BRB No. 11-0158 BLA

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| GERALD THORNSBERRY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| BLEDSOE COAL CORPORATION | ) | DATE ISSUED: 09/30/2011 |
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| and | ) | |
| | ) | |
| JAMES RIVER COAL COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| 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 Benefits on Modification of an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Leroy Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits on Modification of an Initial Claim (2009-BLA-5148) of Administrative Law Judge Larry S. Merck, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)

(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Claimant filed his claim for benefits on May 8, 2002.[1] Director's Exhibit 2. In a Decision and Order issued on April 19, 2006, Administrative Law Judge Larry Price denied benefits, finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *See Thornsberry v. Bledsoe Coal Corp.*, BRB No. 06-0598 BLA (Mar. 28, 2007) (unpub.); Director's Exhibit 72. On November 14, 2007, claimant filed a request for modification. Director's Exhibit 78. The case was reassigned to Judge Merck (the administrative law judge), who issued his Decision and Order on October 4, 2010, which is the subject of this appeal. The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and credited claimant with at least twenty-seven years of coal mine employment. The administrative law judge found that claimant failed to establish a basis for modification, by demonstrating either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that, based on the x-ray and medical opinion evidence, he established the existence of pneumoconiosis and that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that claimant worked twenty-seven years in coal mine employment, that there is no biopsy evidence to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and that claimant is not eligible for any of the regulatory presumptions for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6, 12-13.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose 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 & Sons*, 9 BLR 1-4 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310. In considering whether a change in conditions has been established, an 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. *See 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). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet- General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

The administrative law judge considered the newly submitted evidence on modification and found that the x-rays are negative for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that there is no reasoned and documented medical opinion to establish that claimant has either clinical or legal pneumoconiosis[4] pursuant to 20 C.F.R.

[4] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

§718.202(a)(4). Decision and Order at 12, 19. The administrative law judge also reviewed "all of the evidence considered and discussed by [Judge] Price" and found no mistake in a determination of fact with respect to the prior denial of benefits. *Id*. at 19.

Claimant asserts on appeal that he has established pneumoconiosis, based on the positive x-ray readings by Dr. Wicker, of an x-ray dated June 4, 2003, and by Dr. Alexander, of x-rays dated February 19, 2007 and March 4, 2009.[5] Claimant's Brief (unpaginated) at [3]. The administrative law judge, however, permissibly determined that the June 4, 2003 x-ray is negative for pneumoconiosis because Dr. Wicker is a B reader and his positive reading is outweighed by a negative reading of the same x-ray by Dr. Wiot, who has superior credentials as he is dually qualified as a Board-certified radiologist and B reader. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 11; Director's Exhibit 13; Employer's Exhibit 5. The administrative law judge also properly determined that the February 19, 2007 and March 4, 2009 x-rays are "inconclusive for determining the presence of clinical pneumoconiosis" since each x-ray was read as positive by Dr. Alexander, a Board-certified radiologist and B reader, but also as negative for pneumoconiosis by Dr. Wiot. *See* Decision and Order at 12; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994); Director's Exhibit 75; Claimant's Exhibit 1; Employer's Exhibit 5A. The administrative law judge further found that there are no positive readings of the remaining x-rays submitted on modification, dated October 2, 2002, March 8, 2005 and October 8, 2009.[6] Decision and Order at 11; Employer's Exhibits 1, 3, 1A. Because substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that finding is affirmed. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87.

Under 20 C.F.R. §718.202(a)(4), the administrative law judge considered a medical report by Dr. Jarboe, submitted by employer on modification, and hospital and treatment records, submitted by claimant. Dr. Jarboe's opinion does not support claimant's burden of proof, as Dr. Jarboe specifically opined that claimant does not have either clinical or legal pneumoconiosis. Employer's Exhibits 1A-2A, 6A-7A. The

[5] Claimant mistakenly refers to Dr. Alexander as Dr. Anderson in his brief. Claimant's Brief (unpaginated) at [3].

[6] The administrative law judge also found that the x-ray readings contained in claimant's treatment records were "inconclusive," as they do not make any specific finding regarding the presence or absence of pneumoconiosis. Decision and Order at 12; *see* Claimant's Exhibit 3.

administrative law judge correctly found that while the hospital and treatment records reference that claimant has a "history of black lung" and chronic obstructive pulmonary disease, they do not include a specific diagnosis of coal workers' pneumoconiosis and "there is no statement about the etiology" of claimant's respiratory condition. Decision and Order at 18, *quoting* Claimant's Exhibits 2, 3. Thus, the administrative law judge properly found that the treatment records do not contain a reasoned and documented diagnosis of either clinical or legal pneumoconiosis. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 18.

Similarly, the administrative law judge observed correctly that while several CT scans contained in the treatment records submitted by claimant on modification identify emphysema, they do not reveal the presence of clinical pneumoconiosis and "there is no statement of the etiology" of the emphysema from which to conclude that claimant has legal pneumoconiosis. Decision and Order at 19; *see* Claimant's Exhibit 3. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant did not satisfy his burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[7] *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Clark*, 12 BLR at 1-155.

The Board is not permitted to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The Board's circumscribed scope of review requires that the party challenging the Decision and Order below address with specificity the errors committed by the administrative law judge. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf*, 10 BLR at 1-120; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). In this case, claimant recites evidence favorable to his claim, but has not identified any specific errors made by the administrative law judge. We, therefore, affirm the

[7] Claimant notes that Dr. Wicker, his treating physician, and Dr. Amisetty diagnosed that he has a respiratory condition due to coal dust exposure. Claimant's Brief at [3]. As noted by the administrative law judge, however, the opinions of Drs. Wicker and Amisetty were considered by Administrative Law Judge Larry Price and were rejected, on the ground they did not explain the rationale for their conclusions. Decision and Order at 15; Director's Exhibit 64. The administrative law judge indicated that he found no mistake in a determination of fact by Judge Price in giving those opinions less weight. Decision and Order at 19; *see generally* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

administrative law judge's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 and the denial of benefits.[8]

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits on Modification of an Initial Claim 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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BETTY JEAN HALL
Administrative Appeals Judge

[8] We decline to address claimant's assertions that the evidence is sufficient to establish total disability and that his pneumoconiosis arose out of coal mine employment, as those issues were not reached by the administrative law judge. Claimant's Brief at [3-4].