BRB Nos. 03-0108 BLA
and 03-0108 BLA-A

CLARENCE O. CRITES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 10/31/2003
	)	
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 on Modification - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

William S. Mattingly and Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Timothy S. Williams (Howard M. 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification - Denying Benefits (01-BLA-0777) of Administrative Law Judge Michael P. Lesniak on claimant's request for modification and 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] On September 14, 2000, claimant filed a request for modification of the decision of the United States Court of Appeals for the Fourth Circuit in *Crites v. Consolidation Coal Co.,* No. 97-1968 (4th Cir. Sept. 17, 1999)(unpublished). Director's Exhibit 86. The Fourth Circuit held that Administrative Law Judge Stuart A. Levin's 1995 prior denial of benefits was supported by substantial evidence and thus, it affirmed the Board's Decision and Order in *Crites v. Consolidation Coal Co.,* BRB No. 95-1971 BLA (May 29, 1997)(unpublished). Director's Exhibit 84. The Board affirmed, in *Crites,* Judge Levin's weighing of the medical opinion evidence in finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that his disability is due to pneumoconiosis. Director's Exhibit 82. Because claimant failed to meet his burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, the Board affirmed Judge Levin's denial of benefits. *Id.*

Following claimant's request for modification, Administrative Law Judge Michael P. Lesniak (the administrative law judge), in his Decision and Order on Modification – Denying Benefits, which is the subject of the instant appeal, found that the evidence of record fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence of record establishes that claimant is totally disabled due to a respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). The administrative law judge further indicated that because claimant failed to establish the existence of pneumoconiosis, he could not establish that his totally disabling respiratory impairment is due to the disease. The administrative law judge thus found, based on his review of the record evidence, that claimant failed to establish a mistake in a determination of fact in the prior denial or a change in conditions under 20 C.F.R. §725.310 (2000), and failed to establish his entitlement to benefits. Accordingly, the administrative law judge denied claimant's request for modification and the claim.

On appeal, claimant contends that the administrative law judge erred in failing to consider all of the medical evidence of record to determine the merits of claimant's request for modification of the prior denial of benefits. Claimant further contends that the administrative law judge erred in failing to determine whether the status of Drs. Abrahams

[1] 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.

and Shroering, as claimant's treating physicians, entitles their medical opinions to special weight. Claimant also argues that the administrative law judge provided no valid reason for according less weight to Dr. Koenig's opinion, and failed to address the issue, raised below by claimant, of whether the medical opinions of Drs. Renn and Castle are contrary to the definition of pneumoconiosis under the Act. Claimant seeks a remand of the case to the administrative law judge for further consideration of the evidence. Employer responds, and urges affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief in claimant's appeal.

Employer has filed a cross-appeal. BRB No. 03-0108 BLA-A. Employer contends that while the administrative law judge correctly determined that claimant failed to establish modification and that he is not entitled to benefits, the administrative law judge erred (1) by analyzing the evidence for a change in conditions where claimant alleged only a mistake in a determination of fact, and (2) by determining that the instant claim was timely filed under 20 C.F.R. §725.308 (2000). Employer also challenges the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b). Employer requests that its arguments on cross-appeal be considered in the event that the Board vacates the administrative law judge's Decision and Order and remands the case. Claimant and the Director respond to employer's cross-appeal, and disagree with employer's arguments that the administrative law judge erred in determining that the claim was timely filed and in analyzing claimant's modification request to determine whether the evidence establishes a change in conditions as well as a mistake in a determination of fact. Employer has filed a reply brief in the cross-appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred by failing to consider all the medical evidence of record, rather than just the evidence submitted in connection with claimant's request for modification, to determine the merits of claimant's request for modification. The administrative law judge found that claimant alleged a mistake in a determination of fact in the prior denial, specifically asserting that Judge Levin mistakenly determined that claimant did not have pneumoconiosis, and that claimant also implied that claimant's condition had changed since the prior denial. Decision and Order on Modification at 2 n.1. The administrative law judge thus analyzed the case for both issues. *Id.* The administrative law judge set forth the x-ray, pulmonary function and blood gas study evidence of record in its entirety. The administrative law judge then summarized the medical opinion evidence submitted since Judge Levin's July 10, 1995 prior denial of benefits. The administrative law judge indicated that all relevant evidence previously submitted was "incorporated by reference as if fully set forth herein." Decision and Order on Modification

at 13. The administrative law judge subsequently noted that the prior denial of benefits was based on claimant's failure to establish that he suffers from pneumoconiosis or that he is totally disabled due to pneumoconiosis. Decision and Order on Modification at 26. He stated that "[a]ll of the evidence must be considered to determine whether pneumoconiosis or total disability due to pneumoconiosis can now be established or [whether] a mistake in a determination of fact was made." *Id.*

The administrative law judge then determined that the preponderance of the x-ray evidence of record was negative at 20 C.F.R. §718.202(a)(1), and that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (a)(3).[2] Considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that there is no disagreement among the physicians that claimant has chronic obstructive pulmonary disease, and that the issue was whether claimant's obstructive disorder is related to his coal mine employment. The administrative law judge indicated that Drs. Abrahams, Rasmussen and Koenig opined that claimant's chronic obstructive pulmonary disease is due to coal mine employment, while Drs. Renn, Branscomb, Fino, Rosenberg and Castle opined that claimant's lung disease is due to asthma, unrelated to claimant's coal mine employment. The administrative law judge found that "[a]ll of these most recent physicians (sic) rendered opinions based on the claimant's medical histories, the physical examinations, and test results. Thus, I find all of these opinions to be documented." Decision and Order on Modification at 28. The administrative law judge then determined that the newly submitted opinions do not differ in that each of the rendering physicians found the x-ray evidence to be essentially negative. He added, "Alternatively, the physicians do differ in their reasoning as to the basis of the miner's obstructive airway disease; specifically, whether the miner suffers from an occupational lung disease or asthma." *Id.* The administrative law judge then weighed the newly submitted medical opinions.

The administrative law judge found the newly submitted medical opinions of Drs. Castle, Renn and Branscomb to be better supported by claimant's overall medical record than the newly submitted medical opinions of Drs. Abrahams, Rasmussen and Koenig. Specifically, the administrative law judge found that Dr. Rasmussen's newly submitted opinion, that claimant's chronic obstructive pulmonary disease is due to claimant's coal mine employment, is not well reasoned because Dr. Rasmussen did not explain his findings that claimant's clinical history is not suggestive of asthma and that claimant's loss of lung function can be attributed to his coal mine employment. The administrative law judge also found that the newly submitted opinions of Drs. Abrahams and Koenig, that claimant's chronic obstructive pulmonary disease is due to coal mine employment, are not "as carefully considered" as the other physicians' opinions because, *inter alia*, these doctors did not

[2] We affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) - (a)(3) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

discuss claimant's most recent medical history as part of claimant's entire condition, as did Drs. Renn and Castle, who offered contrary opinions. Decision and Order on Modification at 29. The administrative law judge determined that the opinions and testimonies of both Drs. Castle and Renn are the best reasoned discussions of the miner's condition and consequently he accorded them greatest weight at 20 C.F.R.§718.202(a)(4). The administrative law judge further found that Dr. Fino "essentially disagrees with the definition of legal pneumoconiosis and Dr. Rosenberg states that the miner's condition 'probably relates to asthmatic diathesis' but does not explain what causes him to arrive at this conclusion." Decision and Order on Modification at 30. The administrative law judge thus concluded that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) or under any subsection of 20 C.F.R. §718.202(a). The administrative law judge then indicated, "Moreover, in considering the new evidence of record along with the prior evidence of record, I find that there has been no mistake of fact or change in condition with respect to ALJ Levin's earlier finding that the claimant does not suffer from pneumoconiosis." *Id.*

Claimant specifically asserts that the administrative law judge's failure to consider all of the medical reports of record prejudiced his case. Specifically, claimant argues that had the administrative law judge considered Dr. Rasmussen's earlier medical reports he would have determined that Dr. Rasmussen's opinion is indeed well-reasoned. Claimant also argues that the administrative law judge thus ignored medical evidence supportive of a finding that claimant's respiratory disability is due to his coal mine employment, including (1) the medical opinions of Dr. Schroering, who was claimant's treating physician and who found that claimant's respiratory impairment resulted from his coal mine employment as opposed to his asthma; (2) the finding of the West Virginia Occupational Pneumoconiosis Board that claimant's impairment was due to pneumoconiosis, and (3) the opinions of employer's experts, Drs. Rectenwald and Hayes, who found both that claimant had pneumoconiosis which arose out of his coal mine employment and that claimant had a moderate impairment. Claimant thus requests a remand of the case for consideration of the entire record.

Claimant's contentions lack merit. As an initial matter, the administrative law judge's analysis of the evidence in considering claimant's request for modification is consistent with the provisions of 20 C.F.R. §725.310 (2000) and the decision of the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Specifically, as set forth above, the administrative law judge considered the newly submitted evidence along with the previously submitted evidence in concluding that there was no mistake in a determination of fact in the prior appeal and no change in claimant's condition. While claimant correctly contends that the administrative law judge did not summarize the previously submitted medical opinions of record at 20 C.F.R. §718.202(a)(4), the administrative law judge incorporated by reference this previously submitted evidence. Decision and Order on Modification at 13. Critically, the administrative law judge's omission did not prejudice claimant's case, as claimant contends, because the administrative law judge, within his

discretion, relied on the more recent medical opinions of record to determine whether claimant suffers from pneumoconiosis. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); Decision and Order on Modification at 28. Because the administrative law judge acted within the purview of his discretion, we affirm his weighing of the medical evidence on modification. Further, we are not persuaded by claimant's assertion of prejudice as it is unsubstantiated.

Claimant next contends that the administrative law judge erred by failing to recognize Drs. Abrahams and Schroering as claimant's treating physicians and by failing to determine whether their status entitled their medical opinions to special weight. Claimant argues that the administrative law judge should consider the treating physicians' opinion pursuant to the factors set forth in the newly promulgated regulation at 20 C.F.R. §718.104(d), but acknowledges that the regulation applies only to evidence developed after January 19, 2001 and thus does not apply to the opinions of Drs. Abrahams and Schroering. Claimant further argues that the medical opinions of Drs. Abrahams and Schroering are documented and reasoned and establish that claimant's respiratory impairment is due to bronchitis which arose from his coal mine work and is not due to asthma unrelated to claimant's coal mine work.

Claimant's contentions lack merit. The administrative law judge specifically quoted claimant's hearing testimony that he "received treatment from the Fairmont Clinic and Dr. Schroering for quite a while and is currently seeing Dr. Abrahams regularly for lung problems, about three or four times a year. Tr. at 41-42." Decision and Order on Modification at 4; *see also* Decision and Order at 15. Further, the administrative law judge was under no obligation to accord "special weight" to the opinions of claimant's treating physicians, Drs. Abrahams and Shroering, *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993), or to consider these pre-January 19, 2001 opinions under 20 C.F.R. §718.104(d). 20 C.F.R. §718.101(b). In this case, the administrative law judge permissibly accorded less weight to Dr. Abrahams' opinion because he found that, in contrast to Drs. Renn and Castle, Drs. Abrahams and Koenig did not discuss claimant's most recent medical history as part of claimant's entire condition.[3] The administrative law judge further explained:

> Specifically, Dr. Castle testified that there has not been any change of significance in the miner's lung condition during the studies in the late 70's or 80s (sic) through the present time and that the miner did not report a productive cough or significant sputum production during his most recent exam with Dr. Abrahams. This is consistent with the majority of the medical

[3] Claimant did not submit an opinion by Dr. Shroering in connection with the instant request for modification.

> records in which the miner consistently reports more of a wheezing type of cough with little sputum production.
>
> In addition, Dr. Renn explained that the miner's ventilatory function has not decreased over time below that expected for the normal aging process, and the October 2001 ventilatory values were above what one would expect from a coal mine dust induced disease. Moreover, in his December 14, 200[0] report, Dr. Abrahams himself states that although Claimant is close to being disabled, he still maintains adequate ventilatory capacity to perform his prior job, which could actually indicate an improvement in the miner's condition. I note that all of these statements are inconsistent with pneumoconiosis, which is a latent and progressive disease [, 20 C.F.R.] §718.201(c), and has also been described as a progressive and irreversible disease. *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258-259 (4th Cir. 2000), *citing Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987).

Decision and Order on Modification at 29. Because the administrative law judge provided a rationale for his determination that the opinions of Dr. Abrahams and Dr. Koenig, "do not appear as carefully considered as the other physicians," Decision and Order on Modification at 29, we affirm his determination, at 20 C.F.R. §718.202(a)(4), that the opinions of Drs. Abrahams and Koenig were outweighed by the contrary medical opinions rendered by Drs. Castle and Renn. *Grizzle*, 994 F.2d at 1097-1098, 17 BLR at 2-128-129.

Claimant next contends that the administrative law judge provided invalid reasons in support of his decision to accord less weight to the medical opinion of Dr. Koenig at 20 C.F.R. §718.202(a)(4). Claimant argues that Dr. Koenig cited to several medical treatises and "discussed incomplete reversibility, variability, elevated RV/TLC ratio, increased TLC and the normal DLCO in concluding that the major part of Mr. Crites' impairment was caused by COPD rather than asthma." Claimant's Brief at 30. Claimant asserts that it was irrational for the administrative law judge to discredit Dr. Koenig's opinion on the basis that Dr. Koenig noted but did not discuss claimant's gastroesophageal reflux disease. Claimant argues that since "esophageal reflux syndrome is a risk factor for chronic bronchitis, it does not detract from Dr. Koenig's opinion that [] Mr. Crites has COPD in the form of chronic bronchitis." Claimant's Brief at 31. Claimant concedes that Dr. Koenig did not discuss claimant's obesity, but argues that since the record is devoid of any evidence that claimant's obesity has any effect on his "test scores," it was irrational for the administrative law judge to discredit Dr. Koenig's opinion on this basis.

Claimant's contentions lack merit. As set forth above, the administrative law judge provided a rational basis for his finding that the opinions of Drs. Abrahams and Koenig were outweighed by the contrary medical opinions. Further, the administrative law judge acted within his discretion in finding that although Dr. Koenig stated that "the preponderance of

objective evidence indicates that Mr. Crites has [chronic obstructive pulmonary disease],not asthma," Claimant's Exhibit 6, the physician did not explain "what in the miner's medical records led him to this conclusion, other than the fact that the Claimant worked in the mine and didn't smoke." Decision and Order on Modification at 29. An administrative law judge may choose to discredit a medical opinion that he determines lacks a thorough explanation. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The administrative law judge also properly found that "unlike Drs. Castle, Renn and Branscomb, Dr. Koenig did not discuss the miner's history of esophageal reflux syndrome or his obesity, the first of which is a risk factor of chronic bronchitis and occurs in 40% of asthmatic patients, and obesity, as explained by Dr. Branscomb, tends to increase x-ray markings, increase shortness of breath of any etiology, and predisposes a patient to gastric aspiration." Decision and Order on Modification at 29; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997)(There are several factors that an administrative law judge must consider in determining the weight to accord a particular medical expert's opinion, and the detail of the analysis in the opinion is just one of them.) Moreover, to the extent that claimant seeks a reweighing of the medical opinion evidence, we reject claimant's arguments. *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989).

Claimant also contends that the administrative law judge erred by failing to consider that the opinions of Drs. Castle and Renn, upon which he principally relied to deny benefits, are contrary to the statutory and regulatory definition of pneumoconiosis, as both physicians expressed the belief that chronic bronchitis arising out of coal mine work does not cause any clinically significant airway impairment. Claimant asserts that the administrative law judge failed to address this issue, which was properly raised below, and claimant requests a remand of the case for the administrative law judge to determine the reliability of the medical opinions of Drs. Castle and Renn. Claimant argues that the opinions of Drs. Castle and Renn "categorically exclude the possibility that Mr. Crites' coal mine dust exposure could have caused his clinically significant obstructive impairment in the form of chronic bronchitis." Claimant's Brief at 38.

In the instant case, the administrative law judge noted that asthma, asthmatic bronchitis, or emphysema may fall within the regulatory definition of pneumoconiosis if they are related to coal dust exposure. Decision and Order on Modification at 28 n.4; 20 C.F.R. §718.201(a)(2). The administrative law judge determined, at 20 C.F.R. §718.202(a)(4), that the reports and deposition testimonies of Drs. Castle and Renn were "the best reasoned discussions of the miner's condition." Decision and Order on Modification at 30. The administrative law judge found:

> Dr. Castle thoroughly discusses the miner's medical records, and explains in a step by step manner in his deposition testimony precisely how he would go about diagnosing the miner, and what led him to his ultimate conclusion that the miner suffers from adult onset asthma, not occupational in nature, while

> still considering the alternative opinions of the other physicians. Dr. Renn also thoroughly explains the basis for his opinion that the miner suffers from adult onset asthma with precise elements from the miner's physical examinations, medical history and complaints, and the objective test evidence.

Id.

Claimant contends that the administrative law judge did not address claimant's argument, raised in his February 16, 2002 post-hearing brief to the administrative law judge, that the opinions of Drs. Castle and Renn run contrary to the regulatory definition of pneumoconiosis. Claimant's Post-Hearing Brief Dated February 16, 2002. The administrative law judge explicitly found on modification that both Drs. Castle and Renn thoroughly explained the basis for their opinions that claimant suffers from adult onset asthma, unrelated to claimant's coal mine employment. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); Decision and Order on Modification at 30. The administrative law judge's crediting of the opinions of Drs. Castle and Renn in the instant case is thus supported by substantial evidence and contains no reversible error. We, therefore, affirm the administrative law judge's weighing of the medical opinions of Drs. Castle and Renn in denying claimant's request for modification and the claim.

Based on the foregoing, we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that claimant failed to establish modification at 20 C.F.R. §725.310 (2000). We, therefore, further affirm the administrative law judge's denial of claimant's request for modification and the claim. Given our affirmance of the administrative law judge's denial of benefits in the instant case, we need not address employer's arguments raised in its cross-appeal in BRB No. 03-0108 BLA-A.

Accordingly, the administrative law judge's Decision and Order on Modification - Denying Benefits 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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PETER A. GABAUER, JR.
Administrative Appeals Judge