BRB No. 09-0205 BLA

P.T. o/b/o ESTATE OF J.T. Claimant-Petitioner v. ENDURO COAL COMPANY and KENTUCKY COAL PRODUCERS S-I FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/03/2009 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates 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 Benefits (2007-BLA-05140) of Administrative Law Judge Donald W. Mosser 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). This case involves a request for

modification.[1] The administrative law judge adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and, accordingly, denied benefits and claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000).[2]

On appeal, claimant generally contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4).[3] Claimant also argues that the administrative law judge did not give proper weight to the opinions of the miner's treating physicians and to the treatment records. 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.[4] 33 U.S.C. §921(b)(3), as incorporated into the

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[1] Claimant is the widow of a miner, who died on February 7, 2006. She is pursuing the claim on behalf of his estate. The miner filed two claims for black lung benefits during his lifetime. The miner's first claim, filed on December 10, 1971, was finally denied on June 27, 1980. Director's Exhibit 60. He filed a second claim for benefits on October 18, 1988. The Board affirmed the denial of benefits on this claim on October 22, 1993. The miner made repeated requests for modification. Ultimately the miner was found to be totally disabled, but the claim was denied because pneumoconiosis was not established. The Board affirmed the denial of the miner's request for modification of the denial of the 1988 claim on September 29, 2000. [*J.T.*] *v. Enduro Coal Co.*, BRB No. 99-0611 BLA (Sept. 29, 2000)(unpub.). The administrative law judge found that the current claim filed on February 2, 2001, was a request for modification of that denial.

[2] Because this claim was pending on January 19, 2001, the effective date of the revisions to the regulations, the former version of 20 C.F.R. §725.310 applies to this claim. 20 C.F.R. §725.2(c).

[3] The administrative law judge's finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3), is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1984).

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

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

In determining whether claimant established a basis for modifying the denial of the claim at Section 725.310 (2000), the administrative law judge must consider whether there has been a change in conditions or whether a mistake in a determination of fact was made in the previous decision.[5] In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, 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. *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 (1993). In considering whether a mistake in a determination of fact has been made, the administrative law judge is required to consider the entire evidentiary record. *Nataloni*, 17 BLR at 1-84.

After considering the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is rational, supported by substantial evidence and contains no reversible error. It is, therefore, affirmed.

The administrative law judge first considered whether the new evidence establishes a basis for modification by demonstrating a change in conditions pursuant to Section 725.310 (2000). Pursuant to Section 718.202(a)(1), the administrative law judge properly found that the three new x-rays were negative, based on the preponderance of the negative readings of those x-rays by better qualified physicians. *See Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cranor v.*

[5] Contrary to claimant's argument, the administrative law judge properly found that the instant claim is a request for modification and not a subsequent claim, as it was filed within one year of the last denial of benefits. *See* Decision and Order at 3; 20 C.F.R. §725.310 (2000).

Peabody Coal Co., 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*). Specifically, the administrative law judge properly found that the February 14, 2001 x-ray was negative, even though it was initially read as positive by Dr. Hussain, a B reader, based on the negative reading by Dr. Halbert, a B reader and Board-certified radiologist. The administrative law judge properly found that the May 14, 2001 x-ray was negative, as it was read as negative by Dr. Fino, a B reader. The administrative law judge properly found that the May 6, 2004 x-ray was negative, as he credited the negative reading of Dr. Kendall, a B reader and Board-certified radiologist, over the positive reading of Dr. Forehand, who is only a B reader and whose readings of 1/0 and then 1/1 were inconsistent. Consequently, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that the negative readings by Drs. Halbert and Kendall, the better qualified readers, outweighed the positive readings by Drs. Hussain and Forehand. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7. Accordingly, we affirm the administrative law judge's finding that the new x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and, therefore, a change in conditions pursuant to Section 725.310 (2000).

In analyzing the new medical opinion evidence relevant to the issue of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge properly rejected the opinions of Drs. Hussain and Trivette, who found both clinical and legal pneumoconiosis. The administrative law judge permissibly rejected Dr. Hussain's diagnosis of clinical pneumoconiosis because the doctor relied on his positive reading of an x-ray that was subsequently reread as negative. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984). The administrative law judge also rejected Dr. Hussain's diagnosis of legal pneumoconiosis because the doctor did not explain and discuss the effects of smoking versus coal mine employment on the miner's chronic obstructive pulmonary disease. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Likewise, the administrative law judge permissibly rejected the opinion of Dr. Trivette, the miner's treating physician, because he did not explain the basis for his diagnoses. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, contrary to claimant's argument, because the administrative law judge did not find the opinion of the miner's treating physician to be reasoned, he properly rejected it. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Turning to the opinions of Drs. Forehand and Fino, the administrative law judge noted that Dr. Forehand's opinion, finding clinical and legal pneumoconiosis, was reasoned, but accorded greater weight to the opinion of Dr. Fino, that the miner did not have clinical or legal pneumoconiosis, because it was better reasoned. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR at 1-46 (1985). The administrative law judge noted that Dr. Fino's opinion was more consistent

with "the objective evidence and documented medical research." Decision and Order at 12. The administrative law judge also properly accorded greater weight to the opinion of Dr. Fino because, as a Board-certified internist and pulmonologist, he was better qualified than Dr. Forehand.[6] Decision and Order at 12; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, contrary to claimant's argument, the administrative law judge also reviewed the miner's 2003, 2004, and 2005 treatment records from Buchanan General Hospital and Pikeville United Methodist Hospital, which included a negative CT scan, and properly determined that they did not establish the existence of clinical or legal pneumoconiosis. Decision and Order at 6-7. The administrative law judge also noted that Dr. Fino reviewed these records, as well as the other new evidence, in determining that the miner did not have clinical or legal pneumoconiosis. Decision and Order at 9. Consequently, the administrative law judge's findings that the new medical opinion evidence failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, thereby, a change in conditions pursuant to Section 725.310 (2000), are affirmed.

The administrative law judge also found, on reviewing the entire record, that a mistake in determination of fact had not been made pursuant to Section 725.310 (2000), when the claim was previously denied. Claimant has not identified a mistake in a determination of fact in the previous decision and a review of the record does not reveal one. Decision and Order at 12. Accordingly, we affirm the administrative law judge's finding that neither the new evidence nor the evidence as a whole establishes pneumoconiosis and, thereby, a basis for modifying the prior denial of benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant has failed to establish the existence of pneumoconiosis on the record, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's finding that entitlement to benefits is precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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[6] Dr. Forehand's report indicates that he is a B reader. Claimant's Exhibit 1. Contrary to claimant's argument, this qualification, while relevant to the weight to accord Dr. Forehand's x-ray readings, does not entitle his medical opinion to greater weight than the opinion of a Board-certified internist and pulmonologist. *See* 20 C.F.R. §718.202(a)(1); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge