BRB No. 00-1201 BLA

ALFRED C. STACY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROGERS COAL COMPANY	)	
	)	DATE ISSUED:
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Alfred C. Stacy, Hurley, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (99-BLA-1282) of Administrative Law Judge Stuart A. Levin 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,

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

30 U.S.C. §901 *et seq*. (the Act). The instant case involves a duplicate claim filed on October 12, 1990. In the initial decision, Administrative Law Judge John C. Holmes found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, Judge Holmes denied benefits. By Decision and Order dated March 26, 1998, the Board vacated Judge Holmes's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and remanded the case for further consideration. *Stacy v. Rogers Coal Co*., BRB No. 97-1146 BLA (Mar. 26, 1998) (unpublished).

In a Decision and Order on Remand dated July 20, 1998, Judge Holmes found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, Judge Holmes denied benefits. After claimant filed an appeal with the Board, employer filed a timely Motion for Reconsideration with the Office of Administrative Law Judges. Employer argued that Judge Holmes had erred in excluding Dr. Castle's report from the record. The Director, Office of Workers' Compensation Programs

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on May 23, 1973. Director's Exhibit 51. The SSA denied the claim on July 11, 1973 and May 11, 1979. *Id.* The Department of Labor denied the claim on November 6, 1979. *Id.* There is no evidence that the miner took any further action in regard to his 1973 claim.

The miner filed a second claim on October 12, 1990. Director's Exhibit 1.

(the Director), filed a motion to dismiss claimant's appeal with the Board, advising the Board that employer had filed a Motion for Reconsideration with the Office of Administrative Law Judges. By Order dated September 1, 1998, the Board dismissed claimant's appeal as premature. *Stacy v. Rogers Coal Co*., BRB No. 98-1495 BLA (Sept. 1, 1998) (Order) (unpublished). The Board advised the parties that if any party remained aggrieved after the issuance of the Order on Reconsideration, the party would have to file a new appeal with the Board. *Id.*

In an Order Granting Reconsideration dated September 28, 1998, Judge Holmes agreed with employer that Dr. Castle's report was timely filed and should have been admitted into evidence. Judge Holmes, therefore, granted employer's motion for reconsideration and amended his 1998 Decision and Order on Remand to reflect Dr. Castle's report as being a part of the record.

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 (2000), Administrative Law Judge Stuart A. Levin (the administrative law judge) denied claimant's request for modification. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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 (2000), 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, Judge Holmes denied benefits because claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

[4]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1973 claim was denied because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 51. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis.

The newly submitted evidence consists of six interpretations of an x-ray taken on May 26, 1999. Dr. Alexander, a B reader and Board-certified radiologist, interpreted claimant's May 26, 1999 x-ray as positive for pneumoconiosis. Director's Exhibit 113. Drs. Wheeler and Scott, two equally qualified physicians, initially interpreted copies of claimant's May 26, 1999 x-ray as unreadable. Employer's Exhibits 1, 3. Drs. Wheeler and Scott subsequently rendered negative interpretations of claimant's May 26, 1999 x-ray, this time interpreting the actual x-ray film. Employer's Exhibits 5, 6. Dr. Castle, a B reader, also interpreted claimant's May 26, 1999 x-ray as negative for pneumoconiosis. Employer's Exhibit 7.

The administrative law judge found that "Dr. Alexander's positive reading of the May 26, 1999 film [was] outweighed by the negative readings by Drs. Wheeler and Scott." Decision and Order at 15. Although Drs. Alexander, Wheeler and Scott are each dually qualified as B readers and Board-certified radiologists, the administrative law judge accorded greater weight to the x-ray interpretations rendered by Drs. Wheeler and Scott based upon their additional status as professors of radiology. Decision and Order at 14. The administrative law judge acted within his discretion in according greater weight to the interpretations of Drs. Wheeler and Scott based upon their

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[5]Although Section 725.309 has been revised, these revisions apply only to claims filed after January 19, 2001.

[6]Drs. Wheeler and Scott are Associate Professors of Radiology at Johns Hopkins University. Employer's Exhibits 2, 4. The record does not reveal that Dr. Alexander is a professor of radiology.

additional radiological qualifications. *See generally Worach v. Director, OWCP*, 17 BLR 1-105 (1993). We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis.

Inasmuch as there is no other newly submitted evidence supportive of a finding of pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Modification may also be based upon a finding of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). 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." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In the instant case, the administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis. The Fourth Circuit 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. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

In his consideration of whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion in according greater weight to the x-ray interpretations of Drs. Pendergrass, Shipley, Spitz, Wheeler and Scott based upon their additional radiological qualifications. *See generally Worach*, *supra*; Decision and Order at 14-15. In addition to being dually qualified as B readers and Board-certified radiologists, the administrative law judge noted that each of these physicians is employed as a professor of radiology.

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[7]The United States Court of Appeals for the Fourth Circuit has held that a party 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. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

[8]Dr. Pendergrass is a Professor and Vice-Chairman in the Department of Radiology and Radiological Sciences at Vanderbilt University Hospital. Director's Exhibit 56. Dr. Shipley is an Associate Professor of Clinical Radiology at the University of Cincinnati. Director's Exhibit 48. Dr. Spitz is a Professor of Radiology at the University of Cincinnati.

Decision and Order at 14-15. All of the interpretations rendered by these physicians are negative for pneumoconiosis. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306. Consequently, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

The record contains numerous medical opinions. While Drs. Sutherland, Caday and Chithambo diagnosed pneumoconiosis, Director's Exhibits 9, 25, 28, 92, Drs. Endres-Bercher, Palte, Castle and Tuteur opined that claimant does not suffer from the disease. Director's Exhibits 38, 54, 70, 82, 96. The administrative law judge discredited the opinions of Drs. Sutherland and Caday because he found that the x-ray evidence did not support their respective diagnoses of pneumoconiosis. *See* Decision and Order at 15. The administrative law judge's weighing of the evidence is consistent with the requirements of *Compton*.

The administrative law judge accorded less weight to Dr. Chithambo's diagnosis of pneumoconiosis because it was based in part upon an unreliable pulmonary function study.

Director's Exhibit 50. As previously noted, Drs. Wheeler and Scott are Associate Professors of Radiology at Johns Hopkins University. Employer's Exhibits 2, 4. The record does not reveal that the remaining physicians of record who rendered x-ray interpretations are professors of radiology.

[9]These negative interpretations include interpretations of x-rays taken on September 14, 1987, April 30, 1990, November 23, 1990, January 28, 1991, May 2, 1991 and May 26, 1999. Director's Exhibits 31, 32, 34, 35, 37, 45, 46, 48, 50; Employer's Exhibits 5, 7.

[10]Pulmonary function and arterial blood gas studies are not generally considered to be diagnostic of the presence or absence of pneumoconiosis. *See generally Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984); *Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983). However, in the instant case, the administrative law judge accurately noted that Dr. Chithambo relied upon the fact that claimant's May 5, 1992 pulmonary function study

Decision and Order at 15. In rendering his diagnosis of pneumoconiosis, Dr. Chithambo relied upon the results of a May 5, 1992 pulmonary function study. The administrative law judge found that the results of claimant's May 5, 1992 pulmonary function study were contradicted by the normal results of a subsequent pulmonary function study conducted on November 20, 1996. *Id.* Pulmonary function studies taken on November 24, 1987, November 23, 1990 and May 2, 1991 also produced higher values than the ones obtained from claimant's May 5, 1992 pulmonary function study. The administrative law judge properly questioned Dr. Chithambo's diagnosis of pneumoconiosis inasmuch as it was based in part upon a May 5, 1992 pulmonary function study that was called into question by the results of the other pulmonary function studies of record. *See generally Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). Moreover, the administrative law judge properly credited the opinions of Drs. Palte and Castle that claimant did not suffer from pneumoconiosis over Dr. Chithambo's contrary opinion because he found that the opinions of Drs. Palte and Castle were better supported by the objective evidence. *See Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 15. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

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revealed a combination of restrictive/obstructive pulmonary disease to support his diagnosis of pneumoconiosis. Director's Exhibit 92.

[11]Although a pulmonary function study conducted on March 19, 1991 produced even lower values than claimant's May 5, 1992 pulmonary function study, the administrative law judge noted that Drs. Lantos and Tuteur questioned the validity of this study. Decision and Order at 10. Although Dr. Lantos initially indicated that claimant's March 19, 1991 pulmonary function study was valid, he subsequently noted that claimant "may not have given full effort" during the study. Director's Exhibit 28. Dr. Lantos noted that because a person cannot "fudge" normal values, the higher values from claimant's May 2, 1991 pulmonary function study should be accepted as valid. *Id.* Dr. Tuteur also invalidated the results of claimant's March 19, 1991 pulmonary function study. *See* Director's Exhibit 49.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge