BRB No. 08-0655 BLA

F.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ONEIDA COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED: 05/27/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Cully & Wissore), Carbondale, Illinois, for claimant.

John C. Artz (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (07-BLA-5694) of Administrative Law Judge Richard A. Morgan denying benefits 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 claimant's request for modification of the denial of a subsequent claim filed on March 12, 2001.[1] In the initial Decision and Order,

[1] Claimant initially filed a claim for benefits on June 27, 1973. Director's Exhibit 1. The district director denied the claim on September 4, 1980 because claimant did not establish any of the elements of entitlement. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Administrative Law Judge Gerald M. Tierney credited claimant with twenty-six years of coal mine employment,[2] and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Considering the merits of the claim, Judge Tierney found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Tierney denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Tierney's finding pursuant to 20 C.F.R. §725.309(d) as unchallenged on appeal. [*F.S.*] *v. Oneida Coal Co.*, BRB No. 05-0959 BLA (Apr. 28, 2006)(unpub.). The Board also affirmed Judge Tierney's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* The Board, therefore, affirmed Judge Tierney's denial of benefits. *Id.*

Claimant requested modification on January 30, 2007. Director's Exhibit 69. In a Decision and Order dated May 13, 2008, Administrative Law Judge Richard A. Morgan (the administrative law judge) found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that all of the evidence of record, when weighed together, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Consequently, the administrative law judge found that the evidence did not demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, denied claimant's request for modification.

On appeal, claimant argues that the administrative law judge erred in finding that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 living 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Claimant initially argues that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The new x-ray evidence consists of two interpretations of a September 19, 2007 x-ray. Dr. Ahmed, a B reader and Board-certified radiologist, interpreted this x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, and Dr. Wiot, an equally qualified physician, interpreted the x-ray as negative for the disease. Employer's Exhibit 2. Based upon the equal radiological qualifications of the doctors, the administrative law judge permissibly found that the new x-ray evidence was "in equipoise," and, therefore, did not satisfy claimant's burden of establishing the existence of pneumoconiosis by a preponderance of the evidence.[4] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); Decision and Order at 16. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

[4] The administrative law judge adopted Administrative Law Judge Gerald M. Tierney's finding that the former x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), a finding that was affirmed by the Board. Decision and Order at 16. Claimant does not challenge the administrative law judge's evaluation of the previously submitted x-ray evidence. *See Skrack*, 6 BLR at 1-711.

Claimant next contends that the administrative law judge erred in his consideration of the new medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[5] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The new medical opinion evidence consists of updated medical reports from Drs. Trenbath, Rasmussen, Cohen, and Zaldivar.[6] In a report dated December 15, 2006, Dr. Trenbath opined that claimant does not suffer from asthma. Director's Exhibit 69. Dr. Trenbath diagnosed severe chronic obstructive pulmonary disease (COPD) and exacerbation of COPD with wheezing. *Id.* Because Dr. Trenbath did not explain how the underlying medical evidence supported his diagnoses, the administrative law judge found that the doctor's opinion was not well-reasoned. Decision and Order at 19.

[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). The administrative law judge accurately noted that no new medical opinion evidence was submitted that addressed the issue of clinical pneumoconiosis. Decision and Order at 18 n.33. The administrative law judge, therefore, adopted Judge Tierney's prior finding that the former medical opinion evidence did not establish the existence of clinical pneumoconiosis. *Id.* Claimant does not challenge this finding. *See Skrack*, 6 BLR at 1-711.

[6] Drs. Trenbath, Rasmussen, Cohen, and Zaldivar previously submitted medical opinions in this case. In the previous decision, Judge Tierney found that those medical opinions did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Director's Exhibit 63. The Board held that Judge Tierney properly found that while Dr. Trenbath diagnosed chronic obstructive pulmonary disease (COPD) and emphysema, the doctor did not relate either of these conditions to coal dust exposure. Director's Exhibit 68. The Board, therefore, held that Dr. Trenbath's diagnoses did not support a finding of legal pneumoconiosis. *Id.*

The Board further held that Judge Tierney acted within his discretion in finding that, standing alone, Dr. Rasmussen's diagnoses were not well-reasoned because, other than identifying claimant's "risk factors," the doctor failed to provide an adequate rationale for his conclusions. Director's Exhibit 68. The Board also held that Judge Tierney permissibly concluded that the opinions of Drs. Cohen and Zaldivar were of equal probative value because they possessed equal qualifications, both made valid points, and both supplied evidence to support their conclusions. *Id.* The Board, therefore, affirmed Judge Tierney's finding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Dr. Rasmussen opined that claimant does not suffer from bronchial asthma. Director's Exhibit 69; Claimant's Exhibit 2. Dr. Rasmussen opined that claimant suffers from chronic obstructive lung disease due to coal mine dust exposure and cigarette smoking. *Id.* The administrative law judge accorded less weight to Dr. Rasmussen's opinion for several reasons, including that he was not as well-qualified as were Drs. Cohen and Zaldivar. Decision and Order at 18-19.

The administrative law judge next considered the new medical reports of Drs. Cohen and Zaldivar. Dr. Cohen opined that there was inadequate documentation to support a diagnosis of asthma. Director's Exhibit 71; Claimant's Exhibit 3. Dr. Cohen opined that claimant suffers from COPD and chronic bronchitis that was caused by his coal mine dust exposure. Claimant's Exhibit 3. Dr. Cohen opined that claimant's cigarette smoking "likely was not a contributory factor." *Id.*

Based in part upon the results of a new physical examination, Dr. Zaldivar prepared an October 9, 2007, report, wherein he opined that claimant does not suffer from legal pneumoconiosis, but suffers from non-occupationally-acquired asthma. Employer's Exhibit 1. Dr. Zaldivar based his diagnosis of asthma on several factors, including: claimant's childhood history of asthma; claimant's history of exacerbation of breathing difficulties when confronted with strong odors, perfumes, and other agents; claimant's medication with Advair, Maxair, Flovent, and a Proventil inhaler, which are treatments for asthma; claimant's improvement when given bronchodilator medication; and claimant's normal diffusion capacity. *Id.* In a supplemental report dated February 11, 2008, Dr. Zaldivar reiterated that his diagnosis of asthma was not based upon any single factor, but rather upon consideration of all factors making up claimant's case. Employer's Exhibit 4.

Although the administrative law judge found that the opinions of Drs. Cohen and Zaldivar were both well-documented and well-reasoned, he accorded greater weight to Dr. Zaldivar's opinion because Dr. Zaldivar supported his opinion with citations to relevant medical literature. Decision and Order at 20. The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant argues that the administrative law judge erred in his consideration of Dr. Trenbath's opinion. The administrative law judge found that Dr. Trenbath did not provide any explanation for how the underlying documentation supported his diagnosis of COPD. Decision and Order at 19. Substantial evidence supports this finding. The administrative law judge, therefore, permissibly determined that Dr. Trenbath's opinion

was not sufficiently reasoned.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Claimant next contends that the administrative law judge erred in his consideration of Dr. Rasmussen's opinion. The administrative law judge accorded less weight to Dr. Rasmussen's opinion because he found that Dr. Rasmussen was less qualified than Drs. Cohen and Zaldivar. The administrative law judge explained that while Drs. Cohen and Zaldivar are Board-certified in Internal Medicine and Pulmonary Disease, Dr. Rasmussen is Board-certified in Internal Medical only. Decision and Order at 18.

Claimant contends that the administrative law judge failed to consider Dr. Rasmussen's "other credentials that make him specially qualified." Claimant's Brief at 8. Claimant argues that because Dr. Rasmussen conducted the Department of Labor-sponsored physical examination in this case, he is obviously qualified to render an opinion in black lung claims. *Id.* at 8-9. The administrative law judge, however, did not find that Dr. Rasmussen was not qualified to render an opinion. Rather, the administrative law judge found that the opinions of Drs. Cohen and Zaldivar were entitled to greater weight based upon their superior qualifications.

Claimant cites several published and unpublished decisions recognizing Dr. Rasmussen's "excellent reputation and impressive credentials in the area of occupational medicine." Claimant's Brief at 9; *see e.g.*, *Eagle v. Armco Inc.*, 943 F.2d 509, 510-11, 15 BLR 2-201, 2-203 (4th Cir. 1991). Claimant also cites the 1972 legislative history of the Black Lung Benefits Act, recognizing that Dr. Rasmussen "has probably made more extensive examinations of miners than any other physician." *Id.* Finally, claimant notes that Dr. Rasmussen has published numerous articles on coal workers' pneumoconiosis. *Id.*

The Board is not empowered to substitute its opinion for that of the administrative law judge regarding the weight to accord the conflicting medical evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In this case, the administrative law judge rationally accorded greater weight to the opinions of Drs. Cohen and Zaldivar because they demonstrated their expertise in the field of Pulmonary Disease by satisfying the requirements to become Board-certified in that subspecialty. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Dillon v. Peabody Coal Co.*,

[7] Moreover, because Dr. Trenbath did not attribute claimant's COPD to his coal mine dust exposure, his opinion does not support a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

11 BLR 1-113 (1988); Decision and Order at 18. Consequently, we affirm the administrative law judge's crediting of the opinions of Drs. Cohen and Zaldivar, over that of Dr. Rasmussen, based upon their superior qualifications.[8]

We also reject claimant's contention that the administrative law judge erred in crediting Dr. Zaldivar's opinion, that claimant suffers from non-occupationally-acquired asthma, over Dr. Cohen's opinion, that claimant suffers from COPD caused by his coal mine dust exposure. The administrative law judge noted that Dr. Zaldivar cited medical literature in support of his finding that claimant's normal diffusing capacity was consistent with asthma. Decision and Order at 19-20. Conversely, the administrative law judge observed that Dr. Cohen did not provide any such support for his statement that a normal diffusing capacity would also be consistent with chronic bronchitis, the form of COPD that he diagnosed in this case. *Id.* at 20. Because Dr. Zaldivar cited to medical literature in support of his opinion, the administrative law judge permissibly accorded greater weight to his opinion. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Clark*, 12 BLR at 1-155.

The administrative law judge also found that Dr. Zaldivar's opinion that claimant suffers from non-occupationally-acquired asthma was well-reasoned, noting that Dr. Zaldivar based his opinion upon pulmonary function study results, a normal diffusion capacity, arterial blood gas studies, a history of wheezing and shortness of breath exacerbated by odors and the weather, and a history of childhood asthma. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 20; Employer's Exhibits 1, 4. Because it is supported by substantial evidence, we affirm the administrative law judge's decision to accord greater weight to Dr. Zaldivar's opinion.

Claimant's remaining statements regarding the opinions of his experts amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *Anderson*, 12 BLR at 1-113. In his consideration of whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly addressed the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. We, therefore,

[8] Because the administrative law judge provided a proper basis for according less weight to Dr. Rasmussen's opinion, *i.e.*, that he was not as highly qualified as the other physicians of record, we need not address claimant's remaining arguments regarding the weight accorded to Dr. Rasmussen's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R §718.202(a)(4).

Because the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), *see Compton*, 211 F.3d at 211, 22 BLR at 2-174, we affirm the administrative law judge's denial of claimant's request for modification pursuant to 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order 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