BRB No. 03-0465 BLA

SEBERT OSBORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 04/22/2004
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 Request for Modification and Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

William S. Mattingly and Dorthea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

SMITH, Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order – Denying Request for Modification

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[1]Claimant is Sebert Osborne, the miner, who filed his claim for benefits on April 1, 1998. Director's Exhibit 1. Administrative Law Judge Rudolf L. Jansen denied claimant's claim for benefits on June 12, 2000. Director's Exhibit 47. On June 13, 2001, the Benefits Review Board affirmed Judge Jansen's denial. Director's Exhibit 66. Claimant requested modification and submitted new evidence on August 22, 2001. Director's Exhibits 57, 59. The district director denied claimant's request for

and Denying Benefits (02-BLA-0375)[2] of Administrative Law Judge Edward Terhune Miller in a miner's 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).[3] The administrative law judge credited the miner with over twenty-six years of coal mine employment. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the newly submitted evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but 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). Decision and Order at 8-10. Therefore, the administrative law judge found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[4] Decision and Order at 10. Accordingly, benefits were denied on modification.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis and in failing to comply with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) pursuant to 20 C.F.R. §718.202(a). Claimant's Brief at 4-6. Claimant additionally asserts that the administrative law judge erred in failing to find that his total respiratory disability is due to pneumoconiosis. Claimant's Brief at 6-7. Employer responds, urging affirmance of the denial of benefits.

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modification, and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 61, 63.

[2]As noted by the Director, Office of Workers' Compensation Programs, the administrative law judge inadvertently listed the incorrect case number on his Decision and Order. The correct case number is 02-BLA-0375, as indicated above.

[3]The Department of Labor has 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[5]

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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the old 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. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In the prior decision, Administrative Law Judge Rudolf L. Jansen denied claimant's claim for benefits because claimant failed to establish the existence of pneumoconiosis and that his total respiratory disability was due to pneumoconiosis. Director's Exhibit 47. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability due to pneumoconiosis pursuant to Section 718.204(c).

Pursuant to 20 C.F.R. §718.202(a)(1), the new x-ray evidence consists of five x-ray readings of two x-rays dated July 2, 2001 and September 16, 2002. This new evidence contains one positive x-ray interpretation of the July 2, 2001 x-ray rendered by Dr. Cappiello, who is a B-reader[6] and a Board-certified radiologist, and one positive x-

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[5]We affirm the administrative law judge's findings that claimant established twenty-six years of coal mine employment and that there was no mistake in fact pursuant to 20 C.F.R. §725.310 (2000) inasmuch as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm, as unchallenged, the administrative law judge's findings that, based on the new evidence, pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) and total respiratory disability was established pursuant to 20 C.F.R. §718.204(b). *Id.*

ray interpretation of the September 16, 2002 x-ray by Dr. Castle, who is a B-reader. Director's Exhibits 59; Employer's Exhibit 11. Drs. Scatarige, Scott, and Wheeler, who are B-readers and Board-certified radiologists, interpreted the September 16, 2002 x-ray as negative. Employer's Exhibit 9. The administrative law judge noted the two positive x-ray interpretations, but found that "Dr. Castle's discussion of this x-ray film [in his deposition testimony] militates against a finding that his x-ray reading establishes pneumoconiosis."[7] Decision and Order at 8. Therefore, the administrative law judge concluded that only Dr. Cappiello's reading of the July 2, 2001 x-ray is positive for pneumoconiosis. *Id.*

In weighing the remaining x-ray evidence, the administrative law judge noted that three physicians, who are B-readers and Board-certified radiologists, read the September 16, 2002 x-ray as negative for pneumoconiosis. *Id.* Moreover, the administrative law judge stated that "the conclusions of these physicians . . . are supported by the other medical evidence, particularly the physicians' opinions . . . ." *Id.* Accordingly, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis and a change in conditions based on the new x-ray evidence at Section 718.202(a)(1) because the "better supported negative x-ray interpretations outweigh the one positive interpretation." *Id.* at 8, 10.

Claimant contends that the administrative law judge erred in accepting "employer's physicians [sic] contentions that the claimant could never be found to be suffering from pneumoconiosis unless the employer's physicians admitted that the markings on the claimant's x-rays were pneumoconiosis." Claimant's Brief at 5. We reject claimant's contention. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) by relying on the majority of the x-ray interpretations by physicians' with superior radiological qualifications. The administrative law judge further found that the x-ray readings of

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[6]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[7]Dr. Castle classified the September 16, 2002 x-ray as 1/0, t/s, Employer's Exhibit 11, but testified that the changes on this x-ray are not of coal workers' pneumoconiosis, but are changes typically present in people with an extensive smoking history, Employer's Exhibit 11 at 17-19.

these physicians were supported by the medical opinion evidence which, as the administrative law judge noted, "discuss the physiologic testing, and conclude that those tests support a finding of disability due to cigarette smoke induced problems, but not the existence of pneumoconiosis." Decision and Order at 8. The administrative law judge therefore did not reject the positive x-ray evidence because employer's physicians found the x-ray evidence to be negative for pneumoconiosis. Rather, the administrative law judge rejected the positive x-ray evidence because it is contradicted by the medical opinion evidence which is based on other objective medical evidence in addition to x-ray evidence. Moreover, inasmuch as the administrative law judge considered the medical opinion evidence when weighing the x-ray reports, there is no merit in claimant's contention that the administrative law judge failed to comply with the Fourth Circuit's holding in *Compton* that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *Compton*, 211 F.3d at 211, 22 BLR at 2-174; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

In rendering his Section 718.202(a)(1) finding, the administrative law judge erred, however, in considering Dr. Castle's testimony regarding his interpretation of the September 16, 2002 x-ray at Section 718.202(a)(1). In *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*), the Board held that a physician's comments that address the source of pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis at Section 718.202(a)(1), but should be considered at 20 C.F.R. §718.203. Nonetheless, we hold that the administrative law judge's error in this regard is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because substantial evidence supports the administrative law judge's finding that the September 16, 2002 x-ray is negative for pneumoconiosis, even if the administrative law judge considered Dr. Castle's reading of this x-ray to be positive for pneumoconiosis.[8] *See Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and a change in conditions based on the new x-ray evidence.

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[8]Drs. Scatarige, Scott, and Wheeler, who are B-readers and Board-certified radiologists, read the September 16, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 9. Dr. Castle, a B-reader, classified this x-ray as 1/0, t/s. Employer's Exhibit 11.

Pursuant to Section 718.202(a)(4), the administrative law judge found that "Dr. Castle, who examined claimant, [and] Drs. Spagnolo, Dahhan, and Fino, who reviewed the medical records, concluded in reasoned opinions based on objective evidence that Claimant does not have pneumoconiosis." Decision and Order at 9. As the administrative law judge properly noted, none of the new medical opinions in the record supports a finding that claimant has pneumoconiosis. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and a change in conditions based on the new medical opinion evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Because the administrative law judge properly considered the new x-ray and medical opinion evidence together in accordance with *Compton*, we also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis or a change in conditions based on the new evidence pursuant to Section 718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

The administrative law judge next considered whether claimant could establish that his total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[9] Regarding the newly submitted medical opinions, the administrative law judge noted that Drs. Spagnolo, Dahhan, Fino, and Castle all concluded that claimant's total respiratory disability is not due to his coal mine employment, Employer's Exhibits 4, 5, 6, 10, 11. Decision and Order at 10. The administrative law judge found that claimant failed to establish total disability due to pneumoconiosis based on the opinion of Dr. Castle, as supported by the opinions of Drs. Spagnolo, Dahhan, and Fino. Decision and Order at 10. Claimant asserts that the administrative law judge erred in relying on the opinions of Drs. Castle, Spagnolo, Fino, and Dahhan pursuant to Section 718.204(c) inasmuch as these physicians' conclusions regarding the cause of claimant's disability are based on their erroneous assumption that claimant does not suffer from pneumoconiosis. Claimant's Brief at 6-7. Contrary to claimant's contention, these physicians did not base their findings on the *erroneous* assumption that claimant does not suffer from pneumoconiosis because the administrative law judge in this case found, in fact, that claimant failed to establish the existence of pneumoconiosis. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). Because claimant has not submitted

[9]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) in the new regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the new regulations.

any new evidence which is supportive of a finding that claimant's total respiratory disability is due to his pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis and a change in conditions by the newly submitted medical opinion evidence. *See* 20 C.F.R. §718.204(c); *Ondecko*, 114 S.Ct. at 2259, 18 BLR at 2A-12; *Kuchwara*, 7 BLR at 1-170.

Based on the administrative law judge's findings, we affirm his denial of modification pursuant to Section 725.310(a) (2000) because the administrative law judge rationally determined that claimant failed to establish a change in conditions. *See* discussion, *supra*; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see also 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).

Accordingly, the administrative law judge's Decision and Order – Denying Request for Modification and Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with the majority that the administrative law judge's decision should be affirmed. I disagree only with the majority's assertion that when weighing the x-ray evidence pursuant to 20 C.F.R. §718.202(a), the administrative law judge erred in considering Dr. Castle's testimony regarding his x-ray reading. Because Dr. Castle testified that the x-ray showed only smoke induced changes in the lungs, not changes induced by dust exposure, *i.e.*, pneumoconiosis, the doctor erred in giving the reading an ILO classification under *Guidelines for the Use of ILO International Classification of*

Radiographs of Pneumoconioses (Rev. ed. 1980). As the title indicates, this classification is for pneumoconiosis exclusively, *i.e.*, changes in the lungs caused by dust exposure. Since the doctor's testimony showed that he was mistaken in providing an ILO classification, the reading was not properly classified and the administrative law judge was obliged to exclude it from consideration when weighing the evidence at Section 718.202(a)(1).

The administrative law judge's determination is not inconsistent with *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*). In that case Dr. Castle classified the x-ray as 1/1 and stated that it did not show coal workers' pneumoconiosis, and that the etiology was unknown. The Board held that the doctor's statements regarding the etiology of the pneumoconiosis was irrelevant to the weighing of evidence at Section 718.202(a); such testimony should be considered when determining whether the pneumoconiosis arose out of coal dust exposure pursuant to Section 718.203. In *Cranor*, there was no dispute about whether the x-ray showed pneumoconiosis, the dispute was about the cause of pneumoconiosis, which is properly considered at Section 718.203. In the case at bar, the doctor testified that the x-ray did not show dust induced lung disease, for that reason it was error to assign the x-ray reading an ILO classification and the administrative law judge properly excluded it from consideration of the evidence pursuant to Section 718.202(a)(1). In all other respects I concur in the majority's decision.

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REGINA C. McGRANERY
Administrative Appeals Judge