BRB No. 02-0199 BLA

RALPH JUDE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WOLF CREEK COLLIERIES	)	
	)	
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (1999-BLA-1122) of Administrative Law Judge Robert L. Hillyard 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).[1] This case has been before the

[1] The Department of Labor has amended the regulations implementing the

Board several times and involves a lengthy procedural history which has been summarized in the administrative law judge's 1998 Decision and Order. Decision and Order on Third Remand - Award of Benefits [1998 Decision and Order] at 1-3; Director's Exhibit 132. Within his 1998 Decision and Order, the administrative law judge acknowledged the Board's remand instructions and considered the medical evidence of record, finding that it was insufficient to establish a definite date that claimant's pneumoconiosis became totally disabling. 1998 Decision and Order at 4. Consequently, the administrative law judge determined that the date from which benefits commence is July 1980, the month in which claimant filed his application for benefits. 1998 Decision and Order at 4-5.

Employer appealed this decision to the Board. However, employer filed a Motion for Remand for Modification Proceedings, requesting that the Board dismiss its appeal and remand the case to the district director for modification proceedings. Director's Exhibit 140. By Order issued January 21, 1999, the Board granted employer's motion, thereby, dismissing employer's appeal and remanding the case to the district director. *Jude v. Wolf Creek Collieries*, BRB No. 98-1606 BLA (Jan. 21, 1999)(Order)(unpub.); Director's Exhibit 145. Claimant's motion for reconsideration of the Board's Order dismissing employer's appeal was denied. *Jude v. Wolf Creek Collieries*, BRB No. 98-1606 (Mar. 11, 1999)(Order)(unpub.); Director's Exhibit 148.

Following administrative handling of employer's request for modification, the district director forwarded the case to the Office of Administrative Law Judges, wherein it was again assigned to Judge Hillyard (the administrative law judge). Addressing the merits of employer's request for modification, the administrative law judge found that a change in conditions was not established pursuant to 20 C.F.R. §725.310 (2000).[2] However, the administrative law judge found that the newly submitted medical evidence, in conjunction with the previously submitted evidence established that the miner's total disability did not arise, in whole or in part, out of claimant's coal mine employment and also that

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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.

[2] The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claims, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

claimant was not suffering from pneumoconiosis. Consequently, the administrative law judge found the evidence sufficient to establish rebuttal of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, and, therefore, was sufficient to establish a mistake in a determination of fact pursuant to Section 725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical evidence of record is sufficient to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310 (2000). Specifically, claimant contends that the administrative law judge erred in failing to accord proper weight to the opinions of Drs. Amin and Hussain, claimant's treating physicians. In addition, claimant contends that the administrative law judge erred in granting Employer's Motion to Compel Claimant to Undergo Examination by Dr. Dahhan. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

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).

Initially, claimant contends that the administrative law judge erred in granting Employer's Motion to Compel Claimant to Undergo Examination, since he only submitted an updated medical report from his treating physician. Claimant's Brief at 2. Claimant also contends that the case has been ongoing for over nineteen years and he has already been examined by multiple physicians. *Id*.

In granting Employer's Motion to Compel Claimant to Undergo Examination, the administrative law judge considered the arguments of the parties,[3] as well as the record in this case, and found employer entitled to have

[3] As support for its motion, employer argues that claimant submitted new medical evidence in the form of Dr. Hussain's March 1999 report and, therefore, employer should be allowed the opportunity to rebut this new opinion. In response, claimant argues that he has not submitted new evidence, but rather, has only provided an updated report from his treating physician. Claimant also

claimant undergo the requested examination.[4] While an employer's right to have a claimant re-examined or to compel a claimant to respond to discovery requests pursuant to a request for modification is not absolute, the determination of whether an employer is entitled to such examination or discovery rests within the discretion of the administrative law judge. *Stiltner v. Wellmore Coal Corp*., 22 BLR 1-37, 1-40-42 (2000) (*en banc*); *Selak v. Wyoming Pocahontas Land Co*., 21 BLR 1-173, 1-177-78 (1999) (*en banc*).[5] Herein, the administrative law judge considered the arguments of the parties and the evidence contained in the record and, thus, the decision to grant employer's motion was reasonably within his discretion. *Id*.

In addressing employer's request for modification, the administrative law judge found the newly submitted evidence, in conjunction with the previously submitted evidence, sufficient to establish a mistake in a determination of fact pursuant to Section 725.310 (2000). The administrative law judge found that the evidence was sufficient to establish rebuttal of the Section 718.305 presumption, inasmuch as employer established that claimant's total disability did not arise, in whole or in part, from his coal mine employment and also that claimant was not suffering from pneumoconiosis.

In the administrative law judge's first Decision and Order, *see* Decision and Order - Award of Benefits [1986 Decision and Order], he found the x-ray evidence to be equally probative and applied the "true doubt rule" to determine that claimant had established the existence of pneumoconiosis. 1986 Decision and Order at 13. In the most recent Decision and Order, *see* Decision and Order - Denial of Benefits [2001 Decision and Order], the administrative law judge acknowledged that the "true doubt rule" violates Section 556(d) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act

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notes the protracted history of this case.

[4] In conjunction with Employer's Motion to Compel Claimant to Undergo Examination, employer submitted a Motion to Remand Case to District Director to Complete Development of Evidence. The administrative law judge denied Employer's Motion to Remand. None of the parties challenges this finding.

[5] The Board's decisions in *Selak* and *Stiltner* were based on 20 C.F.R. §718.404(b) (2000). After revision of the regulations, this language, in substantially the same form, is now set forth at 20 C.F.R. §725.203(d). *See* 20 C.F.R. §725.2(c). Upon review of 20 C.F.R. §725.203(d), the legal standard set forth in *Selak* and *Stiltner* is applicable to this case.

by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). 2001 Decision and Order at 10. Consequently, the administrative law judge reconsidered the previously submitted x-ray evidence, along with the newly submitted x-ray which were all negative for the existence of pneumoconiosis, and found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis.[6] 2001 Decision and Order at 11.

In weighing the medical opinion evidence, the administrative law judge accorded little weight to the opinion of Dr. Hussain, finding that the physician primarily based his opinion on positive x-ray evidence which was contrary to the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis. 2001 Decision and Order at 11. The administrative law judge, however, accorded greater weight to the opinions of Drs. Dahhan and Branscomb, finding the opinions well documented and the most comprehensive reports of record as they were based on a review of the medical reports of record which spanned approximately twenty years. *Id*. Consequently, the administrative law judge found this evidence, in conjunction with the previously submitted evidence, insufficient to establish the existence of pneumoconiosis. As a result, the administrative law judge found that this medical evidence, in conjunction with the previously submitted evidence, sufficient to establish rebuttal of the Section 718.305 presumption by establishing that claimant does not have pneumoconiosis. *Id*.

Claimant challenges the administrative law judge's decision to grant employer's request for modification, based on his determination that employer established a mistake in a determination of fact pursuant to Section 725.310 (2000), contending generally that the administrative law judge erred in failing to accord proper weight to the medical opinions of Drs. Amin and Hussain based on their status as claimant's treating physicians. We disagree.

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[6] Claimant does not allege any error with the administrative law judge's finding that the x-ray evidence, old and new, is insufficient to establish the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's finding with regard to the x-ray evidence as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Contrary to claimant's assertion, the administrative law judge was not required to accord greater weight to the opinions of claimant's treating physicians, Drs. Amin and Hussain, based solely on their status as treating physicians. The opinions of treating physicians "should be '[g]iven their proper deference;'" however, where an administrative law judge finds that a treating physician's opinion is not credible, the administrative law judge need not accord additional weight to the treating physician's opinion. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, BLR (6th Cir. 2002), quoting *Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir.1995); *see also* 20 C.F.R. §718.104(d)(5). Herein, the administrative law judge reasonably found that notwithstanding Dr. Amin's and Dr. Hussain's status as claimant's treating physicians, their opinions are not well-supported by underlying documentation and the physicians did not adequately explain their conclusions. 2001 Decision and Order at 9; Director's Exhibit 151; Claimant's Exhibit 1; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In addition, the administrative law judge reasonably found Dr. Hussain's diagnosis of pneumoconiosis entitled to little weight because it was based primarily on positive x-ray evidence which is against the administrative law judge's findings with regard to the x-ray evidence as a whole. 2001 Decision and Order at 11; Director's Exhibit 151; *see Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984).

Moreover, the administrative law judge rationally found that the medical opinions of Drs. Dahhan and Branscomb, which are based, at least in part, on a review of all of the medical evidence of record spanning approximately twenty years, are entitled to greater weight based on his determination that these opinions are thorough, reasoned, documented and supported by the medical evidence. 2001 Decision and Order at 10-11; Director's Exhibits 129, 152; Employer's Exhibit 1; *see Clark, supra; Lucostic, supra*. The administrative law judge also reasonably exercised his discretion in according the opinions of Drs. Dahhan and Branscomb greater weight based on their superior professional qualifications.[7] *Id*.; *see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

[7] Dr. Dahhan is Board-certified in Internal Medicine and Pulmonary Diseases. Employer's Exhibit 1. Dr. Branscomb is Board-certified in Internal Medicine and is also a Distinguished Professor Emeritus of the University of Alabama at Birmingham. Director's Exhibit 129. The record does not contain the

Consequently, the administrative law judge's finding is supported by substantial evidence.

Additionally, claimant generally contends that the opinions of Drs. Varney, Setson and Wright support "the Claimant's entitlement to federal black lung benefits." Claimant's Brief at 7. However, claimant does not set forth any specific allegations of error with respect to the administrative law judge's weighing of the medical opinion evidence, other than those allegations of error previously addressed and rejected by the Board in this decision. *See* discussion, *supra*. Consequently, since claimant does not allege any other errors of law with specificity, we affirm the administrative law judge's finding that the weight of the medical evidence is insufficient to establish that claimant is suffering from pneumoconiosis. *See 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).

Furthermore, we affirm the administrative law judge's finding that based on his determination that the evidence is insufficient to establish the existence of pneumoconiosis, employer has established rebuttal of the Section 718.305 presumption. 2001 Decision and Order at 11; 20 C.F.R. §718.305(d); *see DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). Similarly, we affirm the administrative law judge's finding that this establishes a mistake in a determination of fact and, therefore, affirm his decision to grant employer's request for modification and subsequent denial of benefits. 20 C.F.R. §725.310; *see King v. Jericol Mining, Inc*., 246 F.3d 822, 825, BLR (6th Cir. 2001); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82-84 (1998)(McGranery, J., dissenting).

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curriculum vitae of Drs. Amin and Hussain.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge