BRB No. 08-0639 BLA

H.J.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN METALS & COAL INTERNATIONAL (formerly VIRGINIA CREWS COAL COMPANY)	)	DATE ISSUED: 07/21/2009
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet Rundle & Associates), Pineville, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Modification (07-BLA-5268) of Administrative Law Judge Jeffrey Tureck 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 has a lengthy procedural history.[2] The administrative law judge credited claimant with sixteen and one-half years of qualifying coal mine employment, and adjudicated employer's request for modification of claimant's award of benefits pursuant to the regulatory provisions at 20 C.F.R. Part 718 and 20 C.F.R. §725.310 (2000). The administrative law judge found a mistake in Administrative Law Judge Samuel J. Smith's prior determination that the x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and, upon review of the entire record, found that the weight of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that granting modification was in the interest of justice in this case. Accordingly, benefits were denied.

[1] The instant claim was filed on January 21, 1993. The Department of Labor subsequently 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 (2009). The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. §725.310, do not apply to requests for modification of claims, such as this, filed before January 19, 2001. 20 C.F.R. §725.2. Unless otherwise indicated, all citations to the regulations refer to the revised regulations.

[2] The procedural history of the instant claim is set forth in [*H.J.S.*] *v. Fossil Fuels, Inc., et al.*, BRB Nos. 98-1336 BLA and 98-1336 BLA-A (Apr. 27, 2000)(unpub.). In that disposition, the Board affirmed claimant's entitlement to benefits, but remanded the case for further findings as to whether Steve Horn, as the President and Chief Executive Officer of the Tug Huff Coal Corporation, could be designated as the responsible operator herein, as Tug Huff had been found to be incapable of assuming liability for benefits. The Board further vacated Administrative Law Judge Samuel J. Smith's finding that the Black Lung Disability Trust Fund would assume liability if Mr. Horn did not qualify, and held that employer should be designated as the responsible operator if Mr. Horn did not qualify. *See* Director's Exhibit 68. Subsequently, employer appealed the Board's decision to the United States Court of Appeals for the Fourth Circuit, which ultimately dismissed the appeal for lack of jurisdiction, on September 19, 2000. Director's Exhibits 70, 73, 75, 80. The record file was subsequently lost and reconstructed, and the case was remanded to the district director to develop additional evidence regarding Mr. Horn's ability to pay benefits. Director's Exhibit 89. On February 1, 2006, Administrative Law Judge Pamela Lakes Wood dismissed Mr. Horn and designated employer as the responsible operator herein. Director's Exhibit 101. On June 20, 2006, employer requested modification of the determination that claimant is entitled to benefits.

In the present appeal, claimant challenges the administrative law judge's determination to grant modification of the finding of entitlement pursuant to Section 725.310 (2000). Claimant asserts that employer was not diligent in seeking modification of the award of benefits, and thus, the granting of modification herein is not in the interest of justice. On the merits, claimant contends that the administrative law judge erred in relying solely on negative x-ray evidence to find that the existence of pneumoconiosis was not established, rather than weighing all relevant evidence together under Section 718.202(a), consistent with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[3] Employer responds, urging affirmance of the administrative law judge's granting of modification and the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, and that he is totally disabled by pneumoconiosis. 30 U.S.C. §901; 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 (1989).

Pursuant to Section 725.310 (2000), modification may be granted in a miner's claim on the grounds of a change in conditions or a mistake in a determination of fact with regard to the prior denial of benefits. *See* 20 C.F.R. §725.310(a) (2000). 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." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The United States Court of Appeals for the Fourth Circuit has held that a moving party need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *Jessee v. Director, OWCP*, 5 F.3d 723, 18

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner's last coal mine employment occurred in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2 at 2.

BLR 2-26 (4th Cir. 1993). Rather, when a request for modification is filed, the administrative law judge may "reconsider all the evidence for any mistake of fact," including whether "the ultimate fact" of entitlement was wrongly decided. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

Claimant initially contends that the administrative law judge erred in granting modification based upon his finding of a mistake in the earlier determination of fact that the x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1), and upon his weighing of the record evidence at Section 718.202(a). Specifically, claimant contends that the administrative law judge erred in failing to properly evaluate the x-ray evidence; erred in failing to consider all relevant evidence together consistent with *Compton*; and erred in crediting the diagnoses of no pneumoconiosis at Section 718.202(a)(4), by physicians who relied solely on negative x-ray evidence, over the opinion of Dr. Rasmussen, that claimant's impairment was attributable to a combination of coal dust exposure and smoking. Claimant's arguments are without merit.

At Section 718.202(a)(1), the administrative law judge reviewed the x-ray evidence available to Judge Smith, and determined that Judge Smith ignored relevant Board-certifications in radiology and other qualifications, as he indicated that the B reader qualification was "far more important" and that one B reader "cannot be preferred over another," Director's Exhibit 42 at 19. Decision and Order at 5. Assuming, *arguendo*, that Judge Smith's method of treating all B readers the same was proper, the administrative law judge concluded that, since the record at the time contained eight negative interpretations by B readers and only three positive interpretations by B readers, Judge Smith erred in finding that the "evidence is fairly even from both a quantitative and qualification standpoint," Director's Exhibit 42 at 19, and that the positive interpretation of a September 21, 1993 x-ray by the West Virginia Occupational Pneumoconiosis Board (WVOPB) tipped the balance in favor of claimant. Decision and Order at 5. Because the interpretation of the WVOPB did not comply with the ILO-U/C classification system, the administrative law judge properly determined that it could not establish the existence of pneumoconiosis under Section 718.202(a)(1), *see* 20 C.F.R. §718.102(b), and he permissibly found that the remaining x-ray evidence, even if it were considered to be equally probative, could not satisfy claimant's burden of proof by a preponderance of the evidence. *Id.*; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). The administrative law judge then considered the newly submitted x-ray evidence, consisting of uniformly negative B reader interpretations by Drs. Wiot, Meyer and Rasmussen of a February 10, 1993 x-ray, and by Dr. Zaldivar of a June 7, 2006 x-ray, and rationally concluded that the weight of the evidence, old and new, was negative for pneumoconiosis. In so finding, the administrative law judge determined that Drs. Wiot and Meyer, as well as Drs. Spitz and Shipley, who provided negative interpretations of earlier x-rays considered by Judge Smith, were highly qualified

radiologists who were professors of radiology for many years and had numerous publications to their credit. Decision and Order at 5. Consequently, the administrative law judge acted within his discretion in finding that the negative interpretations by these best qualified physicians were entitled to the greatest weight. *Id.*; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1983); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). As substantial evidence supports the administrative law judge's finding, that the weight of the x-ray evidence of record, old and new, was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), it is affirmed.

We also find no merit to claimant's argument that the administrative law judge's consideration of all relevant evidence on the issue of the existence of pneumoconiosis was not consistent with *Compton*, 211 F.3d 203, 22 BLR 1-162. After finding that the x-ray evidence of record was negative for pneumoconiosis, and that the record contained no relevant biopsy evidence in this living miner's claim, *see* Decision and Order at 6; Director's Exhibit 83; Employer's Exhibit 1 at 24, the administrative law judge determined that Dr. Rasmussen was the only physician of record who diagnosed pneumoconiosis, in examination reports of October 4, 1993 and March 28, 1994, based in part on the positive x-ray interpretations of Dr. Patel, a Board-certified radiologist and A reader. Decision and Order at 6; Director's Exhibit 83. The administrative law judge further determined that Dr. Rasmussen subsequently testified at a 2007 deposition that he would not have diagnosed clinical pneumoconiosis if the x-ray interpretations had been negative. Decision and Order at 6; Employer's Exhibit 1 at 18, 22, 24-25. As the administrative law judge found that Dr. Rasmussen, who is now a B reader, interpreted an essentially contemporaneous x-ray as negative, and the administrative law judge found that the x-ray evidence was negative for pneumoconiosis, he permissibly found that Dr. Rasmussen's diagnosis of clinical pneumoconiosis had no probative value. Decision and Order at 6; *see Compton*, 211 F.3d at 212, 22 BLR at 175. Additionally, to the extent that Dr. Rasmussen's diagnosis was affected by his earlier belief that claimant's 1993 and 1994 test results demonstrated a totally disabling respiratory impairment, whereas the physician subsequently acknowledged that he now believed the test results showed a mild airways obstruction, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion was not credible. Decision and Order at 6-7; Employer's Exhibit 1 at 25; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). As Drs. Vasudevan, Zaldivar, Castle and Spagnolo did not diagnose clinical or legal pneumoconiosis, the administrative law judge properly found that the medical opinions of record were insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), and we affirm his findings thereunder, as supported by substantial evidence. Decision and Order at 7; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1985).

Because the administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we affirm his finding that employer established a mistake in a determination of fact pursuant to Section 725.310 (2000), as supported by substantial evidence. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

We next address the administrative law judge's analysis with respect to his determination that modification in this case is appropriate and in the interest of justice. In this connection, claimant asserts that employer, or its predecessor, was found to be the responsible operator herein throughout the litigation of this matter, with the exception of a brief period after June 11, 1998, and that the administrative law judge mischaracterized the record by stating that employer had only been designated as the responsible operator in 2006. Claimant thus contends that the administrative law judge erred in finding that employer was sufficiently diligent in requesting modification of the award of benefits. Claimant's argument is without merit. While the Department of Labor identified employer, which previously did business as Virginia Crews Coal Company, as one of several potentially liable operators early in these proceedings, the administrative law judge accurately found that employer was not found to be the responsible operator herein until February 1, 2006, Director's Exhibit 101, and that the modification request was filed less than five months thereafter. Further, a review of the record supports the administrative law judge's determination that employer has "vigorously defended this claim since its designation as a potential responsible operator." Decision and Order at 4. Accordingly, the administrative law judge rationally concluded that employer was diligent in seeking modification. Moreover, the administrative law judge properly considered other relevant factors, including the propriety of employer's motives, any futility of employer's remedy, and the interests of finality, and acted within his discretion in finding that granting employer's request for modification pursuant to Section 725.310 (2000) would render justice under the Act.[4] Decision and Order at 3-5; *see Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). Consequently, we affirm the administrative law judge's denial of benefits.

[4] Claimant has not challenged the administrative law judge's findings that the record contains no evidence suggesting that employer had an improper motive in requesting modification; that employer's remedy is "far from futile," as denial of modification would obligate employer for reimbursement of $131,524.98 in interim benefits and medical payments to the Department of Labor, as well as for future payments; and that no finality interests prevail herein, as any delays in the litigation were largely out of employer's control. Decision and Order at 4.

Accordingly, the Decision and Order Denying Benefits on Modification 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