BRB No. 07-0122 BLA

J.K.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/28/2007
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER
	)	

Appeal of the Decision and Order – Denying Request for Modification and Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Barbara L. Feudale, Gordon, Pennsylvania, for claimant.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Request for Modification and Denying Benefits (05-BLA-0053) of Administrative Law Judge Ralph A. Romano rendered 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

[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

is before the Board for a third time. On February 7, 1998, claimant filed a claim for benefits, which was denied by Administrative Law Judge Ainsworth H. Brown on August 27, 1998 because the evidence was found to be insufficient to establish the existence of pneumoconiosis. Director's Exhibits 1, 46. Pursuant to claimant's appeal, the Board vacated the denial of benefits based on a procedural error, and remanded the case for further consideration.[2] *[J.K.] v. Director, OWCP*, BRB No. 99-1239 BLA, slip. op. at 3 (Nov. 30, 2000) (unpub.). The Board instructed Judge Brown to "clarify the contents of the official record and evaluate the x-rays and medical opinions separately under 20 C.F.R. §718.202(a)(1) and (4), before weighing all types of evidence together to determine whether claimant suffered from pneumoconiosis." *Id*. The Board also instructed him to address, as necessary, whether claimant established that his pneumoconiosis arose out of his coal mine employment, and whether claimant was totally disabled due to pneumoconiosis. *Id*., slip op. at 4.

In his Decision and Order Denying Benefits on Remand dated October 24, 2001, Judge Brown again found that claimant failed to establish the existence of pneumoconiosis, and denied benefits. Director's Exhibit 55. Claimant appealed, and the Board affirmed Judge Brown's findings pursuant to 20 C.F.R. §718.202(a), *see [J.K.] v. Director, OWCP*, BRB No. 02-0178 BLA (Aug. 20, 2002) (unpub.). Director's Exhibit 59. Claimant filed a request for modification and submitted additional evidence. Director's Exhibit 60. The district director issued a Proposed Decision and Order

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(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] At the hearing held on April 28, 1999, Judge Brown admitted into the record a report by Dr. Rashid, which had been proffered by the Director, Office of Workers' Compensation Programs, less than twenty days prior to the hearing, *see* 20 C.F.R §725.456. Judge Brown ruled at the hearing that claimant had sixty days post-hearing to submit rebuttal evidence. On July 15, 1999, claimant requested an extension of time to submit his evidence. The administrative law judge denied the motion on the grounds that it was not timely filed. On appeal, the Board determined that Judge Brown erred in failing to consider claimant's motion for enlargement of time since it was filed within sixty days of the hearing, and therefore, fell within the time-limit set by Judge Brown for the submission of post-hearing evidence. *[J.K.] v. Director, OWCP*, BRB No. 99-1239 BLA, slip. op. at 3 (Nov. 30, 2000) (unpub.). On remand, Judge Brown granted claimant's motion and reopened the record for admission of Dr. Kraynak's May 24, 2001 report.

Denying Modification on January 29, 2003. Director's Exhibit 64. Claimant requested a hearing, and the case was forwarded to the Office of Administrative Law Judges. A hearing was held on November 23, 2003 before Judge Romano (the administrative law judge). In his March 14, 2004 Decision and Order, the administrative determined that there was no mistake in fact with respect to Judge Brown's denial of benefits. Furthermore, because the newly submitted evidence failed to establish that claimant suffered from pneumoconiosis, he also found that claimant failed to establish a material change in conditions. Accordingly, benefits were denied pursuant to 20 C.F.R. §725.310 (2000).

Claimant filed a notice of appeal with the Board on April 22, 2004. Director's Exhibit 79. However, at claimant's request, the Board subsequently dismissed the appeal and remanded the case to the district director for modification proceedings, *[J.K.] v. Director, OWCP*, BRB No. 04-0578 BLA (July 27, 2004) (Order) (unpub.). Director's Exhibit 84. The district director denied modification on February 2, 2005. Director's Exhibit 88. Following a formal hearing held on January 20, 2006, the administrative law judge also denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000).

Claimant appeals, alleging that the administrative law judge erred in failing to credit him with twenty-two years of coal mine employment. Claimant also challenges the administrative law judge's evaluation of the x-ray evidence at 20 C.F.R. §718.202(a)(1), and his weighing of the conflicting medical opinion evidence as to the existence of pneumoconiosis, under 20 C.F.R. §718.202(a)(4). Claimant maintains that he is entitled to modification based on the opinion of Dr. Kraynak that he is totally disabled due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds to claimant's appeal, urging affirmance of the denial of benefits.

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.[3] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's findings are rational and supported by substantial evidence.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment occurred in Pennsylvania. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989) (*en banc*).

The United States Court of Appeals for the Third Circuit, wherein jurisdiction for this claim lies, has held that, in ruling on a petition for modification, the administrative law judge must determine whether the record demonstrates a change in conditions since the prior decision or a mistake in a determination of fact in the prior decision, even where no specific allegation of either has been made by claimant. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Furthermore, in determining whether claimant has established a basis for modification based on a change in conditions pursuant to Section 725.310 (2000), 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 the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

In this case, claimant's initial claim, and his prior request for modification, were denied on the grounds that he failed to establish the existence of pneumoconiosis. In reviewing the instant modification request, the administrative law judge determined that there was no mistake in fact with respect to the prior denials issued by Judge Brown or the Board. Decision and Order – Denying Request for Modification and Denying Benefits (D&O on Modification) at 9. He also found no mistake in fact with regard to his prior denial of claimant's 2002 modification request, as the evidence did not establish the existence of pneumoconiosis.[4] *Id*.

Claimant does not specifically challenge the administrative law judge's finding that there was no mistake in fact, s*ee Skrack v. Director, OWCP*, 6 BLR 1-710 (1983), although he maintains that he should have been credited with twenty-two years of coal mine work as opposed to fifteen years of coal mine work. Claimant's Brief at 2-6. Contrary to claimant's contention, the administrative law judge properly found that the parties stipulated to fifteen years of coal mine employment while the case was before Judge Brown, which stipulation was supported by the record. He also properly noted that

[4] In order to establish entitlement to benefits in a living miner's claim, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to prove any one of these elements precludes entitlement. *Id*.

claimant had not submitted any additional documentation to support his allegation that he worked for twenty-two years in coal mine employment. D&O on Modification at 3; *see generally Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Thus, we affirm the administrative law judge's finding as to the length of claimant's coal mine employment.[5]

Claimant also argues that the administrative law judge's determination that the positive and negative x-ray evidence is in equipoise as to the existence pneumoconiosis "is an unfair deadlocking analysis," and asks the Board to determine that he has satisfied his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant's Brief at 7. The Board, however, is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.,* 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988).

We disagree that the administrative law judge erred in finding the positive and negative readings to be equally probative. The record on modification includes nine readings of five different x-rays dated November 23, 1992, February 18, 1999, November 12, 2002, October 24, 2003 and September 29, 2005. Of these x-rays, the November 23, 1992 x-ray was read once as negative by a Board-certified radiologist and B reader, and once as positive for pneumoconiosis by a Board-certified radiologist and B reader. Director's Exhibits 84, 87. The February 18, 1999 x-ray was read as positive for pneumoconiosis by a dually-qualified physician. Director's Exhibit 43. The November 12, 2002 x-ray was read once as negative by a dually qualified physician, and once as positive by a dually qualified physician. Director's Exhibits 84, 86. The October 24, 2003 x-ray was read as negative by two dually qualified physicians. Director's Exhibits 85, 92. The September 29, 2005 x-ray was read once as negative by a physician with no radiological qualifications, once as negative by a dually qualified physician, and once as positive by a dually qualified physician. Director's Exhibits 95, 96; Claimant's Exhibit 7. In weighing these conflicting readings, the administrative law judge properly considered the qualifications of the physicians, and found that the positive and negative readings by the Board-certified radiologists and B readers were equally balanced. Because the administrative law judge properly performed both a quantitative and qualitative analysis

[5] Because claimant is eligible to invoke, based on a finding of fifteen years of coal mine employment, the presumption at 20 C.F.R. §718.203(b) that his pneumoconiosis, if established, arose out of coal mine employment, we consider any error committed by the administrative law judge in determining the length of claimant's coal mine employment, under the facts of this case, to be, at most, harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

of the conflicting x-rays in reaching his determination that the evidence was in equipoise, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section718.202(a)(1). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); D&O on Modification at 5.

With respect to Section 718.202(a)(4), we also reject claimant's contention that the administrative law judge erred by not giving controlling weight to the opinion of his treating physician, Dr. Kraynak, that he suffers from pneumoconiosis, over the contrary opinion of Dr. Rashid, that claimant does not have pneumoconiosis. The question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). While the United States Court of Appeals for the Third Circuit, wherein jurisdiction for this claim lies, has held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician, *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997), the court has also indicated that automatic preferences are disfavored, *Mancia*, 130 F.3d at 590-91; 21 BLR at 2-238; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). The administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to a treating physician's opinion, when warranted. *See* 20 C.F.R. §718.104(d);[6] *Mancia*, 130 F.3d at 590-91, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-201.

Contrary to claimant's assertion, the administrative law judge properly found that Dr. Kraynak's opinion, that claimant is totally and permanently disabled due to coal workers' pneumoconiosis, was entitled to less weight for several reasons. First, unlike Dr. Rashid, who is a Board-certified internist, Dr. Kraynak is not Board-certified in any medical specialty, and therefore, the administrative law judge permissibly found that Dr. Kraynak was less-qualified. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); D&O on

[6] Section 718.104(d) states that the officer adjudicating the claim must "give consideration to the relationship between the miner and treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the adjudication officer shall take into consideration the nature of the relationship, the duration of the relationship, the frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

Modification at 6. Second, the administrative law judge properly noted that Dr. Kraynak "relied upon pulmonary function study results which have been challenged by Dr. Michos[,] a pulmonary specialist" based on poor effort.[7] D&O on Modification at 6. Third, the administrative law judge found that Dr. Kraynak's examination was less extensive than Dr. Rashid's examination, since Dr. Kraynak's examination did not include an arterial blood gas study or a post-bronchodilator pulmonary function test. Dr. Kraynak also failed to explain, to the satisfaction of the administrative law judge, how the objective testing he did perform supported his opinion that claimant was totally disabled due to pneumoconiosis. Thus, the administrative law judge permissibly found that, despite Dr. Kraynak's treatment of claimant, his opinion as to the existence of pneumoconiosis was not as well-reasoned as Dr. Rashid's contrary opinion that claimant did not have pneumoconiosis. Such a determination was rational and within his discretion. *See* 20 C.F.R. §718.104(d)(5); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Lango*, 104 F.3d at 577, 21 BLR at 2-201; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

The administrative law judge has broad discretion to determine the weight to accord each physician's opinion. *See Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238. Relying on Dr. Rashid's reasoned and documented opinion, that clamant does not suffer from pneumoconiosis, the administrative law judge permissibly concluded that claimant failed to establish the existence of pneumoconiosis. Because claimant failed to establish the existence of pneumoconiosis, he was unable to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[8] *See Nataloni*, 17 BLR at 1-84. Since claimant

[7] Claimant challenges the administrative law judge's crediting of Dr. Rashid opinion, noting that Dr. Rashid's September 29, 2005 pulmonary function study was invalidated by Dr. Kraynak. Claimant's Brief at 10. The administrative law judge, however, stated that he assigned "greater weigh[t] to Dr. Rashid's notations that [c]laimant's cooperation and comprehension were good and the study was proper [and not indicative of any respiratory condition] since Dr. Rashid is more highly qualified." D&O on Modification at 8. We affirm the administrative law judge's credibility determination. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987).

[8] Although the administrative law judge also found that the "newly submitted evidence" failed to establish total disability, the administrative law judge was not required to reach that issue, since total disability was not an element of entitlement previously adjudicated against claimant in his initial claim or his prior modification request. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). We decline to address the administrative law judge's finding that clamant failed to establish total disability, since we affirm his determinations pursuant to 20 C.F.R. §§718.202(a) and 725.310 (2000).

failed to demonstrate either a mistake in fact or a change in conditions as required by 20 C.F.R. §725.310 (2000), we affirm the administrative law judge's denial of benefits.

Accordingly, the Decision and Order – Denying Request for Modification and Denying Benefits of the administrative law judge 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