BRB No. 06-0166 BLA

BOBBY D. MANN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TURNER BROTHERS, INCORPORATED	)	
	)	DATE ISSUED: 09/27/2006
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 Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Bobby D. Mann, Wister, Oklahoma, *pro se*.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (04-BLA-0164) of Administrative Law Judge Thomas M. Burke 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). This case has an extensive procedural history, which was previously set out in the Board's Decision and Order issued on September 24, 2003. *Mann v. Turner Brothers, Inc.*, BRB No. 03-0284 BLA (Sept. 24, 2003)(unpub.). In that Decision and Order, the Board held that there was no substantial issue to review on appeal and, therefore, the Board affirmed the administrative law judge's denial of benefits. The Board held that the findings of Administrative Law Judge Pamela Lakes Wood, that claimant failed to establish the

existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), were supported by substantial evidence. *Mann v. Turner Brothers, Inc.*, BRB No. 03-0284 BLA (Sept. 24, 2003)(unpub.). The Board denied claimant's request for reconsideration. *Mann v. Turner Brothers, Inc.*, BRB No. 03-0284 BLA (Jan. 22, 2004)(Order)(unpub.). In a letter dated February 3, 2004, claimant requested modification of the Board's January 22, 2004 Order. Director's Exhibit 114.

On October 4, 2005, the administrative law judge issued his Decision and Order Denying Living Miner's Benefits, which is the subject of the instant appeal. After considering the procedural history of this case, the administrative law judge reviewed Judge Wood's 2002 Decision and Order and the evidence of record. The administrative law judge determined that there was no basis to modify the 2002 Decision and Order denying benefits. Therefore, the administrative law judge denied benefits.

In support of his appeal, claimant has submitted several letters to the Board asserting that the administrative law judge erred in relying on Dr. Renn's opinion, and that the administrative law judge erred in stating that Dr. R. B. Winters was his treating physician. Claimant also argues that the prior finding of pneumoconiosis, which was upheld by the Tenth Circuit, should be binding on the parties in this case. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. Bethenergy Mines, Inc.,* 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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).

As an initial matter, we reject claimant's argument that he has established entitlement because he has, at different points in the adjudication of his claims, been found to have established each of the elements of entitlement. While Administrative Law Judge Robert S. Amery found the existence of pneumoconiosis established in 1995, a finding which was affirmed by both the Board and the United States Court of Appeals for the Tenth Circuit, and Judge Wood found the evidence submitted after Judge Amery's denial sufficient to establish total disability, claimant has not established entitlement to benefits. 20 C.F.R. §725.310(a) (2000). Under modification, pursuant to Section 725.310 (2000), prior findings are subject to re-evaluation by the adjudicator. *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305, (6th Cir. 2001); *Jonida Coal Co. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, the record now contains

additional evidence that must be considered by the adjudicator. Consequently, we reject claimant's assertion that the earlier findings are binding on the parties.

In view of Judge Wood's finding that claimant had established both a change in conditions pursuant to Section 725.310 (2000), and a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), we review her findings on the merits to determine whether claimant has established a basis for modification of her 2002 Decision and Order. Judge Wood found the evidence insufficient to establish the existence of pneumoconiosis and, therefore, she did not consider the other elements of entitlement. The Board held that Judge Wood's findings pursuant to Section 718.202(a) were supported by substantial evidence. *See Mann*, BRB No. 03-0284 BLA.

Section 22 of the Longshore Act, 33 U.S.C. §922, provides in part:

> Upon his own initiative, or upon the application of any party in interest…on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation…or at any time prior to one year after the rejection of a claim, review a compensation case…in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation….

33 U.S.C. §922.

"[B]y its plain language, 33 U.S.C. §922 is a broad reopening provision that is available to employers and employees alike." *King*, 246 F.3d at 825, 22 BLR at 2-310. When a request for modification is filed, "[t]he fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact," *Hunt*, 124 F.3d at 743, 21 BLR at 2-210, including whether the "ultimate fact" was "wrongly decided." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Modification may be established by showing that there has been a change in conditions or a mistake in a determination of fact since the prior decision. 20 C.F.R. §725.310 (2000). The Board has held that in considering whether a claimant has established a change in conditions, the 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 Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In considering whether modification is established based on a mistake in a

determination of fact, the administrative law judge must consider the entirety of the evidentiary record. *See Nataloni, supra*.

We first consider the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge incorporated by reference Judge Wood's summary of the evidence and he detailed the evidence submitted subsequent to her 2002 Decision and Order.[1] In evaluating the x-ray evidence, the administrative law judge noted that the Board had affirmed Judge Wood's finding that the x-ray evidence did not establish the existence of pneumoconiosis, and he found that none of the newly submitted x-ray interpretations diagnosed coal workers' pneumoconiosis. The administrative law judge found that the chest x-ray evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1).

A review of the record reveals no mistake in Judge Wood's evaluation of the x-ray evidence pursuant to Section 718.202(a)(1), a finding that the Board previously found to be supported by substantial evidence. Further, the administrative law judge correctly found that none of the newly submitted x-ray interpretations diagnoses coal workers' pneumoconiosis. Therefore, we affirm the administrative law judge's finding that claimant has not established a mistake in fact or a change in conditions pursuant to Section 718.202(a)(1).[2]

The administrative law judge also considered complicated pneumoconiosis and 20 C.F.R. §718.304, the only presumption from 20 C.F.R. §718.202(a)(3) that is applicable in this case.

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[1] The newly submitted evidence includes eight x-ray interpretations. Dr. Albers read x-rays taken on April 4, 2002 and April 8, 2002, and did not address whether claimant had pneumoconiosis. Director's Exhibit 141. Dr. Nelson read films taken on April 11, 2002, April 14, 2002, and April 18, 2002, and although he noted a 2.5 centimeter nodule in the left lower lung, he did not address whether claimant had pneumoconiosis. Director's Exhibit 141. Dr. Hocott read a chest x-ray dated May 7, 2002, and he noted densities in claimant's lung, but he did not address whether claimant had pneumoconiosis. Dr. Pascual interpreted an x-ray taken on November 2, 2003, and did not address whether claimant had pneumoconiosis. Director's Exhibit 141. The chest x-ray taken on November 27, 2003 was read by Dr. Smith, who stated that there was no acute cardiopulmonary process. Director's Exhibit 141. These interpretations do not conform to the ILO classification standards, *see* 20 C.F.R. §718.102(b), and the record does not contain the specific radiological qualifications of any of these physicians.

[2] The administrative law judge noted that the record does not contain any autopsy or biopsy evidence, and therefore he declined to address 20 C.F.R. §718.202(a)(2) further. Because the administrative law judge's characterization of the evidence relevant to Section 718.202(a)(2) is accurate, claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(2) as a matter of law.

Decision and Order at 13-14. The administrative law judge noted Judge Wood's evaluation of the evidence of a large nodule in claimant's lung. *See* 2002 Decision and Order at 12-13. The administrative law judge determined that the evidence does not establish the existence of complicated pneumoconiosis and does not invoke the presumption contained in Section 718.304, and he noted that the record does not contain any newly submitted evidence diagnosing complicated pneumoconiosis.

Because a review of the record reveals no mistake in Judge Wood's finding pursuant to Section 718.304, which the Board previously found supported by substantial evidence, we affirm the administrative law judge's finding that there was no mistake in a determination of fact in Judge Wood's finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Further, since the newly submitted evidence does not contain evidence supportive of a finding of complicated pneumoconiosis, modification based on a change in conditions cannot be demonstrated. We therefore hold that claimant has not established modification pursuant to Sections 718.202(a)(3) and 718.304.

We next review the administrative law judge's consideration of the evidence at 20 C.F.R. §718.202(a)(4). The administrative law judge incorporated by reference Judge Wood's summary of the evidence, and he summarized the medical evidence submitted subsequent to the issuance of her 2002 Decision and Order.[3] Decision and Order at 14-18. The administrative law judge found that there was no error in Judge Wood's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge

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[3] The newly submitted medical opinion evidence includes the deposition of Dr. Renn. Dr. Renn diagnosed pulmonary emphysema due to tobacco smoking, a left lower lobe nodule that was stable, and a moderately severe obstructive ventilatory defect, none of which is related to claimant's coal mine employment or dust exposure in his coal mine employment. Employer's Exhibit 2 at 19-20. The newly submitted evidence also contains treatment and hospital records dated between 1977 and 2004. In 2002, 2003 and 2004 Dr. R. *B*. Winters noted chronic obstructive pulmonary disease, Director's Exhibit 141, and in reports from 1993, 1999 and 2001, Dr. R. *L*. Winters noted chronic obstructive pulmonary disease. Director's Exhibit 141. In 1993 and 1999, Dr. R. *L*. Winters commented on a lesion in claimant's left lung which he considered to be benign. Director's Exhibit 141. In a November 2, 2003 discharge summary, Dr. Blankenship noted, among many other conditions, "emphysematous chronic obstructive pulmonary disease/black lung" Director's Exhibit 141. In 2002, Dr. Albers considered a CT scan of claimant's lung and noted a 1.8 centimeter nodular density in claimant's left lung base, which he suggested be biopsied. Director's Exhibit 141. In an April 22, 2002 discharge summary, Dr. Webb noted an abnormal chest x-ray and chronic obstructive pulmonary disease. Director's Exhibit 141. In a 2003 hospital admission history and physical, Dr. Asbury noted, in the section for describing medical history, black lung and chronic obstructive pulmonary disease. Dr. Asbury's discharge diagnosis was erosive esophagitis and chronic obstructive pulmonary disease. Director's Exhibit 126.

also found that the newly submitted medical evidence did not establish, pursuant to Section 718.202(a)(4), that claimant's condition has changed since the issuance of the 2002 Decision and Order.

In considering the newly submitted medical opinion evidence, the administrative law judge noted that the recent treatment and hospital reports contain notations of "black lung," but the administrative law judge determined that these notations "appear to be based on a history obtained from the miner as opposed to medical data and, therefore, the opinions are neither well-documented nor well-reasoned." Decision and Order at 19. The administrative law judge also noted that the record contains several notations of chronic obstructive pulmonary disease and emphysema, but he found that because the physicians did not attribute these conditions to coal dust exposure, they do not constitute diagnoses of legal pneumoconiosis. Decision and Order at 19. The administrative law judge then turned to Dr. Renn's opinion that clamant does not have coal workers' pneumoconiosis, and stated that "Dr. Renn's deposition testimony is probative because it is based on an earlier examination of Claimant as well as a comprehensive review of the medical records in this claim, including the miner's recent hospitalization and treatment records." Decision and Order at 19. The administrative law judge concluded:

> In sum, Judge Wood's finding that the miner does not suffer from legal or clinical coal workers' pneumoconiosis was well-reasoned and supported by the record before her. The hospitalization and treatment records constitute an insufficient basis upon which to find that Judge Wood's *Decision* was erroneous or that the miner's condition has change since that time. Indeed, Dr. Renn's subsequent deposition testimony further supports Judge Wood's determination. As a result, Claimant has not established the presence of coal workers' pneumoconiosis under §718.202 of the regulations.

Decision and Order at 20.

Claimant asserts that the administrative law judge erred by finding that Dr. R. *B*. Winters was claimant's treating physician. Decision and Order at 15. Claimant was treated by both Dr. R. *B*. Winters and Dr. R. *L*. Winters, and the administrative law judge did not distinguish between the opinions of these two physicians. Decision and Order at 15. Because neither of these physicians diagnosed coal workers' pneumoconiosis, or any conditions that would constitute legal pneumoconiosis, the opinions of these two physicians cannot assist claimant in establishing the existence of pneumoconiosis, or a basis for modification in this case. Therefore, any error by the administrative law judge in this regard is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, we affirm the administrative law judge's finding that the opinions of the physicians who diagnosed chronic obstructive pulmonary disease or emphysema but did

not provide an etiology for this diagnosis, do not constitute diagnoses of pneumoconiosis. Decision and Order at 19. The administrative law judge reasonably interpreted the opinions of Drs. Blankenship, R. B. Winters and R. L. Winters, Webb and Asbury, Director's Exhibits 126, 141, and properly found these opinions insufficient to assist claimant in establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Lafferty v. Cannelton Industries, Inc.,* 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP,* 7 BLR 1-167 (1984).

After considering the allegations of error, the administrative law judge's findings and the evidence of record, we affirm the administrative law judge's finding that claimant has not established a basis for modification at Section 718.202(a)(4). Initially, we affirm the administrative law judge's finding that there was no mistake in a determination of fact in Judge Wood's Decision and Order. The administrative law judge reasonably determined that Judge Wood's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), which the Board previously found to be supported by substantial evidence, was well-reasoned and supported by the record before her. Further, since none of the newly submitted medical opinion evidence establishes the existence of pneumoconiosis, it does not support a finding of modification based on a change in conditions pursuant to Section 718.202(a)(4).[4] While claimant correctly asserts that the administrative law judge erred in stating that Dr. Renn examined claimant, Decision and Order at 19, this error is harmless, as none of the newly submitted medical opinions supports a finding of pneumoconiosis pursuant to Section 718.202(a)(4). *See Larioini*, *supra*.

We therefore affirm the administrative law judge's finding that claimant has not established a mistake in a determination of fact, nor has he demonstrated a change in conditions pursuant to Section 725.310 (2000). Consequently, claimant has not established a basis for modification of the 2002 Decision and Order denying benefits.

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[4] Although some of the newly submitted evidence in this case was developed after the effective date of the revised regulations, and would, therefore, be subject to consideration under 20 C.F.R. §718.104(d) regarding the weighing of claimant's treating physician, since none of the opinions by Dr. R. L. Winters or Dr. R. B. Winters diagnoses a condition that constitutes pneumoconiosis under the Act, there is no need to specifically consider the impact of Section 718.104(d) in this case.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge