reopened the survivor's claim. Employer also argues that the administrative law judge erred in excluding Dr. Rosenberg's new opinion from the record on the ground that claimant's request for modification was based on a mistake in a determination of fact, and not a change in conditions. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[7]

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 applicable 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 establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case

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[6] The sole ground for modification in a survivor's claim is that there has been a mistake in a determination of fact. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

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

arises, has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *Worrell*, 27 F.3d at 230, 18 BLR at 2-296. In this case, the administrative law judge stated that "the entire record will be reviewed to determine whether a mistake in the determination of a fact occurred in [Administrative Law Judge Daniel J. Roketenetz's] denial of benefits." January 23, 2008 Decision and Order at 4.

Claimant initially contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The administrative law judge noted that "Judge Roketenetz found that every x-ray that was read for the presence or absence of pneumoconiosis was interpreted as negative." January 23, 2008 Decision and Order at 5. The administrative law judge next considered all the x-rays of record. The administrative law judge then concluded, "[b]ecause of the uniformity of opinion, I find that the x-ray evidence fails to establish the existence of pneumoconiosis and that [c]laimant has not established a mistake of fact concerning the x-ray evidence." *Id*.

The record consists of the twenty-five interpretations of ten x-rays dated May 26, 1995, May 7, 1996, December 18, 1996, March 24, 1997, July 6, 1998, August 26, 1998, December 3, 1998, December 14, 1998, January 1, 1999, and January 3, 1999.[8] All of the x-ray readings were negative for pneumoconiosis. Director's Exhibits 25, 31, 35. Consequently, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings.[9] *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). Because it is supported by substantial evidence, we

[8] As previously noted by Judge Roketenetz and the Board, the record also consists of many x-ray readings that were not properly classified for the existence of pneumoconiosis. 20 C.F.R. §718.102; Director's Exhibits 12, 31; April 16, 2003 Decision and Order at 6; [*M.D.*] *v. Ray Coal Co.*, BRB No. 03-0542 BLA, slip op. at 3.

[9] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for her contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 5. Thus, we reject claimant's suggestion.

affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, claimant argues that the administrative law judge erred in discrediting the opinions of Drs. James Chaney and George Chaney, the miner's treating physicians. The record consists of the reports of Drs. James Chaney, George Chaney, Younes, Tuteur, Castle, Fino, and Burki. Dr. James Chaney opined that the miner had coal workers' pneumoconiosis. Director's Exhibit 12. Dr. George Chaney opined that the miner had coal workers' pneumoconiosis and chronic obstructive pulmonary disease related to coal dust exposure. Director's Exhibits 11, 12, 23, 24. Dr. Younes opined that the miner had chronic obstructive pulmonary disease related to coal dust exposure. Director's Exhibit 26. By contrast, Drs. Tuteur, Castle, and Fino opined that the miner did not have pneumoconiosis. Director's Exhibits 31, 35. Dr. Burki opined that the miner did not have an occupational lung disease related to coal dust exposure.[10] Director's Exhibit 31.

The administrative law judge considered Judge Roketenetz's prior finding that the opinions of Drs. Tuteur, Castle, and Fino, that the miner did not have pneumoconiosis, outweighed the contrary opinions of Drs. James Chaney, George Chaney, and Younes. The administrative law judge then found that Judge Roketenetz did not make a mistake in a determination of fact in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4).[11] The administrative law judge further stated:

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[10] Judge Roketenetz found that Dr. Burki failed to provide any reasoning or rationale for his conclusion that the miner did not have an occupational lung disease related to coal dust exposure. April 16, 2003 Decision and Order at 14; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The Board declined to address whether Judge Roketenetz properly discredited Dr. Burki's opinion, because it did not assist claimant in establishing that the miner had pneumoconiosis. [*M.D.*] *v. Ray Coal Co.*, BRB No. 03-0542 BLA, slip op. at 4, n.5; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[11] The administrative law judge stated, "I agree with Judge Roketenetz's weighing of the opinions of Drs. [James] Chaney, [George] Chaney, and Younes." January 23, 2008 Decision and Order at 7. The administrative law judge further stated that "the contrary evidence provided by Drs. Fino, Tuteur, and Castle was better reasoned and more credible." *Id*.

> I would add, however, that I find the opinions of Drs. Tuteur, Castle, and Fino credible, because they are supported by the underlying objective evidence, especially the x-ray evidence, and the miner's history of tuberculosis and repeating lung infections. I find particularly persuasive Dr. Fino's explanation that a patient with Parkinson's disease is susceptible to pneumonia, because he is unable to protect his airways by preventing food from entering his lungs. The miner's terminal hospitalization was due to aspiration pneumonia that led to respiratory failure and death. Dr. Castle echoed this conclusion.

January 23, 2008 Decision and Order at 7; *see also Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985).

As the Board previously noted, Judge Roketenetz properly accorded greater weight to the opinions of Drs. Tuteur, Castle, and Fino, that the miner did not have pneumoconiosis, because they were thorough, well-reasoned and well-documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In addition, Judge Roketenetz properly accorded greater weight to the opinions of Drs. Tuteur, Castle, and Fino, because of their superior qualifications.[12] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, Judge Roketenetz properly discredited the opinions of Drs. James Chaney, George Chaney, and Younes, because they were not reasoned. *Clark*, 12 BLR at 1-155.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Because it was not unreasonable for the administrative law judge to agree with Judge Roketenetz's finding that the opinions of Drs. James Chaney and George Chaney were not reasoned, *Clark*, 12 BLR at 1-155, we reject claimant's assertion that the administrative law judge erred in discrediting the opinions of Drs. James Chaney and George Chaney. Furthermore, we reject claimant's assertion that the administrative law judge substituted his opinion for that of the physicians.

Claimant also argues that the administrative law judge should have accorded greater weight to the opinions of Drs. James Chaney and George Chaney because they

[12] Drs. Tuteur, Castle, and Fino are Board-certified in internal medicine and pulmonary disease. Director's Exhibits 31, 35. The record does not contain the credentials of Drs. James Chaney and George Chaney.

were the miner's treating physicians.[13] In his prior Decision and Order, Judge Roketenetz acknowledged that Drs. James Chaney and George Chaney were the miner's treating physicians. Nonetheless, as discussed, *supra*, Judge Roketenetz properly discredited the opinions of Drs. James Chaney and George Chaney, because they were not reasoned. *Clark*, 12 BLR at 1-155. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *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*, 338 F.3d at 513, 22 BLR at 2-647. In the instant case, the administrative law judge acted within his discretion in agreeing with Judge Roketenetz's weighing of the opinions of Drs. James Chaney and George Chaney. *Kuchwara*, 7 BLR at 1-170. Consequently, we reject claimant's assertion that the administrative law judge should have accorded greater weight to the opinions of Drs. James Chaney and George Chaney because they were the miner's treating physicians. Moreover, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Finally, we detect no error in the administrative law judge's determination that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Consequently, we affirm it.[14]

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[13] Claimant additionally asserts that the administrative law judge should have applied the criteria set forth at 20 C.F.R. §718.104(d). Contrary to claimant's assertion, the criteria set forth at 20 C.F.R. §718.104(d) for consideration of treating physicians' opinions are applicable only to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Citing *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002), the Board held that Judge Roketenetz's application of Section 718.104(d) was harmless error, based on the Sixth Circuit's recognition that this provision codifies judicial precedent and does not work a substantive change in the law. [*M.D.*] *v. Ray Coal Co.*, BRB No. 03-0542 BLA, slip op. at 5, n. 6.

[14] In view of our disposition of the case at 20 C.F.R. §725.310 (2000), we decline to address employer's contentions, on cross-appeal, that the administrative law judge erred in failing to render a determination of whether modification proceedings were in the interest of justice and in excluding Dr. Rosenberg's new opinion from the record. *Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order denying benefits on modification 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