BRB No. 99-1201 BLA

EUGENE KROH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
T & D TRUCKING COMPANY	)	DATE ISSUED:_____
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Upon Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Modification (98-BLA-1305) of Administrative Law Judge Ainsworth H. Brown 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). Claimant filed a duplicate claim on June 19, 1992.[1] In the initial Decision and Order, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

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[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on December 29, 1981. Director's Exhibit 38. The district director denied the claim on April 2, 1982. *Id.* There is no indication that claimant took any further action in regard to his 1981 claim.

Claimant filed a second claim on August 24, 1990. Director's Exhibit 38. The district director denied the claim on November 30, 1990. *Id.* Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* Claimant, however, subsequently filed a request to withdraw his claim. *Id.* By Order dated July 11, 1991, Administrative Law Judge David W. DiNardi granted claimant's request to withdraw his claim. *Id.*

Claimant filed a third claim on June 19, 1992. Director's Exhibit 1.

Claimant subsequently requested modification of his denied claim. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, the administrative law judge denied claimant's request for modification.

Claimant subsequently filed a second request for modification. After noting that claimant waived any contention regarding a mistake in a determination of fact, the administrative law judge found that claimant failed to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's second request for modification. On appeal, claimant argues that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an 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. *See 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 prior decision, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

The administrative law judge properly noted that the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case aries, has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. Decision and Order Denying Benefits Upon Modification at 2; *see Penn Allegheny Coal Co. v. Williams*,

114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Claimant argues that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The record contains fourteen interpretations of an x-ray taken on June 19, 1998. While six physicians interpreted this x-ray as positive for pneumoconiosis, eight physicians interpreted this x-ray as negative for pneumoconiosis. While four physicians dually qualified as B readers and Board-certified radiologists, Drs. Miller, Ahmed, Cappiellio and Smith, interpreted claimant's June 19, 1998 x-ray as positive for pneumoconiosis,[2] Claimant's Exhibits 30, 32, 36, 53, seven equally qualified physicians, Drs. Ciotola, Duncan, Laucks, Soble, Wheeler, Gayler and Scott, interpreted the x-ray as negative for pneumoconiosis.[3] Director's Exhibit 115; Employer's Exhibits 1, 8.

In his consideration of whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that the positive and negative interpretations of claimant's June 19, 1998 x-ray were "evenly divided."[4] Decision and Order Denying Benefits Upon Modification at 4. Claimant has the burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. Inasmuch as it is based upon substantial evidence,[5] we affirm the administrative law judge's finding that the newly submitted

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[2]Two B readers, Drs. Aycoth and Pathak, also interpreted claimant's June 19, 1998 x-ray as positive for pneumoconiosis. Claimant's Exhibits 34, 38.

[3]Dr. Hertz, a B reader, also interpreted claimant's June 19, 1998 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

[4]Given that a majority of the interpretations of claimant's June 19, 1998 x-ray, including a majority of the interpretations rendered by the best qualified physicians, is negative for pneumoconiosis, the administrative law judge's characterization of the interpretations of claimant's June 19, 1998 x-ray as "evenly divided" is inaccurate.

[5]Claimant argues that the administrative law judge erred in not addressing his newly submitted interpretations of earlier x-ray films. We disagree. Although claimant submitted positive interpretations of x-rays taken on October 1, 1990, June 25, 1992, January 11, 1996 and March 21, 1996, these x-rays were all taken prior to the administrative law judge's denial of claimant's previous request for modification. [In his 1995 Decision and Order, the administrative law judge considered interpretations of claimant's October 1, 1990 and June 25, 1992 x-rays. *See* Director's Exhibit 66. In connection with claimant's previous request for

x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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modification, interpretations of claimant's January 11, 1996 and March 21, 1996 x-rays were submitted into the record. *See* Director's Exhibits 72, 74, 75, 83, 85, 92-94, 104.] Consequently, these x-ray interpretations cannot support a change in conditions pursuant to 20 C.F.R. §725.310.

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically argues that the administrative law judge erred in crediting Dr. Dittman's opinion over the opinions of Drs. Kraynak and Kruk. The administrative law judge credited Dr. Dittman's opinion that claimant did not suffer from coal workers' pneumoconiosis over the contrary opinions of Drs. Kraynak and Kruk based upon his superior qualifications. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order Denying Benefits Upon Modification at 4. Although Dr. Kruk is Board-certified in Internal Medicine,[6] the administrative law judge properly accorded greater weight to Dr. Dittman's opinion inasmuch as Dr. Dittman, in addition to being Board-certified in Internal Medicine, is also Board-eligible for certification in Pulmonary Medicine and "heads a respiratory facility."[7] *Id.*

[6]Dr. Kraynak is Board-certified in Family Medicine. Director's Exhibit 62.

[7]Dr. Dittman is on the active staff in the Department of Internal Medicine at Hazelton St. Joseph Medical Center and Hazelton General Hospital. Employer's Exhibit 9. Dr. Dittman is the Medical Director of the Respiratory Therapy Department at both hospitals. *Id.* Dr. Dittman is also the Medical Director of the Pulmonary Disease/Coal Workers' Clinic at Hazelton General Hospital. *Id.* During his February 5, 1999 deposition, Dr. Dittman noted that he had taken the test to become Board-certified in Pulmonary Medicine, but had been unsuccessful. *Id.*

Claimant, however, also argues that the administrative law judge erred in not considering Dr. Abdul-Al's opinion. We agree. Although the administrative law judge properly noted that Dr. Abdul-Al recorded a history of black lung while he was treating claimant in the hospital, Decision and Order Denying Benefits Upon Modification at 2; Employer's Exhibit 11, the administrative law judge did not address the significance of Dr. Abdul-Al's May 29, 1988 "Discharge Summary" in which Dr. Abdul-Al diagnosed chronic obstructive pulmonary disease and anthracosilicosis. Employer's Exhibit 11. The record also contains office notes from Dr. Abdul-Al covering the period November 8, 1997 through October 16, 1998. These notes include numerous assessments of anthracosilicosis.[8] *Id.* The record also contains a March 27, 1999 letter from Dr. Abdul-Al wherein he related claimant's "severe obstructive pulmonary disease" to his "long time history of working in the mines."[9] Claimant's Exhibit 54. An administrative law judge's failure to discuss relevant evidence requires remand. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). We, therefore, vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[10] Consequently, we vacate the administrative law judge's finding that the evidence is

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[8]Section 718.201 provides that:

> For the purpose of the Act, *pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, **anthracosilicosis**, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201 (emphasis added).

[9]Dr. Abdul-Al is Board-certified in Internal Medicine. Claimant's Exhibit 55.

[10]On remand, the administrative law judge may, but is not required to, accord additional weight to Dr. Abdul-Al's opinion based upon his status as the claimant's treating physician. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see also Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978).

insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 and remand the case for further consideration.[11]

On remand, if the administrative law judge finds the evidence sufficient to establish modification pursuant to 20 C.F.R. §725.310, he must consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Nataloni, supra*; *Kovac*, *supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Modification is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[11]Modification may also be based upon a mistake in a determination of fact. 20 C.F.R. §725.310. At the hearing, claimant's counsel indicated that claimant was not seeking modification based upon a mistake in a determination of fact. Transcript at 25. The administrative law judge, therefore, found that claimant waived any contention respecting a mistake in a determination of fact. Decision and Order Denying Benefits Upon Modification at 2 n.2.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge