

BRB No. 06-0933 BLA

M.L.K.)
)
 Claimant-Respondent)
)
 v.)
)
 EXPANSION COAL COMPANY)
)
 Employer-Petitioner) DATE ISSUED: 09/25/2007
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (00-BLA-0043) of Administrative Law Judge Edward Terhune Miller denying modification 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 involves employer's request for modification of an award of benefits.

Claimant filed a claim for benefits on January 23, 1991. In a Decision and Order dated January 7, 1993, Administrative Law Judge Samuel J. Smith found that claimant established all of the elements of entitlement. Accordingly, Judge Smith awarded benefits. The Board and the United States Court of Appeals for the Sixth Circuit affirmed Judge Smith's award of benefits. *See [M.L.K.] v. Expansion Coal Co.*, BRB No. 93-0963 BLA (Oct. 27, 1994) (unpub.); *Expansion Coal Co. v. [M.L.K.]*, No. 97-

4072 (6th Cir. Nov. 17, 1998) (unpub.).

Employer subsequently filed a request for modification pursuant to 20 C.F.R. §725.310 (2000).¹ Considering both the previously submitted evidence and the new evidence, Administrative Law Judge Edward Terhune Miller (the administrative law judge) found that all of the elements of entitlement had been established. The administrative law judge, therefore, denied employer's request for modification. By Decision and Order dated May 29, 2003, the Board affirmed the administrative law judge's denial of employer's request for modification. *[M.L.K.] v. Expansion Coal Co.*, BRB No. 02-0622 BLA (May 29, 2003) (unpub.) (Smith, J., concurring and dissenting). However, in a Decision and Order on Reconsideration dated February 25, 2004, the Board concluded that the administrative law judge erred in rejecting the opinions of Drs. Branscomb, Fino, and Dahhan as contrary to the decisions of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). *[M.L.K.] v. Expansion Coal Co.*, BRB No. 02-0622 BLA (Feb. 25, 2004) (*en banc*) (unpub.) (McGranery & Hall, JJ., dissenting). Consequently, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found that the evidence established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that employer failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied employer's request for modification.

On appeal, employer contends that the administrative law judge erred in finding that that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also argues that the administrative law judge erred in failing to address whether the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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*,

¹ Although 20 C.F.R. §725.310 has been revised, these revisions apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2(c).

The Existence of Pneumoconiosis

Employer argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion to find that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge on modification agreed with Administrative Law Judge Samuel J. Smith's determination that Dr. Rasmussen's opinion, that claimant suffered from pneumoconiosis, was the most persuasive opinion of record, based upon the quality of its reasoning and because it was supported by the objective evidence.² Decision and Order on Remand at 9. The administrative law judge, therefore, found that employer did not demonstrate a mistake in a determination of fact regarding the existence of pneumoconiosis. *Id.* at 11.

Employer contends that the administrative law judge committed numerous errors in finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer initially argues that the administrative law judge failed to weigh the credibility of Dr. Rasmussen's diagnosis of pneumoconiosis in light of the "overwhelmingly negative x-ray evidence of record." Employer's Brief at 22-23. The Board previously rejected employer's argument that the administrative law judge should have weighed the x-ray and medical opinion evidence together pursuant to

² In his 1993 Decision and Order, Administrative Law Judge Samuel J. Smith found that the opinions of the examining physicians, Drs. Rasmussen, Dahhan, and Vuskovich, were entitled to the greatest weight. 1993 Decision and Order at 20. Of the examining physicians, Judge Smith found that Dr. Rasmussen's opinion was "far better reasoned and more persuasive than the opinions of Drs. Dahhan and Vuskovich." *Id.* Judge Smith found that Dr. Rasmussen's testing was "far more extensive" and found that his medical opinion was "supported by current medical literature..." *Id.* In affirming Judge Smith's finding pursuant to 20 C.F.R. §718.202(a)(4) (2000), the Board held that Judge Smith permissibly accorded determinative weight to Dr. Rasmussen's opinion because he found that it was better reasoned and was supported by more extensive testing and the current medical literature. *[M.L.K.] v. Expansion Coal Co.*, BRB No. 93-0963 BLA (Oct. 27, 1994) (unpub.). Similarly, in its review of Judge Smith's findings, the Sixth Circuit held that Judge Smith permissibly credited Dr. Rasmussen's opinion because he found that the doctor's opinion was better reasoned and more persuasive, and because Dr. Rasmussen had examined claimant and performed extensive testing. *Expansion Coal Co. v. [M.L.K.]*, No. 97-4072 (6th Cir. Nov. 17, 1998) (unpub.). The Sixth Circuit, therefore, held that Judge Smith's finding that the medical opinion evidence established the existence of pneumoconiosis was supported by substantial evidence. *Id.*

the Fourth Circuit's decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). [2003] *[M.L.K.]*, slip op. at 4. We therefore decline to revisit this issue. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer also contends that the administrative law judge erred in discrediting the previously submitted opinions of Drs. Fino and Dahhan. In his Decision and Order on Remand, the administrative law judge noted that both the Board and the Sixth Circuit affirmed Judge Smith's finding that Dr. Rasmussen's opinion was more persuasive than the opinions of Drs. Fino, Dahhan, Vuskovich, Anderson, and Lane. Decision and Order on Remand at 9. Upon his own review of the evidence, the administrative law judge specifically found no mistake of fact in regard to Judge Smith's determination that Dr. Rasmussen's opinion was entitled to greater weight than those of Drs. Fino and Dahhan. *Id.* Because Judge Smith's prior determination was affirmed by both the Board and the Sixth Circuit, we affirm the administrative law judge's finding that Judge Smith did not make a mistake in a determination of fact regarding the existence of pneumoconiosis.³

Employer also argues that the administrative law judge erred in his consideration of the newly submitted opinions of Drs. Garzon and Castle. In its Decision and Order dated May 29, 2003, the Board affirmed the administrative law judge's finding that the opinions of Drs. Garzon and Castle did not show a mistake in a determination of fact in regard to the prior finding of pneumoconiosis. [2003]*[M.L.K.]*, slip op. at 5. In its 2004 Decision and Order on Reconsideration, the Board reaffirmed its prior holding that the administrative law judge permissibly credited Dr. Rasmussen's opinion over those of Drs. Castle and Garzon. [2004] *[M.L.K.]*, slip op. at 4. The Board's previous holdings on this issue constitute the law of the case and govern the Board's determination. See *Brinkley*, 14 BLR at 1-150-151; *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address employer's contentions of error in regard to the administrative law judge's consideration of the opinions of Drs. Garzon and Castle.

Employer also argues that the administrative law judge erred in his consideration of the newly submitted medical opinion of Dr. Branscomb. The Board previously affirmed several of the reasons provided by the administrative law judge for discrediting

³ Employer argues that the administrative law judge's additional reasons for discrediting the opinions of Drs. Fino and Dahhan are improper. However, because the administrative law judge provided a proper basis for discrediting the opinions of Drs. Fino and Dahhan, *i.e.*, the adoption of Judge Smith's determination that Dr. Rasmussen's opinion was entitled to greater weight than those of Drs. Fino and Dahhan, the administrative law judge's error, if any, in discrediting the opinions of Drs. Fino and Dahhan for other reasons constitutes harmless error. See *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Dr. Branscomb's opinion. The Board held that the administrative law judge rationally found that the credibility of Dr. Branscomb's opinion was called into question because the doctor did not unequivocally diagnose a totally disabling respiratory impairment, despite the virtual consensus among the physicians of record that claimant suffered from a totally disabling respiratory impairment. [2003] *[M.L.K.]*, slip op. at 5. The Board also found rational the administrative law judge's decision to accord less weight to Dr. Branscomb's opinion because the doctor preemptorily dismissed the findings of the medical literature upon which Dr. Rasmussen relied, showing that pneumoconiosis causes both restrictive and obstructive impairments. *Id.*

The administrative law judge also found unpersuasive Dr. Branscomb's attempt to discredit Dr. Rasmussen's opinion based upon Dr. Rasmussen's purported reliance upon an inaccurate smoking history. Although the administrative law judge noted a discrepancy in the respective smoking histories relied upon by the doctors,⁴ the administrative law judge noted that Dr. Rasmussen acknowledged that claimant's smoking history was one of the primary factors contributing to claimant's totally disabling respiratory insufficiency. Decision and Order on Remand at 7. The administrative law judge reasonably found that Dr. Branscomb's basis for questioning Dr. Rasmussen's opinion was unpersuasive.

The administrative law judge also noted that Dr. Branscomb based his opinion on previously submitted evidence which was considered by Judge Smith. *See* Decision and Order on Remand at 7. Although an administrative law judge may find a mistake in a determination of fact, the administrative law judge must ultimately determine whether reopening a claim will render justice under the Act.⁵ *O'Keeffe, v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971). In this case, the administrative law judge found that, because Dr. Branscomb's opinion was not based upon any new evidence, employer could have submitted Dr. Branscomb's report when the case was previously before Judge Smith. Decision and Order on Remand at 7. We hold that the administrative law judge did not abuse his discretion in considering the fact that

⁴ The administrative law judge noted that Dr. Rasmussen found that claimant had a twenty-one pack year history, extended by an occasional cigar, while Dr. Branscomb relied upon a thirty pack-year smoking history.

⁵ In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72 (citing *Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)).

employer could have developed and submitted Dr. Branscomb's report at an earlier date. Because it is based upon substantial evidence, we affirm the administrative law judge's determination that Dr. Branscomb's opinion is insufficient to support a mistake in a determination of fact in regard to the existence of pneumoconiosis. 20 C.F.R. §725.310 (2000). Consequently, we affirm the administrative law judge's finding that employer failed to establish that there was a mistake of fact regarding the existence of pneumoconiosis.

Total Disability Due to Pneumoconiosis

Employer argues that the administrative law judge did not separately address whether there was a mistake in a determination of fact regarding the issue of the cause of claimant's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). In his 2006 Decision and Order on Remand, the administrative law judge found that Dr. Rasmussen's opinion was more persuasive than the other opinions as to the cause of claimant's pulmonary impairment, which Dr. Rasmussen attributed in substantial part to coal dust exposure, as well as claimant's smoking history. *See* Decision and Order on Remand at 9. Although the administrative law judge did not provide an explicit finding at Section 718.204(c), the administrative law judge found that Dr. Rasmussen's opinion, that claimant suffered from pneumoconiosis, was entitled to greater weight than the newly submitted medical opinions of Drs. Branscomb, Garzon, and Castle. We further note that Dr. Rasmussen opined that claimant's coal dust exposure was "at least a major contributing factor to his total disabling respiratory insufficiency." Director's Exhibit 18. Because the administrative law judge permissibly found Dr. Rasmussen's opinion to be more persuasive, and consistently applied his credibility analysis to all of the evidence of record, we affirm the administrative law judge's finding that employer failed to establish a mistake in a determination of fact regarding disability causation, as supported by substantial evidence. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order denying employer's request for modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge