BRB No. 11-0257 BLA

REBECCA JILL HUGHES (o/b/o/ WALLACE R. HUGHES)	)	
v.	)	
OLD BEN COAL COMPANY	)	
	)	DATE ISSUED: 12/14/2011
and	)	
SAFECO INSURANCE COMPANY OF AMERICA	)	
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 on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington D.C., for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Modification Denying Benefits (09-BLA-5311) of Administrative Law Judge Jeffrey Tureck, rendered on a miner's 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). This case involves the miner's request for modification of the denial of a claim filed on July 27, 2007. Director's Exhibits 1, 2. The district director denied benefits because the evidence did not establish the existence of pneumoconiosis or that the miner's totally disabling respiratory impairment was due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Director's Exhibit 26. The miner timely requested modification. Director's Exhibit 32; *see* 20 C.F.R. §725.310. The district director denied modification, and the miner requested a hearing, which the administrative law judge held on March 17, 2010. Director's Exhibits 39, 40.

Based on a review of the miner's coal mine employment history form and Social Security Administration earnings records, the administrative law judge found that the miner worked in coal mine employment for no "longer than 9 ¾ years."[2] The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore, found that the evidence did not establish a basis for granting modification. *See* 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4). Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[3]

[1] The miner died while his claim was pending before the administrative law judge. Decision and Order at 2. Claimant, the widow of the miner, is pursuing the claim on his behalf. *Id*.

[2] The record indicates that the miner's coal mine employment was in Illinois. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] Claimant does not challenge the administrative law judge's findings that the miner had no more than nine and three-quarters years of coal mine employment, that he had a smoking history of at least ninety pack-years, that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), and that the existence of clinical pneumoconiosis was not established pursuant to 20 C.F.R.

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. 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).

In order to establish entitlement to benefits under Part 718 in a miner's claim, a claimant must establish the existence of 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §725.310(a), a miner may, at any time before one year after the denial of a claim, request modification of the denial of benefits. An administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. *See* 20 C.F.R. §725.310. The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact," *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 541, 22 BLR 2-429, 2-444 (7th Cir. 2002)(Wood, J., dissenting), including whether the "ultimate fact" was mistakenly decided. *Amax Coal Co. v. Franklin*, 957 F.2d 355, 358, 16 BLR 2-50, 2-54-55 (7th Cir. 1992).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered whether seven readings of three x-rays taken on September 27, 2007, April 30, 2008, and August 12, 2008, established the existence of clinical pneumoconiosis. Two readings were positive for the existence of pneumoconiosis, four readings were negative, and one reading was found to be "ambiguous" because the physician in question stated only that the x-ray was suggestive of pneumoconiosis.[4] Decision and Order at 4. Considering

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§718.202(a)(4). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because the miner established fewer than fifteen years of coal mine employment, a recent amendment to the Black Lung Benefits Act, which became effective on March 23, 2010, does not affect this case. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[4] Dr. Harris, whose radiological qualifications are not of record, read the September 27, 2007 x-ray as showing diffuse small opacities "suggestive" of pneumoconiosis, but he did not provide an ILO classification of the x-ray. Director's Exhibit 17. Dr. Wiot, who is a Board-certified radiologist and B reader, read the September 27, 2007 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Dr.

these readings along with the readers' radiological qualifications, the administrative law judge deferred to the negative readings by those physicians possessing "superior expertise," and found that the three x-rays were negative for pneumoconiosis. Decision and Order at 5. Additionally, the administrative law judge noted that "numerous" x-ray readings contained in the miner's medical treatment records made no mention of pneumoconiosis. *Id.* The administrative law judge therefore found that the x-ray evidence did not establish the existence of pneumoconiosis.

Claimant does not specifically challenge the administrative law judge's analysis of the x-ray evidence. Instead, she alleges generally that one of employer's radiological experts, and the administrative law judge, are biased towards finding the x-ray evidence to be negative. Claimant's Brief at 3 n.1 (unpaginated).

Contrary to claimant's contention, the identity of the party who hires a medical expert does not, by itself, demonstrate partiality or partisanship on the part of the physician. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992). Further, claimant points to no specific evidence in the record of bias on the part of either Dr. Wiot or the administrative law judge. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107-08 (1992)(holding that charges of bias or prejudice must be supported by concrete evidence); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991)(*en banc*)(holding that it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable). Therefore, we reject claimant's unsupported allegations of bias. As claimant makes no other arguments, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.204(a)(4), the administrative law judge considered six medical opinions to determine whether they established that the miner suffered from legal pneumoconiosis.[5] Dr. Crabtree, the miner's treating physician, diagnosed the miner with

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Whitehead, a B reader, and Dr. Houser, who stated that he is not a B reader, read the April 30, 2008 x-ray as positive for pneumoconiosis. Director's Exhibit 32; Claimant's Exhibit 6. Dr. Wiot, however, read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Finally, both Dr. Wiot and Dr. Meyer, who is a Board-certified radiologist and B reader, and a professor of diagnostic radiology, read the August 12, 2008 x-ray as negative for pneumoconiosis. Employer's Exhibit 2.

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and smoking. Claimant's Exhibit 5 at 23-24. Dr. Istanbouly examined the miner on behalf of the Department of Labor, and opined that he suffered from an occupational lung disease that was due to coal mine dust exposure. Director's Exhibit 17. Dr. Houser examined the miner and reviewed his medical records, and diagnosed him with COPD that was due to both smoking and coal mine dust exposure. Director's Exhibit 32; Claimant's Exhibit 6. In contrast, Drs. Repsher, Rosenberg, and Tuteur opined, on behalf of employer, that the miner did not have pneumoconiosis, but suffered from emphysema and COPD that were due solely to smoking. Director's Exhibit 36; Employer's Exhibits 4, 12, 15, 16.

The administrative law judge found that Dr. Crabtree did not provide "a credible explanation for his conclusion that the miner's 9 ¾ years of coal mining combined with his 90 pack-years of smoking to cause his COPD." Decision and Order at 7. Further, the administrative law judge discounted Dr. Istanbouly's opinion, because the physician relied on a smoking history that "understate[d] the miner's actual smoking history by 65 pack-years," and he failed to address the miner's smoking history when he attributed the miner's pulmonary impairment to heart disease and coal mine dust exposure. *Id*. Additionally, the administrative law judge discounted Dr. Houser's opinion, because the physician relied on both an overstated history of twenty-six years of coal mine employment, and an understated history of forty years of smoking. The administrative law judge found that since "none of the physicians' opinions favorable to the claim have any probative value," they did not establish that the miner's COPD was related to his coal mine dust exposure. Decision and Order at 9. In light of that finding, the administrative law judge found it unnecessary to discuss the opinions of Drs. Repsher, Rosenberg, and Tuteur.

Claimant contends that the administrative law judge erred by failing to accord controlling weight to Dr. Crabtree's opinion, based on Dr. Crabtree's status as the miner's treating physician. Claimant's Brief at 6-8 (unpaginated). Claimant argues further that the opinions of Drs. Crabtree and Houser[6] should have been credited because they are better reasoned than the contrary opinions of Drs. Repsher, Rosenberg, and Tuteur. Claimant's Brief at 11-12 (unpaginated). We disagree.

Contrary to claimant's contention, the administrative law judge was not required to accord controlling weight to Dr. Crabtree's opinion. The administrative law judge considered that Dr. Crabtree was the miner's "treating pulmonologist," Decision and Order at 7, but permissibly found that Dr. Crabtree did not adequately explain his reasons

[6] Claimant does not challenge the administrative law judge's credibility determination with respect to Dr. Istanbouly's medical opinion, which is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

for attributing the miner's COPD partly to nine and three-quarter years of coal mine dust exposure, in view of the miner's ninety pack-year smoking history. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); 20 C.F.R. §718.104(d)(5).

Further, the determination of whether a medical opinion is adequately documented and reasoned is for the administrative law judge as the factfinder to decide. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Here, the administrative law judge reasonably discounted Dr. Houser's opinion as to the cause of the miner's COPD, because Dr. Houser relied on erroneous coal mine employment and smoking histories, which led the administrative law judge to question "the overall validity of [Dr. Houser's] conclusions. . . ." Decision and Order at 9; *see Clark*, 12 BLR at 1-155.

Therefore, we reject claimant's contention that the administrative law judge erred in weighing the medical opinions of Drs. Crabtree and Houser, and we affirm the administrative law judge's finding that claimant's medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, we need not address claimant's additional arguments that the opinions of Drs. Repsher, Rosenberg, and Tuteur are flawed and should have been discredited by the administrative law judge.[7] Claimant's Brief at 8-11 (unpaginated).

In view of the foregoing discussion, we affirm the administrative law judge's findings that the medical evidence did not establish the existence of pneumoconiosis, and that claimant did not establish a basis for modification. *See* 20 C.F.R. §725.310. We therefore affirm the denial of benefits.

[7] Claimant additionally alleges that the administrative law judge allowed employer to violate the evidentiary limitations of 20 C.F.R. §725.414 by submitting three medical reports. Claimant's Brief at 8 n.2 (unpaginated). In order to clarify the contents of the record, we briefly address claimant's evidentiary argument, which lacks merit. Under the combined evidentiary limitations that apply when a claim is being considered on modification, each party is entitled to submit two medical reports in its affirmative case under 20 C.F.R. §725.414(a)(2),(3), plus one additional medical report under 20 C.F.R. §725.310(b). *See Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-228 (2007). Because the medical reports of Drs. Repsher, Rosenberg, and Tuteur comply with those limitations, we reject claimant's argument to the contrary.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits 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