BRB No. 11-0136 BLA

LEON S. CRIHFIELD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 10/26/2011
	)	
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 - Denying Benefits on Modification of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig L.L.P.), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits on Modification (2010-BLA-5041) of Administrative Law Judge Daniel L. Leland, rendered on a subsequent claim filed on January 30, 2004, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] In a Decision and Order

[1] Claimant filed prior claims for benefits on November 14, 1991 and November 22, 1996, each of which was denied by the district director because the evidence failed to

dated April 18, 2007, Administrative Law Judge Richard T. Stansell-Gamm denied benefits, finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and that claimant, therefore, was unable to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant appealed, and the denial of benefits was affirmed by the Board. *L.S.C.* [*Crihfield*] *v. Peabody Coal Co.*, BRB No. 07-0670 BLA (May 14, 2008) (unpub.), *petition for review denied, Crihfield v. Peabody Coal Co.*, No. 08-1652 (4th Cir. Feb. 6, 2009).

Claimant filed a request for modification on April 6, 2009. Director's Exhibit 60. The case was assigned to Judge Leland (the administrative law judge), who issued a Decision and Order on October 14, 2010, which is the subject of this appeal. The administrative law judge credited claimant with twenty years of coal mine employment, as stipulated by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge considered the evidence on modification, in conjunction with the evidence previously submitted in the subsequent claim, and determined that it failed to prove the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that claimant did not establish a change in conditions. The administrative law judge also determined that there was no mistake in a determination of fact with regard to Judge Stansell-Gamm's denial of benefits. Accordingly, the administrative law judge found that claimant failed to establish a basis for modification under 20 C.F.R. §725.310 and he denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he has not established the existence of pneumoconiosis and total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence

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establish any of the requisite elements of entitlement. Director's Exhibits 1, 2. Claimant filed a third claim on March 1, 1999, which was ultimately denied by Administrative Law Judge Robert J. Lesniak, pursuant to a Decision and Order on Remand dated October 30, 2002. Director's Exhibit 3. Judge Lesniak found that while the evidence was sufficient to establish total disability, it failed to show that claimant suffered from pneumoconiosis. *Id*. Claimant took no further action with respect to the denial until he filed the current subsequent claim. Director's Exhibit 5.

and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits, with respect to his January 30, 2004 subsequent claim, claimant is required to establish that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because claimant's prior claim, filed on March 1, 1999, was denied for failure to establish the existence of pneumoconiosis, claimant must first prove this element, based on the newly submitted evidence, in order to obtain review of the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2), (3).

Additionally, because this case also involves a request for modification, the administrative law judge is required to determine whether any new evidence submitted with the request for modification, considered in conjunction with the evidence developed in the subsequent claim, establishes the existence of pneumoconiosis and therefore, a change in an applicable condition of entitlement. *See* 20 C.F.R. §§725.309(d), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The administrative law judge must also consider whether there was a mistake in a determination of fact with respect to the most recent denial of benefits. *See* 20 C.F.R. §725.310; *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). If claimant is able to establish either a change in conditions, by proving that there has been a change in an applicable condition of entitlement since the prior denial, or a mistake in a determination of fact, the administrative law judge must then consider whether claimant has established his entitlement to benefits, based on a review of all of the record evidence. *Hess*, 21 BLR at 1-143.

The administrative law judge considered all of the evidence submitted with respect to the 2004 subsequent claim, along with the evidence submitted by the parties on modification. He found that, of five chest x-rays, four were negative for pneumoconiosis and one was in equipoise as to the existence of pneumoconiosis, and that "a preponderance of the x-ray evidence is negative for pneumoconiosis" pursuant to 20

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See* 33 U.S.C. 921(c); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

C.F.R. §718.202(a)(1). Decision and Order at 7. The administrative law judge noted that there was no biopsy evidence at 20 C.F.R. §718.202(a)(2), and that claimant was not eligible for any of the presumptions, set forth at 20 C.F.R. §718.202(a)(3), to establish the existence of pneumoconiosis. *Id*. at 8. The administrative law judge also considered three medical opinions at 20 C.F.R. §718.202(a)(4). *Id*. He gave less weight to Dr. Rasmussen's opinion, that claimant has both clinical and legal pneumoconiosis,[3] and controlling weight to the contrary opinions of Drs. Zaldivar and Renn, that claimant does not have a coal dust-related lung disease.[4] *Id*. Thus, based on his review of all of the evidence together, the administrative law judge concluded that the "evidence fails to show that there has been a change in conditions or a mistake in fact that would warrant a conclusion that [claimant] has either clinical or legal pneumoconiosis." *Id*.

Claimant contends on appeal that the administrative law judge improperly allowed negative x-ray evidence to form the basis for the denial of his claim. Pursuant to 20 C.F.R. §718.202(a)(4), claimant asserts that the administrative law judge erred in failing credit the opinion of Dr. Rasmussen, that he has legal pneumoconiosis, in the form of

[3] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. " 20 C.F.R. §718.201(a)(2).

[4] Dr. Rasmussen examined claimant on April 26, 2004, and noted that he had positive x-ray evidence for coal workers' pneumoconiosis and that objective testing showed chronic obstructive pulmonary disease/emphysema due to both smoking and coal dust exposure. Director's Exhibit 13. Dr. Zaldivar examined claimant on December 14, 2005 and June 6, 2010, and opined that claimant does not have either clinical or legal pneumoconiosis. Director's Exhibit 32; Employer's Exhibit 1. Dr. Renn performed a consultative review of the record on January 10, 2006, and opined that claimant's respiratory disease is unrelated to coal dust exposure and that it is caused by smoking. Director's Exhibit 31.

chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure.[5] Claimant's assertions of error are rejected as they are without merit.

In weighing the evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge correctly noted that Dr. Rasmussen diagnosed coal workers' pneumoconiosis, based on claimant's history of coal dust exposure and a positive reading of the April 26, 2004 x-ray by Dr. Patel, a Board-certified radiologist and B reader. Decision and Order at 4; Director's Exhibit 13. The administrative law judge, however, specifically determined that the April 26, 2004 x-ray was in equipoise since it was also read as negative for pneumoconiosis by Dr. Wheeler, a Board-certified radiologist and B reader. Decision and Order at 7. Based on the administrative law judge's conclusion at 20 C.F.R. §718.202(a)(1), that the April 26, 2004 x-ray is in equipoise and that the remaining x-rays are negative for pneumoconiosis, we affirm the administrative law judge's determination to accord less weight to Dr. Rasmussen's diagnosis of clinical pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

With regard to the issue of the existence of legal pneumoconiosis, Dr. Rasmussen opined that claimant suffers from disabling COPD and stated:

> The two risk factors for [claimant's] loss of lung function are his cigarette smoking and his coal mine dust exposure. Both contribute. Both cause lung tissue destruction, even sharing some cellular and biochemical mechanisms.

Director's Exhibit 13. Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Rasmussen's opinion, as to the etiology of claimant's respiratory condition, was "cursory" and "poorly reasoned." Decision and Order at 8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). The administrative law judge rationally found that "[t]he fact that coal mine dust exposure and cigarette smoking cause lung tissue destruction and share *some* cellular and biochemical mechanisms does not establish that coal mine dust exposure contributed to [this] miner's lung impairment." Decision and Order at 8 (emphasis added); *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

[5] We affirm, as unchallenged by the parties on appeal, the administrative law judge's acceptance of the parties' stipulation to twenty years of coal mine employment and his findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant's contention in this appeal, that Dr. Rasmussen's opinion is entitled to controlling weight, amounts to little more than a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Because the administrative law judge has broad discretion in rendering his credibility determinations, we affirm his finding that Dr. Rasmussen's opinion is insufficient to establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[6] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Since claimant failed to establish the existence of pneumoconiosis, 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. Furthermore, we affirm the administrative law judge's finding that there was no mistake in a determination of fact with respect to the prior denial of benefits by Judge Stansell-Gamm. Decision and Order at 8. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish a basis for modification at 20 C.F.R. §725.310, and his denial of benefits.

[6] As the administrative law judge permissibly rejected Dr. Rasmussen's opinion, which is the only medical opinion of record to support claimant's burden of proof, it is not necessary that we address his credibility findings with regard to Drs. Zaldivar and Renn, as any error in weighing those contrary medical opinions would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits on Modification 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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JUDITH S. BOGGS
Administrative Appeals Judge