BRB No. 10-0424 BLA

KENNETH R. LOHR Claimant-Respondent v. WRIGHT COAL COMPANY and ROCKWOOD INSURANCE COMPANY/INSERVCO Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/16/2011 DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Petition for Modification and Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Lee Ann Rhodes (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Claimant's Petition for Modification and Awarding Benefits (2008-BLA-5778) of Administrative Law Judge Thomas M. Burke rendered on a claim filed on May 26, 2004, 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). In a Decision and Order issued on July 25, 2006, Administrative Law Judge Richard A. Morgan found that the evidence supported the parties' stipulation that claimant has 17.42 years of coal mine employment and is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Judge Morgan, however, denied benefits, finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Lohr v. Wright Coal Co.*, BRB No. 06-0863 BLA (June 29, 2007) (unpub.).

On February 21, 2008, claimant filed a timely request for modification. Director's Exhibit 68. The district director denied claimant's modification request on April 24, 2008. Director's Exhibit 71. Claimant requested a hearing and the case was assigned to Judge Burke (the administrative law judge), whose Decision and Order, issued on February 25, 2010, is the subject of this appeal. The administrative law judge found that a preponderance of the newly submitted evidence, considered in conjunction with the previously submitted evidence, established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Thus, the administrative law judge found that claimant established a change in conditions and a basis for modification under 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits, commencing May 1, 2004.

On appeal, employer asserts that the administrative law judge erred in concluding that claimant satisfied his burden to establish the existence of legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a substantive response in this appeal, unless requested to do so by the Board.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] We agree with claimant and the Director, Office of Workers' Compensation Programs, that the recent amendments to the Black Lung Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 2.

[2] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as claimant's most recent coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

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 is totally disabled by a 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).

Claimant may establish a basis for modification of the denial of his claim by establishing either a change in conditions or a mistake in a determination of fact. 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, considered 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. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). As to the issue of a mistake in a determination of fact, a claimant need not allege a specific error in order for an administrative law judge to find a basis for modification, as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

In this case, employer contends that the administrative law judge erred in finding that claimant established a change in conditions, by crediting the opinions of Drs. Cohen and Rasmussen, that claimant has a disabling respiratory condition due, in part, to coal dust exposure. Employer asserts that because Drs. Cohen and Rasmussen admitted that smoking was the "greatest factor" in claimant's totally disabling pulmonary condition, their opinions are legally insufficient to support claimant's burden of proving the existence of legal pneumoconiosis[3] and disability causation. Employer's Brief at 3. Employer's arguments are rejected as without merit.

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[3] Clinical pneumoconiosis is defined as "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." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined under 20 C.F.R. §718.201(a)(2) as "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).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed four medical opinions on modification, in conjunction with the previously submitted evidence. Dr. Cohen initially examined claimant on March 15, 2005 and prepared reports dated April 15, 2005, November 18, 2005, and March 10, 2008. Director's Exhibits 43, 49, 70. Dr. Cohen considered that claimant worked eighteen years in coal mine employment and that he has a smoking history of sixty-five to ninety-five pack years.[4] Director's Exhibits 43, 70. Dr. Cohen diagnosed clinical pneumoconiosis by x-ray and further opined that pulmonary function testing showed a severe obstructive respiratory impairment, with no significant response to bronchodilator, and a diffusion capacity impairment. Director's Exhibit 43. In addressing the etiology of claimant's disabling respiratory condition, Dr. Cohen testified that smoking and coal dust exposure cause identical forms of obstructive respiratory impairment. Claimant's Exhibit 3. He stated:

> Certainly [claimant's] tobacco smoke exposure would be a more important causal factor, but it doesn't change the fact that I believe that [claimant's] coal mine dust was also a significant contributing factor.

Id. Dr. Cohen also testified that the pulmonary function tests of record show a progressive deterioration of claimant's lung function, consistent with impairment caused by coal dust exposure or pneumoconiosis. *Id.* He concluded that claimant is totally disabled due to smoking and coal dust exposure. *Id.*

Dr. Rasmussen examined claimant on November 24, 2008, and opined that claimant's pulmonary function testing showed an irreversible obstructive respiratory impairment and a diffusion impairment. Claimant's Exhibit 4. He reported that the effects of smoking and coal dust exposure on the respiratory system are "essentially identical." *Id.* Dr. Rasmussen acknowledged that claimant's smoking history of ninety-five pack years is a "very very significant cigarette smoking history." Claimant's Exhibit 6. In addressing the etiology of claimant's disabling obstructive respiratory condition, Dr. Rasmussen stated:

> I clearly believe that his smoking was by far the greatest factor, but [eighteen] years of coal mine dust exposure is sufficient to cause impaired function. By no means as great, I don't' believe as the smoking, but enough so that it has to be considered significant.

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[4] Dr. Cohen initially considered a smoking history of twenty-four to sixty-five pack years but revised his opinion, on March 10, 2008, based on information that claimant smoked from sixty-five to ninety pack years. Director's Exhibit 70. He stated that, while claimant's smoking history was greater than he initially understood, "[t]his has not changed my opinion that [claimant] has severe obstructive lung disease and that his coal mine dust exposure was a significant contributing factor." *Id.*

Id. He concluded that legal pneumoconiosis, in the form of COPD/emphysema, was a contributing factor to claimant's respiratory disability. *Id*.

Dr. Kaplan prepared a report on January 22, 2009, based on his review of certain medical records and reports. Employer's Exhibit 5. Dr. Kaplan noted that claimant has "well-established severe obstructive lung disease" and indicated that there had been significant deterioration in claimant's lung function from 2005 through 2008, as evidenced by the pulmonary function study results. *Id*. Dr. Kaplan opined that "the progressive nature of this impairment is related to his cigarette consumption" and not clinical or legal pneumoconiosis. *Id*.

Dr. Fino examined claimant on February 14, 2005 and again on May 14, 2008. Director's Exhibit 40; Employer's Exhibit 2. He reported that claimant worked eighteen years in coal mine employment and had a forty-five year history of smoking one to two packs of cigarettes a day. Employer's Exhibit 2. Dr. Fino indicated that claimant had no radiographic evidence for clinical pneumoconiosis. Based on the pulmonary function study results, he diagnosed severe chronic obstructive pulmonary disease (emphysema), which he attributed entirely to smoking. Dr. Fino ruled out coal dust exposure as a causative factor for claimant's emphysema, explaining that "the amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema." *Id*. Dr. Fino concluded that claimant does not have clinical or legal pneumoconiosis, and that he is totally disabled due to smoking. *Id*.

In weighing the conflicting medical opinions at 20 C.F.R .§718.202(a)(4), the administrative law judge noted that, while Judge Morgan previously discredited Dr. Cohen's opinion, finding that he understated claimant's smoking history, "Dr. Cohen corrected his misunderstanding in his supplemental medical report, [and] his well-reasoned opinions are now accepted as they are formed on the basis of an accurate smoking history" Decision and Order at 21. The administrative law judge found that Dr. Rasmussen's opinion was reasoned and documented. *Id*. at 23. He gave little weight to Dr. Kaplan's opinion because he did not explain the basis for his causation findings. *Id*. at 21. The administrative law judge also gave less weight to Dr. Fino's opinion. *Id*. The administrative law judge specifically noted that Dr. Fino "attempts to rule out the existence of legal pneumoconiosis based on chest x-ray evidence that fails to show clinical pneumoconiosis" and considered his opinion to be contrary to the regulations, "which recognize that clinical and legal pneumoconiosis are distinct diseases." *Id.*, *citing* 65 Fed. Reg. at 79941 (Dec. 20, 2000). Thus, the administrative law judge credited the opinions of Drs. Cohen and Rasmussen and found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 22. Applying his credibility findings to the issue of disability causation, the administrative law judge further found, based on the opinions of Drs. Cohen and Rasmussen, that claimant established total disability due to legal pneumoconiosis pursuant to 20 C.F.R. 718.204(c). *Id*. at 23.

We reject employer's assertion that because Drs. Cohen and Rasmussen attribute claimant's disabling respiratory condition primarily to smoking, their opinions are insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation pursuant to 20 C.F.R. §718.204(c).[5] In *Bonessa v. U.S. Steel Corp.,* 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989), the United States Court of Appeals for the Third Circuit held that pneumoconiosis need not be the sole cause of a miner's disabling respiratory impairment, but it must be a "substantially contributor" to the disability. *See Felton v. Director, OWCP,* 339 F. App'x. 187 (3rd Cir. 2009)*, citing Bonessa,* 884 F.2d at 734, 13 BLR at 2-37*; see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). In this case, Drs. Cohen and Rasmussen specifically opined that claimant's coal dust exposure was at least a significant factor in his respiratory condition and disability. Director's Exhibits 43, 70; Claimant's Exhibits 4, 6. The administrative law judge, therefore, could properly rely on the opinions of Drs. Cohen and Rasmussen, if reasoned and documented, to find that claimant met his burden of proof to establish that he has legal pneumoconiosis and is totally disabled as a result of his coal mine employment.[6] *See Id.*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

Employer does not specifically challenge the administrative law judge's credibility findings with respect to the medical opinions, except to argue that Dr. Fino reviewed more evidence than Drs. Cohen and Rasmussen.[7] *See Sarf v. Director, OWCP*, 10 BLR

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[5] The regulation at 20 C.F.R. §718.204(c) states that a miner shall be considered totally disabled due to pneumoconiosis, if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" if it has a material adverse effect on the miner's respiratory or pulmonary condition or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii).

[6] We reject employer's assertion that Dr. Rasmussen's opinion, as to the existence of legal pneumoconiosis, is not credible because he did not review any of claimant's x-rays. Employer's Brief at 5. A chest x-ray is relevant to the detection of clinical pneumoconiosis, but not legal pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202(a)(1); *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998) (*en banc*).

[7] Employer states that "unlike Dr. Rasmussen, Dr. Fino had the opportunity to review the miner's prior medical records, including pulmonary function studies and radiographs." Employer's Brief at 5. Employer, however, does not specifically challenge the administrative law judge's finding that Dr. Fino's opinion is contrary to the Act. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We consider this argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson,* 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's findings that the opinions of Drs. Cohen and Rasmussen are reasoned and documented and that the opinions of Drs. Kaplan and Fino are insufficiently reasoned and entitled to little weight. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-395 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark,* 12 BLR at 1-155. Moreover, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We further affirm the administrative law judge's finding that claimant established a change in conditions and a basis for modification pursuant to 20 C.F.R. §725.310. *See Kingery,* 19 BLR at 1-11.

Accordingly the administrative law judge's Decision and Order Granting Claimant's Petition for Modification and Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge