BRB No. 03-0140 BLA
And 03-0140 BLA-A

JOHN H. MCGUIRE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LITTLE BILL COAL COMPANY	)	
	)	DATE ISSUED: 10/28/2003
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, 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 and employer cross-appeals the Decision and Order (01-BLA-0685) of Administrative Law Judge Mollie W. Neal 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, 30 U.S.C. §901 *et seq.* (the Act).[1] The instant case involves a duplicate claim filed on April 4, 1983.[2] In the initial Decision and Order addressing the duplicate claim, Administrative Law Judge E. Earl Thomas, after crediting claimant with at least twenty years of coal mine employment, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Director's Exhibit 67. Judge Thomas further found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* However, Judge Thomas also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Judge Thomas, therefore, found that a material change in conditions had not been established. *Id.* Accordingly, Judge Thomas denied benefits. *Id.* By Decision and Order dated August 3, 1992, the Board, *inter alia*, affirmed Judge Thomas's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *McGuire v. Little Bill Coal Co.*, BRB No. 91-0304 BLA (Aug. 3, 1992) (unpublished). The Board, therefore, affirmed Judge Thomas's denial of benefits. *Id.* After the Board denied claimant's motion for reconsideration, *McGuire v. Little Bill Coal Co.*, BRB No. 91-0304 BLA (Nov. 19, 1992) (Order) (unpublished), the United States Court of Appeals for the Sixth Circuit held that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and, therefore, affirmed Judge Thomas's denial of benefits. *McGuire v. Little Bill Coal Co.*, No. 93-3008 (6th Cir. Jan. 5, 1994) (unpublished).[3]

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[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.

[2] 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 June 19, 1973. Director's Exhibit 35. The SSA denied the claim on March 26, 1974. *Id.* Claimant next filed a claim for benefits with the Department of Labor (DOL) on April 12, 1974. Director's Exhibit 1. On April 7, 1978, claimant elected DOL review of his denied black lung claim. Director's Exhibit 35. The DOL denied the claim on January 8, 1980. Director's Exhibit 24. There is no indication that claimant took any further action in regard to his 1973 or 1974 claims.

Claimant filed a third claim on April 4, 1983. Director=s Exhibit 2.

[3] The United States Court of Appeals for the Sixth Circuit subsequently denied claimant's petition for a rehearing. *McGuire v. Little Bill Coal Co.*, No. 93-3008 (6th Cir. Feb. 11, 1994) (Order) (unpublished).

Claimant subsequently filed a request for modification. Director's Exhibit 77. In a Decision and Order dated April 19, 1996, Administrative Law Judge John C. Holmes found that the evidence was insufficient to establish that claimant was totally disabled by a respiratory impairment. Director's Exhibit 108. Accordingly, Judge Holmes denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000). *Id.*

Claimant filed an appeal with the Board.[4] Director's Exhibit 109. By Decision and Order dated September 25, 1997, the Board affirmed Judge Holmes's denial of modification under 20 C.F.R. §725.310 (2000). *McGuire v. Little Bill Coal Co.*, BRB No. 96-1421 BLA (Sept. 25, 1997) (unpublished). In a Decision dated August 5, 1998, the Sixth Circuit held that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and, therefore, affirmed Judge Holmes's denial of claimant's request for modification. *McGuire v. Little Bill Coal Co.*, No. 97-4192 (6th Cir. Aug. 5, 1998) (unpublished).

On July 29, 1999, claimant filed a second request for modification of his denied claim. Director's Exhibit 131. Administrative Law Judge Mollie W. Neal (the administrative law judge) held a hearing on October 4, 2001. The record reflects that claimant died on September 3, 2002, one month before the administrative law judge issued her October 3, 2002 decision. In that decision, the administrative law judge found 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). The administrative law judge, therefore, denied claimant's request for modification. On appeal, claimant contends that the administrative law judge failed to give proper weight to the medical opinions of his family and treating physicians. Employer responds in support of the administrative law

[4] On September 26, 1996, the Board received a letter from claimant, along with some additional medical evidence. Director's Exhibits 112, 114. By Order dated February 21, 1997 the Board advised claimant that it considered claimant's letter to be a request for modification. *McGuire v. Little Bill Coal Co.*, BRB No. 96-1421 BLA (Feb. 21, 1997) (Order) (unpublished). The Board, therefore, dismissed claimant's appeal and remanded the case to the district director for modification proceedings. *Id.*

On March 18, 1997, claimant filed an appeal of the Board's February 21, 1997 Order. Director's Exhibit 116. By Order dated May 21, 1997, the Board directed claimant to notify the Board whether he wished to pursue his appeal before the Board or whether he wished to pursue his request for modification. *McGuire v. Little Bill Coal Co.*, BRB No. 96-1421 BLA (May 21, 1997) (Order) (unpublished). On June 2, 1997, claimant notified the Board that he wanted the Board to review his case. Director's Exhibit 120. Consequently, by Order dated June 17, 1997, the Board reinstated claimant's appeal. *McGuire v. Little Bill Coal Co.*, BRB No. 96-1421 BLA (June 17, 1997) (Order) (unpublished).

judge's denial of benefits. Employer also contends that the Board should dismiss the instant appeal for lack of standing and because there is not an authorized representative to pursue claimant's appeal. Employer has also filed a cross-appeal, contending that the administrative law judge erred in admitting claimant's post-hearing evidence into the record and in failing to provide employer with an opportunity to respond to this evidence. 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).

We initially address employer's argument, raised in its response brief, that the Board lacks jurisdiction to address claimant's appeal because claimant's counsel has not provided any evidence that he is authorized to represent claimant's estate. Neither the Act nor the regulations specify who may pursue a miner's claim after his death. However, the regulations governing Black Lung adjudications contain no requirement that the personal representative of a deceased miner's estate be made a party to the miner's claim in order for the administrative law judge to proceed on it. Rather, in order for a miner's claim to be considered, the regulations require that a miner must be alive when his claim is filed. *See* 20 C.F.R. §725.301(d). Inasmuch as the miner in the instant case was alive when he filed his claim, and the claim is part of the record, the miner's claim was properly before the administrative law judge. *Combs v. Director, OWCP*, 8 BLR 1-88 (1985).

In regard to who may file an appeal with the Board, Section 802.201(b) provides that:

> In the event that a party has not attained the age of 18, is not mentally competent, or is physically unable to file and pursue or defend an appeal, the Board may permit any legally appointed guardian, committee, or other appropriate representative to file and pursue or defend the appeal, or it may in its discretion appoint such representative for purposes of the appeal. The Board may require any legally appointed representative to submit evidence of that person's authority.

20 C.F.R. §802.201(b).

In the instant case, we hold that claimant's counsel, having been appointed by claimant to pursue his claim, reasonably filed an appeal with the Board of the administrative law judge's denial of the claim. We, therefore, reject employer's contention that claimant's counsel lacks standing to pursue the instant appeal.

We now turn our attention to claimant's request for modification. 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),[5] 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. *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 found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).[6] Consequently, Judge Holmes denied claimant's request for modification under 20 C.F.R. §725.310 (2000), a finding ultimately affirmed by the Board and the Sixth Circuit. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).

The administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii) and (iii). Decision and Order at 8. Inasmuch as no party challenges these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge also found that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 8-9. While Drs. Mejia, Sundaram and Fritzhand opined that claimant was totally disabled from a pulmonary standpoint, Director's Exhibits 132, 136, Drs. Dahhan and Branscomb opined that claimant retained the respiratory capacity to perform his coal mine employment. Director's Exhibit 148, Employer's Exhibits 1, 4.

In her consideration of the evidence, the administrative law judge accorded less weight to the opinions of Drs. Mejia and Fritzhand, that claimant suffered from a totally disabling respiratory impairment, because she found that these physicians provided no

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

[6] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

basis or explanation for their conclusions.[7] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 8-9; Director's Exhibits 132, 136. Because claimant does not challenge the administrative law judge's findings that the opinions of Drs. Mejia and Fritzhand are not sufficiently reasoned, we uphold the administrative law judge's determinations. *Skrack*, 6 BLR at 1-711.

Claimant contends that the administrative law judge failed to give proper weight to his family and treating physician, Dr. Mejia. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should get the deference they deserve based upon their power to persuade. *Williams*, 338 F.3d at 513. The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that administrative law judges must evaluate treating physicians just as they consider other experts. *Williams*, 338 F.3d at 513.

As discussed, *supra*, the administrative law judge properly accorded less weight to Dr. Mejia's opinion that claimant did not have the respiratory capacity to perform his coal mine employment because she found that his opinion was not sufficiently reasoned. *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order at 8-9.

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[7] In a report dated June 30, 1999 report, Dr. Mejia opined that claimant suffered from a moderate to severe pulmonary impairment that prevented him from performing the work of a coal miner. Director's Exhibit 132. In the section of his report requesting a detailed rationale for his opinion, Dr. Mejia stated: "please see Section D." *Id.* In Section D of his report, Dr. Mejia noted, *inter alia*, that claimant had shortness of breath on exertion and that his pulmonary function study revealed moderate obstructive disease. *Id.* Dr. Mejia, however, did not explicitly explain how the statements in Section D of his report supported his finding that claimant was totally disabled.

In an August 3, 1999 report, Dr. Fritzhand interpreted claimant's pulmonary function study as revealing a moderately severe obstructive airway impairment. Director's Exhibit 136. Dr. Fritzhand also noted that claimant had long standing shortness of breath, ambulated with a slow nonlimping gait, and had distant heart sounds. *Id.* Dr. Fritzhand opined that claimant's respiratory function was "certainly impaired." *Id.* Dr. Fritzhand also opined that claimant was totally and permanently disabled from participating in any type of coal mine work on a sustained basis. *Id.* Dr. Fritzhand, however, failed to explain how his findings supported a finding of respiratory disability.

The administrative law judge also permissibly accorded greater weight to Dr. Dahhan's opinion that claimant was not disabled from a pulmonary standpoint based upon his superior qualifications.[8] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 8; Employer's Exhibit 1.

The administrative law judge further found that Dr. Dahhan's opinion, that claimant was not totally disabled from a respiratory standpoint, was well documented and well-reasoned and was supported by that of Dr. Branscomb, a physician who also specialized in the area of pulmonary disease.[9] Decision and Order at 8.

In regard to Dr. Sundaram's opinion that claimant was not physically able, from a pulmonary standpoint, to perform his usual coal mine employment, the administrative law judge found that Dr. Sundaram's opinion was outweighed by the contrary opinions of Drs. Dahhan and Branscomb. The administrative law judge specifically found that:

> Dr. Sundaram's opinion is not accorded weight equal to that of either Drs. Branscomb or Dahhan, because he did not have the benefit of all of the Claimant's medical records in reaching his findings. Dr. Dahhan, on the other hand, not only examined the miner, but also reviewed and considered all of the medical evidence in reaching his opinion. Similarly, Dr. Branscomb's opinion is based on his review of all of the Claimant's medical records, except for the most recently submitted pulmonary function study, dated March 22, 2001. I find both physician's [sic] opinions better documented and reasoned than Dr. Sundaram's for this reason.

Decision and Order at 9.

Claimant contends that the administrative law judge should have accorded additional weight to Dr. Sundaram's opinion. *See* Claimant's Brief at 7. However, claimant fails to raise any specific error in regard to the administrative law judge's consideration of Dr. Sundaram's opinion, noting only that Dr. Sundaram prepared the miner's death certificate and listed the immediate cause of death as "acute respiratory failure." Claimant's Brief at 7. Because the miner's death certificate does not assess the

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[8] Dr. Dahhan is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 148; Employer's Exhibit 1. The qualifications of Drs. Mejia, Sundaram and Fritzhand are not found in the record.

[9] Dr. Branscomb is Board-certified in Internal Medicine. Employer's Exhibit 4. The administrative law judge also noted that Dr. Branscomb is a distinguished professor in pulmonary medicine at the University of Alabama. Decision and Order at 6.

extent of claimant's respiratory disability, see Claimant's Exhibit 2, it does not assist claimant in establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge found that Dr. Sundaram's opinion was outweighed by the opinions of Drs. Dahhan and Branscomb. Decision and Order at 9.

Claimant argues that:

> The [administrative law judge] erred by giving too much weight to the Defendant-Employer's physicians. These physicians did not have knowledge of the Claimant's physical requirements of his coal mine employment.

Claimant's Brief at 3.

The administrative law judge found that the opinions of Drs. Dahhan and Branscomb, that claimant was not totally disabled from a pulmonary standpoint, were better reasoned than Dr. Sundaram's contrary opinion. Decision and Order at 9. The Sixth Circuit has held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of the claimant's last coal mine employment before crediting that physician's opinion. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-135 (6th Cir. 2000). In the instant case, the administrative law judge noted that Dr. Dahhan found that claimant had only a "*mild* obstructive ventilatory defect." Decision and Order at 6 (emphasis added). The administrative law judge similarly noted that Dr. Branscomb opined that if claimant had any pulmonary impairment, it was "*very mild*" and "not severe enough to prevent coal mining." *Id.* at 7 (emphasis added). Given the fact that Drs. Dahhan and Branscomb found that claimant suffered from, at most, a mild pulmonary impairment, the administrative law judge was not required to consider whether these physicians had any knowledge of the exertional requirements of claimant's last coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Moore v. Hobet Mining & Construction Co.*, 6 BLR 1-706 (1983) (An administrative law judge may find that a doctor's assessment of a respiratory impairment as mild establishes that it is not totally disabling).

Claimant finally contends that the administrative law judge erred in not considering the lay evidence. Where there is medical evidence supportive of a finding of total disability, claimant's testimony is relevant and must be considered by the administrative law judge. *See* 20 C.F.R. §718.204(d)(2); *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985). Because the administrative law judge found no credible medical

evidence supportive of a finding of total disability, she was not required to consider claimant's lay testimony.[10]

Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Modification may also be based upon a mistake in a determination of fact. 20 C.F.R. §725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994). In the instant case, the administrative law judge found that claimant did not demonstrate a mistake in a determination of fact. Decision and Order at 14. Inasmuch as no party challenges this finding, it is affirmed. *Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 (2000), we need not address employer's contentions raised in its cross-appeal. *Larioni*, 6 BLR at 1-1278.

[10] The administrative law judge summarized claimant's testimony in her Decision and Order. *See* Decision and Order at 7.

Accordingly, the administrative law judge's Decision and Order 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