BRB No. 02-0262 BLA

WILLIAM F. COLLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DMV MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS AND MERCANTILE INSURANCE MUTUAL	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (00-BLA-0851) of Administrative Law Judge Daniel J. Roketenetz 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 involves a request for modification of the denial of benefits in a duplicate claim filed on July 14, 1992.[2] Initially, in a Decision and Order dated March 13, 1995, Administrative Law Judge Robert L. Hillyard credited claimant with forty-one years of coal mine employment based upon the stipulation of the parties, and considered the instant duplicate claim under the applicable regulations at 20 C.F.R. Part 718 (2000). Judge Hillyard found the evidence submitted since the denial of claimant's 1986 claim insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) (2000) and 718.203(b) (2000), and total disability under 20 C.F.R. §718.204(c)(1)-(4) (2000). Judge Hillyard consequently found that claimant did not establish a material change in conditions under 20 C.F.R. §725.309 (2000), and denied benefits. Claimant appealed. The Board affirmed Judge Hillyard's weighing of the evidence under Section 718.202(a)(1) and (4) (2000), and affirmed, as unchallenged on appeal, Judge Hillyard's findings that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(2) and (a)(3) (2000). *Collins v. DMV Mining Co., Inc.*, BRB No. 95-1304 BLA (Nov. 6, 1995)(unpublished). The Board further affirmed Judge Hillyard's findings under Section 718.204(c)(1)-(4) (2000) as claimant failed to raise any specific allegations of legal or factual error in Judge Hillyard's findings thereunder. *Id.* The Board thus affirmed the denial of benefits. *Id.* Claimant filed a timely Motion for Reconsideration, which the Board summarily denied in an Order dated March 28, 1996. *Collins v. DMV Mining, Inc.*, BRB No. 95-1304 BLA (Mar. 28, 1996)(unpublished Order on Motion for Reconsideration). Thereafter, claimant filed an appeal with the United

[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]Claimant filed an initial miner's claim for benefits on November 18, 1986, which the district director finally denied on April 4, 1988.

States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises.[3] The Sixth Circuit summarily affirmed Judge Hillyard's decision denying benefits in an unpublished Order dated April 25, 1997. *Collins v. DMV Mining, Inc.*, No. 96-3578 (6th Cir. Apr. 25, 1997)(unpublished Order).

[3]Because claimant's coal mine employment occurred in Kentucky, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Thereafter, on April 23, 1998, claimant filed with the district director a request for modification of the denial of benefits. The case was referred to Administrative Law Judge Thomas F. Phalen, Jr., who held a hearing on modification on May 20, 1999. In his Decision and Order dated July 29, 1999, Judge Phalen considered the evidence submitted in connection with modification and found it insufficient to establish the existence of pneumoconiosis and total disability. Judge Phalen also stated that he found the preponderance of the previously submitted evidence insufficient to establish these elements of entitlement, and thus found that claimant failed to establish modification based on either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Accordingly, Judge Phalen denied benefits. Claimant filed another modification request on October 19, 1999, and the case was referred to Administrative Law Judge Roketenetz (the administrative law judge), who held a modification hearing on October 17, 2000. In a Decision and Order dated November 27, 2001, the administrative law judge credited claimant with forty-one years of coal mine employment, and stated that he was incorporating into his discussion, by reference, the previously considered medical evidence of record. The administrative law judge found this evidence, and the evidence newly submitted in connection with the 1999 request for modification, insufficient to establish both the existence of pneumoconiosis under Section 718.202(a)(1)-(4) and total disability under Section 718.204(b)(2)(i)-(iv). The administrative law judge thus determined that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310 (2000).[4] Accordingly, he denied benefits. On appeal, claimant challenges the administrative law judge's discounting of an x-ray reading submitted with the present request for modification, and discounting of the newly submitted opinions of Drs. Hieronymus and Sundaram under Sections 718.202(a)(4) and 718.204(b)(2)(iv). Employer responds in support of the decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.[5]

[4]The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

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

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, and 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

This case involves a request for modification of the denial of benefits in a duplicate claim. Claimant may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a) (2000). The Board has held that, in considering whether a change in conditions has been established pursuant to Section 725.310 (2000), 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. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Sixth Circuit has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in fact inasmuch as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

(1983); Decision and Order at 9.

Section 725.309 (2000)[6] provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309 (2000). The United States Court of Appeals for the Sixth Circuit has held in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), that in addressing whether the material change in conditions requirement of Section 725.309(d) (2000) has been satisfied, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

[6]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

On appeal, claimant first contends that the administrative law judge failed to even consider a reading of an x-ray dated September 28, 2000, which claimant asserts is a positive diagnosis of pneumoconiosis, sufficient to establish the existence of the disease. Claimant's contention is without merit. The administrative law judge duly considered the reading to which claimant refers – *i.e.*, a reading of the September 28, 2000 film by Dr. Wagner. On that x-ray, Dr. Wagner found "no evidence of acute cardiac or pulmonary change" and did not indicate that pneumoconiosis was present. Decision and Order at 8-9; Claimant's Exhibit 1. The administrative law judge properly credited the negative readings of this film by Drs. Shipley, Spitz, Perme and Wiot, who, unlike Dr. Wagner, are B readers and/or Board-certified radiologists. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 9; Employer's Exhibits 1, 3, 5, 6. The administrative law judge also properly found that the overwhelming majority of x-ray readings of record, which were previously considered, are negative for pneumoconiosis, a finding which claimant does not challenge.[7] Accordingly, we affirm the administrative law judge's finding that the

[7]The administrative law judge incorporated by reference the previously considered evidence of record, and correctly found that the overwhelming majority of the x-ray readings of record is negative for pneumoconiosis. Decision and Order at 8-9. Claimant does not contend otherwise. Specifically, in his Decision and Order dated March 13, 1995, Judge Hillyard found that of forty-six x-ray readings submitted since the previous denial of the 1986 claim, only two readings were positive for pneumoconiosis. Hillyard Decision and Order at 6-9. In his July 29, 1999 Decision and Order, Judge Phalen found that, of the eight x-ray readings submitted in connection with claimant's first request for modification in 1998, six were negative for pneumoconiosis. Phalen Decision and Order at 4, 9-10. Judge Phalen properly discounted the two positive readings of a July 8, 1998 film, which were submitted by Drs. Sundaram and Reddy, and credited six negative readings of a film dated November 3, 1998 because the doctors submitting the negative readings possessed superior radiological

evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1).

qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Phalen Decision and Order at 9-10; Director's Exhibits 74, 84.

In challenging the administrative law judge's weighing of the medical opinion evidence under Section 718.202(a)(4), claimant asserts that the administrative law judge should have accorded determinative weight to the opinions of Drs. Hieronymus and Sundaram as they are treating physicians' opinions.[8] Claimant further asserts that the administrative law judge erred in discounting the opinions on the basis that they were not well-reasoned and documented. Claimant contends that the administrative law judge erred in instead relying upon the opinions of the "usual suspects" submitted by employer – *i.e.*, opinions from Drs. Dahhan, Tuteur, Hippensteel and Renn. We disagree. The administrative law judge properly credited the opinions of Drs. Dahhan and Tuteur, indicating that claimant does not have pneumoconiosis, as he found these opinions to be well-reasoned and documented in light of the objective evidence of record, and since both physicians examined claimant previously and had an opportunity to review all of the evidence of record. *See Woodward, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In addition, the administrative law judge properly credited the opinions of Drs. Dahhan and Tuteur in light of their credentials as Board-certified physicians in internal medicine and pulmonary diseases.[9] Decision and Order at 12; Director's Exhibit 96; Employer's Exhibit 11.

Moreover, while an administrative law judge must give consideration to a physician's status as a miner's treating physician, an administrative law judge is not required to give greater weight to the opinion of a treating physician where the administrative law judge finds the opinion flawed. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). In the instant case, the administrative law judge duly considered the fact that Dr Sundaram saw claimant on more than one occasion and that Dr. Hieronymus treated claimant over the years. The administrative law judge properly discounted the opinions of Drs. Sundaram and Hieronymus as not well-reasoned and documented. *See Woodward, supra; Clark, supra; Tackett, supra;* Decision and Order at 12-13; Claimant's

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[8]20 C.F.R. §718.104(d) provides that the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record, and weigh various factors in considering a treating physician's opinion. *See* 20 C.F.R. §718.104(d)(1)-(5). The provision at Section 718.104 applies to evidence developed after January 19, 2001, and thus does not apply to the opinions of Drs. Hieronymus and Sundaram. *See* 20 C.F.R. §718.104.

[9]The record does not reflect that Dr. Sundaram is a Board-certified pulmonary specialist, and Dr. Hieronymus's curriculum vitae indicates that Dr. Hieronymus is Board-certified in family practice, and is not a Board-certified pulmonary specialist. Director's Exhibit 17.

Exhibits 2, 3. The administrative law judge correctly stated that Dr. Sundaram's report dated October 6, 2000 did not include objective medical data such as x-rays, pulmonary function studies and arterial blood gas studies. Decision and Order at 12; Claimant's Exhibit 2. The administrative law judge also found that Dr. Sundaram based his diagnosis "primarily on [claimant's] coal dust exposure alone," which, in the administrative law judge's view, was insufficient to entitle Dr. Sundaram's opinion much weight in light of the objective evidence of record. *Id*. The administrative law judge properly discounted Dr. Hieronymus's opinion because it was partially based upon an x-ray interpretation, *i.e.*, of the September 28, 20000 film, which was read as negative by four physicians with greater credentials. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984). Decision and Order at 12; Claimant's Exhibit 3.

Substantial evidence supports the administrative law judge's finding that the previously submitted evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). In this regard, the administrative law judge agreed with Judge Phalen's prior findings that the opinions of Drs. Dahhan, Tuteur, Hippensteel and Renn were supported and well-reasoned, and that the opinions of Drs. Sundaram and Hieronymus were not well-reasoned and documented. *See Woodward, supra*; Decision and Order at 13; Phalen Decision and Order 11-12. In addition, the finding of Judge Hillyard that the medical opinion evidence was insufficient to establish pneumoconiosis under Section 718.202(a)(4) was affirmed by the Board and the United States Court of Appeals for the Sixth Circuit, as discussed *supra*. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish the presence of pneumoconiosis under Section 718.202(a)(4).

Inasmuch as the administrative law judge properly found the evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) based on the entirety of the relevant evidence of record, the administrative law judge properly found entitlement to benefits precluded.[10] *See Trent, supra; Gee, supra; Perry, supra*.

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

[10]In view of the administrative law judge's proper finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that, therefore, entitlement to benefits under 20 C.F.R. Part 718 was precluded, we need not address specifically the administrative law judge's consideration of whether a mistake in a determination of fact or a change in conditions was established on modification pursuant to 20 C.F.R. §725.310 (2000), or whether claimant established a material change in conditions at 20 C.F.R. §725.309 (2000).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge