BRB No. 99-0142 BLA

JO ANN JOSEPH (Widow of HERMAN JOSEPH) Claimant-Petitioner v. NATIONAL MINES CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Paul D. Deaton, Paintsville, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, DC, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (97-BLA-1075) of

[1] Claimant, Jo Ann Joseph, filed a survivor's claim for benefits on November 7, 1994. Director's Exhibit 2. Mrs. Joseph is the widow of Herman Joseph, the miner, who died on March 6, 1992. Director's Exhibit 16; Claimant's Exhibit 2. The miner filed his application for benefits on April 2, 1982. Director's Exhibit 1. Both claims are presently pending.

Administrative Law Judge Thomas F. Phalen, Jr. on both the miner's and survivor's claims 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). This case is before the Board for the second time. In the initial Decision and Order, Administrative Law Judge Daniel J. Roketenetz adjudicated the miner's claim pursuant to 20 C.F.R. Part 718, credited the miner with ten years and three months of qualifying coal mine employment, and found that the miner did not suffer from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 50. Claimant timely appealed on the miner's behalf and the Board affirmed Administrative Law Judge Roketenetz's determinations under 20 C.F.R. §718.202(a)(1)-(4), and therefore, affirmed the denial of benefits. *Joseph v. National Mines Corp.*, BRB No. 90-2108 BLA (May 28, 1993)(unpub.); Director's Exhibit 51. Subsequently, the Board denied claimant's request for reconsideration on the miner's claim. *Joseph v. National Mines Corp.*, BRB No. 90-2108 BLA (Aug. 2, 1994)(unpub. Order); Director's Exhibit 52.

Thereafter, claimant filed a survivor's claim for benefits on November 7, 1994, Director's Exhibit 2, which was denied by the district director. A formal hearing was held before Administrative Law Judge Thomas F. Phalen, Jr. (administrative law judge) on April 9, 1998. Adjudicating the miner's claim, the administrative law judge acknowledged that claimant filed "an intent to file a survivor's claim" on November 7, 1994,[2] which was within one year of the denial of the miner's claim, and therefore, it constituted a request for modification of the miner's claim under 20 C.F.R. §725.310. The administrative law judge next credited the miner with ten years and three months of qualifying coal mine employment, and found that because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), there was no mistake in a determination of fact or change in conditions under 20 C.F.R. §725.310. Accordingly, he denied benefits on the miner's claim. Decision and Order at 27-32. With respect to the widow's claim, the administrative law judge determined that, because claimant failed to satisfy her burden of establishing that the miner suffered from pneumoconiosis, a requisite element of entitlement, an award of survivor's benefits was precluded. Accordingly, he denied benefits on the survivor's claim. Decision and Order at 32-33.

[2] Contrary to the administrative law judge's finding, claimant filed a letter dated July 19, 1993 indicating that she wished to file a survivor's claim, and on November 7, 1994, she filed her application for survivor's benefits. Director's Exhibit 2.

On appeal, claimant argues that employer's x-ray evidence precluded her from establishing the existence of pneumoconiosis under Section 718.202(a)(1) and that the administrative law judge improperly weighed the biopsy, autopsy, and medical opinion evidence under Section 718.202(a)(2) and (4). Employer responds, initially arguing that the administrative law judge was without jurisdiction to consider claimant's second motion for modification and, therefore, that the Board similarly lacks jurisdiction to consider the instant appeal. Alternatively, employer urges affirmance of the administrative law judge's denial of benefits on both claims. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not participate in this appeal.[3] Claimant additionally filed a Reply Brief, arguing that the administrative law judge impermissibly neglected the well-reasoned opinions of the "neutral" physicians regarding the autopsy evidence.[4]

The Board's scope of review is defined by statute. If the administrative law judge's

---

[3] The administrative law judge failed to determine whether claimant established modification with respect to total respiratory disability under Section 718.204(c), an element previously adjudicated against the miner. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). However, claimant has not otherwise challenged the administrative law judge's omission on appeal. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[4] We affirm the administrative law judge's findings pursuant to Section 718.202(a)(3) inasmuch as this determination is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 30.

findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the 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).

We initially address employer's contention with respect to the issue of jurisdiction. Employer argues that "a motion for modification is a motion for reconsideration," and as such, the administrative law judge erroneously considered claimant's second motion for modification. Employer's Response Brief at 13. Specifically, employer contends that the holding in *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997), deprives the administrative law judge of jurisdiction, and consequently, deprives the Board of jurisdiction to consider the instant appeal. We disagree. A motion for reconsideration and a petition for modification are two entirely different and distinct pleadings a party may file to obtain further review of the evidence. *See* 20 C.F.R. §§725.310, 802.206(b)(2). Furthermore, the holding in *Abner* is not on point to the instant case. The holding in *Abner* involves whether the filing of successive motions for reconsideration, and not modification, tolls the time limitation on the filing of an appeal.[5]

In the case at bar, the miner filed his application on April 2, 1982, which was denied by Administrative Law Judge Roketenetz and affirmed by the Board. Director's Exhibits 1, 50, 51. Due to the miner's demise, claimant filed a timely Motion for Reconsideration with

---

[5] In *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997), the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this cases arises, held that the employer's petition for review that it had filed before the Court was untimely inasmuch as the employer had filed it more than sixty days after the Board's order denying employer's first motion for reconsideration. Rather than filing a timely appeal with the Court after the Board denied its first motion for reconsideration, the employer filed a second motion for reconsideration with the Board, which the Board also denied, and then filed its appeal with the Court, which the Court held was untimely. *Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997).

the Board on June 29, 1993, which the Board summarily denied on August 2, 1994. Director's Exhibits 52, 68. Claimant filed her survivor's claim on November 7, 1994, which was construed as a timely request for modification of the denial on the miner's claim. *See Kubachka v. Windsor Power House Co.*, 11 BLR 1-171 (1988); Decision and Order at 4, 26. After the district director initially denied both claims, claimant filed successive motions for modification at the district director level before requesting a formal hearing before an administrative law judge. Director's Exhibits 53, 55, 56, 59, 62, 193. Inasmuch as employer does not argue that any of claimant's successive requests for modification were untimely, the administrative law judge had jurisdiction to adjudicate both pending claims, as do we. We, therefore, reject employer's argument.

Relevant to the merits of the case, claimant argues that employer precluded her from proving her claim by x-ray evidence under Section 718.202(a)(1) because employer submitted unduly repetitious evidence, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Although claimant is correct that the APA directs administrative factfinders to exclude "unduly repetitious evidence," the administrative law judge did not err in the instant case. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Inasmuch as the administrative law judge, within a proper exercise of his discretion, found that the numerous negative readings by several Board certified radiologists who are also B-readers substantially outweigh the nine positive readings by physicians who lack equal or superior radiological expertise, the administrative law judge's weighing of the x-ray evidence did not violate *Woodward's* "stricture against considering 'the quantity of evidence alone, without reference to a difference in the qualifications of the readers". *See* 20 C.F.R. §718.202(a)(1); *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Hence, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) inasmuch as it is rational and supported by substantial evidence. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 28.

Pursuant to Section 718.202(a)(2), claimant lists the findings of the physicians who reviewed the miner's biopsy. Claimant, however, fails to delineate how the administrative law judge erred in his analysis of the biopsy evidence pursuant to Section 718.202(a)(2). As the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized, "[t]he Board has repeatedly held that a party challenging the administrative law judge's decision must do more than recite evidence favorable to his case, but must demonstrate with some degree of specificity the manner in which substantial evidence precludes the denial of benefits or why the [administrative law judge's] decision is

contrary to law." *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because claimant fails to state with specificity how the administrative law judge's conclusions are contrary to law, she fails to provide a basis upon which the Board can review the administrative law judge's findings. Inasmuch as claimant offers no legal or factual challenge to the administrative law judge's rationale, we affirm the administrative law judge's findings with respect to the biopsy evidence.

Next, claimant contends that Dr. Jones's "honest evaluation" that he was unable to diagnose coal workers' pneumoconiosis based on his review of the autopsy slides should be compared to the opinions of Drs. Caffrey and Hansbarger. Claimant's contention lacks merit. Claimant is correct that Dr. Jones opined that he "could not substantiate a diagnosis of coal workers' pneumoconiosis," and as such, fails to assist claimant in carrying her burden of establishing the existence of pneumoconiosis.[6] Claimant's Exhibit 4. The administrative law judge permissibly determined that neither the biopsy or autopsy evidence demonstrates the existence of pneumoconiosis because none of the pathologists of record rendered a diagnosis sufficient to establish the existence of clinical pneumoconiosis or coal workers' pneumoconiosis as defined in the Act. *See* 20 C.F.R. §718.201; Decision and Order at 28-30; Director's Exhibits 17, 151, 174, 175, 177, 194, 197; Claimant's Exhibit 2; Employer's Exhibits 1, 2, 5. We, therefore, affirm the administrative law judge's determination that claimant failed to establish the presence of pneumoconiosis under Section 718.202(a)(2).

Claimant argues that the opinions of Drs. Jurich, Sundaram[7] and Leslie are reasoned medical opinions pursuant to Section 718.202(a)(4). Specifically, claimant argues that Dr. Jurich, who did not diagnose pneumoconiosis but found interstitial fibrosis, chronic obstructive pulmonary disease, and asthmatic bronchitis, was the miner's treating physician over a long period of time and during many hospital visits, and consequently, his opinion is entitled to persuasive weight. Although the Sixth Circuit court has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians,

---

[6] Moreover, the administrative law judge excluded Dr. Jones's report because claimant submitted this report post-hearing on May 26, 1988, in violation of the twenty-day rule for the submission of evidence. Decision and Order at 25; Claimant's Exhibit 4. However, claimant has not challenged the administrative law judge's exclusion of this evidence. *See* Skrack, *supra*.

[7] The administrative law judge also found that the reports of Drs. Sundaram and Smith deserved greater weight, but in his discussion of these physicians' opinions, he found that neither physician diagnosed a pulmonary condition sufficient to constitute legal pneumoconiosis. Decision and Order at 31, 32; Director's Exhibits 21, 142, 146, 170.

Tussey v. Island Creek Coal Co., 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993), deference to the treating physician's opinion is not required where a treating physician's opinion contains deficiencies, *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). The administrative law judge examined all of the relevant medical opinions of record and reasonably found that the opinions of Drs. Wright, Long, Broudy, O'Neill, Lane, Tuteur, Dahhan, and Fino that the miner's respiratory condition was the result of cigarette smoking and not related to the inhalation of coal dust, were well reasoned, well documented, and better supported by the objective medical evidence in the record. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 30-32. Inasmuch as the administrative law judge properly determined that the credible medical opinion evidence failed to establish the existence of pneumoconiosis, and this determination is rational and supported by substantial evidence, we affirm the administrative law judge's Section 718.202(a)(4) determination.

Claimant's failure to satisfy her burden of affirmatively establishing that the miner suffered from coal workers' pneumoconiosis under Section 718.202(a) precludes a finding of modification on the miner's claim pursuant to Section 725.310 or entitlement to benefits on the survivor's claim. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge