BRB No. 04-0117 BLA

JACKIE H. CHATMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROYALTY SMOKELESS COAL CORPORATION	)	DATE ISSUED: 09/28/2004
	)	
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 – Denial of Modification Request of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

John H. Shott (Shott, Gurganus & Williamson), Bluefield, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Modification Request (02-BLA-0348) of Administrative Law Judge Richard T. Stansell-Gamm on a duplicate 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 is before the

[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

Board for the second time. On May 16, 2001, claimant filed a request for modification of the denial of his duplicate claim, alleging a mistake in a determination of fact in the prior denial and submitting no new evidence.[2] Director's Exhibit 78. The administrative law judge found that claimant failed to establish a change in conditions since there was no newly submitted evidence. The administrative law judge further found that claimant failed to establish a mistake in a determination of fact in Judge Donnelly's denial of benefits. Specifically, the administrative law judge considered the evidence weighed by Judge Donnelly and found that it was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b).[3] The administrative law judge further found, based on his determinations at Section 725.310, that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the

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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. The amendments to the regulation at 20 C.F.R. § 725.310 (2002) 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.

[2] Claimant originally filed a claim for benefits on January 10, 1984, which was denied by Administrative Law Judge Robert S. Amery on June 23, 1988 on the grounds that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 30. Claimant filed a duplicate claim on November 4, 1996. Director's Exhibit 1. The district director awarded benefits on June 2, 1997. Director's Exhibit 25. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on May 5, 1999 before Administrative Law Judge Lawrence P. Donnelly. Director's Exhibits 31, 47. In a Decision and Order dated April 17, 2000, Judge Donnelly denied benefits, finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(c) (2000), and therefore that claimant failed to show a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Director's Exhibit 48. On appeal, Judge Donnelly's denial of benefits was affirmed by the Board. *Chatman v. Royalty Smokeless Coal Corporation*, BRB No. 00-0788 BLA (May 4, 2001) (unpub.); Director's Exhibit 77. Claimant subsequently filed the instant request for modification. Director's Exhibit 78.

[3] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), 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) (2000), is now found at 20 C.F.R. §718.204(c).

administrative law judge denied claimant's request for modification and claim for benefits.

Claimant appeals, challenging the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a) and 718.204(b), and thereby his determination that there was no mistake in a determination of fact with respect to Judge Donnelly's denial of the duplicate claim. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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).

Claimant may establish modification by establishing either a change in conditions since the issuance of a previous denial or a mistake in a determination of fact in the previous denial. 20 C.F.R. §725.310(a) (2000). 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. 20 C.F.R. §725.310 (2000); *Nataloni v. Director, OWCP*, 17 BLR 1-82. An administrative law judge, in considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), should initially address whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998); *Nataloni*, 17 BLR at 1-82. If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge would then be required to address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). If the evidence is sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the duplicate claim. *Hess*, 21 BLR at 1-143.

In the instant case, claimant did not submit any additional evidence subsequent to Judge Donnelly's April 17, 2000 denial of his claim nor in conjunction with his May 16, 2001 request for modification. The administrative law judge thus properly found that claimant failed to establish a change in conditions at Section 725.310 (2000), and therefore, that claimant could not establish a material change of conditions at Section 725.309 (2000). Decision and Order at 4, 9 n.7.

The administrative law judge next addressed the issue of whether claimant established a ground for modification based on a mistake in a determination of fact contained in Judge Donnelly's denial of benefits. The United States Court of Appeals for the Fourth Circuit has held that a claimant's allegation of a general error in the ultimate determination of entitlement is sufficient to require the administrative law judge to reconsider the entire record in addressing whether there was a mistake in a determination of fact pursuant to Section 725.310 (2000).[4] *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In considering a request for modification, the administrative law judge is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Jessee*, 5 F.3d at 725, 18 BLR at 2-29.

With respect to the issue of whether claimant established a mistake in a determination of fact, the administrative law judge initially noted that subsequent to Judge Donnelly's April 17, 2000 decision, the Fourth Circuit issued its decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), requiring that all relevant evidence be weighed together at 20 C.F.R. §718.202(a) in deciding whether a miner has met his burden to establish the existence of pneumoconiosis. The administrative law judge initially found that Judge Donnelly did not err in concluding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). Of record were five chest x-rays dated June 17, 1979, January 25, 1985, April 27, 1994, November 22, 1996, and February 25, 1998. The administrative law judge noted that the April 27, 1994 x-ray was of little probative value because the physician reading that film had not commented on the presence or absence of pneumoconiosis.[5] With regard to the February 25, 1998 film, the administrative law judge agreed with Judge Donnelly's finding that there was an equal split among the positive and negative readings for pneumoconiosis provided by six dually qualified Board-certified radiologists and B-readers, and, therefore, that the x-ray readings of the February 25, 1998 film were in equipoise as to the existence of pneumoconiosis. The administrative law judge, however, discounted a similar finding rendered by Judge Donnelly as to the November 22, 1996 x-ray film. The administrative law judge stated:

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[4] Because claimant's last coal mine employment occurred in West Virginia, this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. S*ee Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

[5] The administrative law judge found that "since the present claim is a duplicate claim, only chest x-rays developed since the 1988 denial of [claimant's] first claim are relevant." Decision and Order at 5. There are two x-rays of record that predate 1988, but neither film was interpreted for the presence or absence of pneumoconiosis. Employer's Exhibit 8.

> Upon examination, Dr. Francke, a dual qualified radiologist, and Dr. Forehand, a B-reader, interpreted [the November 22, 1986] film as positive for pneumoconiosis. Disagreeing, three dual qualified radiologists, Dr. Wiot, Dr. Spitz, and Dr. Shipley, found the same x-ray completely negative. The consensus of the three dual qualified experts outweighs the positive finding by one dual qualified radiologist and a B-reader. Consequently, rather than equipoise, I consider the November 22, 1996 x-ray negative for pneumoconiosis. Since the other relevant two x-rays, April 27, 1994 and February 25, 1998 have little probative value or stand in equipoise, I conclude the chest x-ray evidence in [claimant's] case is actually negative for the presence of pneumoconiosis due to the November 22, 1996 chest x-ray. Neither Judge Donnelly's equipoise finding nor my negative finding enable [claimant] to prove the presence of pneumoconiosis.

Decision and Order at 5.

The administrative law judge next considered an additional negative x-ray reading by Dr. Hippensteel of a June 17, 1997 x-ray that had been overlooked by Judge Donnelly in the prior decision.[6] The administrative law judge determined that Dr. Hippensteel's negative interpretation of the June 17, 1997 x-ray further supported Judge Donnelly's ultimate finding that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), and thus, that Judge Donnelly's omission did not constitute a mistake in a determination of fact.

Based on the foregoing, we hold that the administrative law judge permissibly found that the weight of the x-ray evidence was negative for pneumoconiosis, and that there had been no mistake in a determination of fact in Judge Donnelly's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).[7]

[6] The administrative law judge noted that Dr. Hippensteel's reading of the June 17, 1997 x-ray had been admitted into the record at the hearing before Judge Donnelly. He stated, "Had Judge Donnelly included Dr. Hippensteel's negative interpretation, the equipoise balance may have become sufficiently unstable to result in a finding that the preponderance of the chest x-ray evidence is negative for the presence or pneumoconiosis." Director's Exhibit 70; Decision and Order at 6.

[7] We reject claimant's contention that the administrative law judge erred in his reliance on the negative x-ray readings since the administrative law judge had discretion to reweigh the evidence and draw his own inferences. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The administrative law judge's finding, that there was no mistake in a determination of fact at 20 C.F.R. §718.202(a)(1), assumes, at best,

Decision and Order at 6. We affirm the administrative law judge's findings at Section 718.202(a) as they are based on a quantitative and qualitative analysis of the x-ray evidence and because they are supported by substantial evidence. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We, therefore, reject claimant's challenge to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1).

With respect to whether claimant established the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4), we reject claimant's contention that the administrative law judge erred by not crediting the finding of pneumoconiosis rendered by the West Occupational Pneumoconiosis Board. Director's Exhibit 3. Contrary to claimant's contention, the administrative law judge properly found that the award for pneumoconiosis issued by the West Virginia Occupational Pneumoconiosis Board was not binding in this case because that agency applied a different standard for determining benefit entitlement.[8] *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985); Decision and Order at 7. Moreover, that administrative law judge properly considered commissioner letters notifying claimant of his state award, but also noted that the record did not contain copies of the medical evidence relied on by that state board in reaching its determination. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1- 149 (1989) (*en banc*). The administrative law judge therefore found, within his discretion, that Judge Donnelly's findings regarding the existence of pneumoconiosis had not been compromised by his failure to discuss the state award, and that there had been no mistake in a determination of fact. Decision and Order at 7.

In addition, a review of the record supports the administrative judge's finding that neither of the two physicians of record, Dr. Hippensteel nor Dr. Vasudevan, diagnosed the existence of pneumoconiosis. The administrative law judge agreed with claimant's argument that Dr. Vasudevan did not address a positive x-ray reading for pneumoconiosis, taken in conjunction with his examination, prior to opining that claimant's chronic obstructive pulmonary disease was due to smoking. The administrative law judge correctly pointed out, however, that regardless of any flaws in Dr. Vasudevan's opinion, the doctor did not provide an opinion supportive of either medical or legal pneumoconiosis. *See* 20 C.F.R. §718.201. Thus, the administrative law

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that the x-ray evidence is in equipoise, as determined by Judge Donnelly, and that claimant therefore did not satisfy his burden of proof. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom.* G*reenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

[8] This argument was previously addressed by the Board in this case. *Chatman*, slip op. at 4.

judge properly found that Dr. Vasudevan's opinion was insufficient to satisfy claimant's burden of proof at Section 718.202(a)(4). *See* 20 C.F.R. §§718.201, 718.202(a)(4); Director's Exhibits 17, 18, 20; Decision and Order at 6. Moreover, the administrative law judge permissibly credited Dr. Hippensteel's opinion, that claimant did not have pneumoconiosis, because he found that it was reasoned and documented, and, therefore, entitled to controlling weight.[9] *See Clark*, 12 BLR at 1-149 ; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 40, 70; Decision and Order at 6-7. Consequently, because there was no medical opinion evidence supportive of claimant's burden to establish the existence of pneumoconiosis, the administrative law judge correctly concluded that there had been no mistake in a determination of fact at Section 718.202(a)(4).[10]

Furthermore, applying *Compton*, the administrative law judge properly found, "If the preponderance of the more probative radiographic evidence stands in equipoise (or is negative for the presence of pneumoconiosis) and no physician to evaluate [claimant's] pulmonary condition presented a diagnosis of pneumoconiosis, then consideration of both factors together, as required by *Compton*, still leads to the conclusion that [claimant] does not have pneumoconiosis." Decision and Order at 7; *see Compton*, 211 F.3d at 203, 22 BLR at 2-162. Because the administrative law judge properly weighed all of the relevant evidence together in finding that claimant failed to establish the existence of pneumoconiosis, we affirm his finding at 20 C.F.R. §718.202(a) as it is consistent with *Compton* and supported by substantial evidence.

Lastly, claimant contends that the administrative law judge erroneously found that there was no mistake in a determination of fact contained in Judge Donnelly's findings at

[9] Claimant argues that Dr. Hippensteel's opinion "cannot be credited" because the physician based his opinion, that claimant did not have pneumoconiosis, entirely on a negative chest x-ray. Claimant's Brief at 5. The Board, however, previously affirmed Judge Donnelly's finding that Dr. Hippensteel's opinion, as to the presence or absence of pneumoconiosis, was based not only on a negative chest x-ray but also on his examination of claimant, claimant's history, symptoms and objective testing. S*ee Chatman*, slip op. at 4. Therefore, claimant's arguments concerning the probative value of Dr. Hippensteel's opinion are rejected.

[10] The administrative law judge found that claimant was unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 (a)(2) and (a)(3). These findings are affirmed as they are unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-1710 (1983); Decision and Order at 5, n.4.

20 C.F.R. §718.204(b).[11] Claimant's contention lacks merit. The administrative law judge correctly found that since there were only two non-qualifying pulmonary function studies presented to Judge Donnelly to establish a material change in conditions, claimant failed to satisfy his burden of establishing a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2)(i). Under 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge also reviewed two arterial blood gas studies dated November 22, 1996 and June 17, 1997, which had been weighed by Judge Donnelly. Because the November 22, 1986 study was qualifying for total disability but the June 17, 1997 study was not, the administrative law judge properly considered the arterial blood gas evidence to be at a "stand off" and, therefore, that claimant failed to carry his burden of proof in establishing total disability at Section 718.204(b)(2)(ii). Decision and Order at 7-8.

With respect to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found merit in claimant's argument that Judge Donnelly failed to give proper consideration to the physical requirements of his usual coal mine work. After reviewing claimant's application for benefits, his hearing testimony, and the medical records, the administrative law judge found that claimant last worked as a mine electrician and welder. Decision and Order at 8. The administrative law judge determined that claimant was engaged in moderate manual labor at his last coal mine job since he was required to lift heavy motors and walk frequently. *Id*. The administrative law judge then compared the physical requirements of claimant's usual coal mine employment with the medical evidence of record and permissibly found that claimant was not totally disabled from a respiratory perspective. *Id*. He noted that Dr. Vasudevan opined that claimant had only very mild pulmonary impairment and that Dr. Hippensteel, being aware of claimant's work requirements, had specifically opined that claimant had no pulmonary or respiratory impairment. Decision and Order at 9. Consequently, the administrative law judge found that Judge Donnelly's determination, that claimant was unable to establish total disability pursuant to Section 718.204(b)(2)(iv), was correct and did not represent a mistake in a determination of fact. *Id.* We thus affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b), that claimant failed to establish a totally disabling respiratory or pulmonary impairment, as it is rational and supported by substantial evidence.

Since there was no newly submitted evidence to establish the existence of pneumoconiosis or total respiratory or pulmonary disability, and the administrative law judge found no mistake in a determination of fact regarding Judge Donnelly's denial of

[11] The only element of entitlement adjudicated against claimant by the district director in his prior claim was the existence of pneumoconiosis; however, Judge Donnelly additionally found that claimant was not totally disabled so this element of entitlement is relevant to the analysis at 20 C.F.R. §718.309(d) (2000) and is being considered by the Board in this appeal.

claimant's duplicate claim pursuant to 20 C.F.R. §§718.202(a) and 718.204(b), the administrative law judge properly determined that claimant failed to establish a change in conditions at 20 C.F.R. §725.310, and therefore that claimant could not establish a material change in conditions pursuant to 20 C.F.R. §718.309(d) (2000) in this case. *See Hess* 21 BLR at 1-141. Because claimant failed to establish the existence of pneumoconiosis and total respiratory or pulmonary disability, each a requisite element of entitlement to benefits under Part 718, *see 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*), an award of benefits is precluded.

Accordingly, the Decision and Order of the administrative law judge denying claimant's request for modification and the claim for 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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JUDITH S. BOGGS
Administrative Appeals Judge