

BRB No. 03-0549 BLA

BILLY J. RICHARDSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SEA B MINING COMPANY)	DATE ISSUED: 05/28/2004
)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Billy J. Richardson, Swords Creek, Virginia, *pro se*.¹

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (03-BLA-0004) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal

¹Brenda Yates, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant, but is not representing him on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² This case involves a request for modification of a duplicate claim. The pertinent procedural history of this case is as follows: Claimant filed his initial claim on February 28, 1994. Director's Exhibit 2. The district director denied this claim on August 8, 1994 and September 21, 1994 because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibits 17, 22. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on December 27, 1995. Director's Exhibit 1. On June 23, 1997, Administrative Law Judge Richard A. Morgan issued a Decision and Order denying benefits. Director's Exhibit 40. Although Judge Morgan found that claimant established a material change in conditions, he found that claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id.* The Board affirmed Judge Morgan's denial of benefits. *Richardson v. Sea "B" Mining Co.*, BRB No. 97-1459 BLA (June 18, 1998)(unpub.). Claimant filed a request for modification on September 23, 1998. Director's Exhibit 43. In a Decision and Order dated March 23, 2000, Administrative Law Judge Richard K. Malamphy found that claimant failed to establish the existence of pneumoconiosis. Judge Malamphy, therefore, found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Accordingly, Judge Malamphy denied benefits. Director's Exhibit 72. By Decision and Order dated April 19, 2001, the Board held that Judge Malamphy rationally found that the existence of pneumoconiosis was not established. The Board, therefore, held that Judge Malamphy properly found that "a basis for modification of the prior claim" was not established. Consequently, the Board affirmed Judge Malamphy's denial of benefits. *Richardson v. Sea B Mining Co.*, BRB No. 00-0688 BLA (Apr. 19, 2001)(unpub.).

Claimant filed the most recent request for modification on March 12, 2002. Director's Exhibit 77. In a Decision and Order Denying Modification dated April 25, 2003, the administrative law judge adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).³ The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the

²The 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.

³The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 at 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 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. *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). In the prior decision, Judge Malamphy denied benefits because he found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and thus, claimant failed to establish modification, a finding subsequently affirmed by the Board. Director's Exhibit 72. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence (*i.e.*, the evidence submitted since Judge Malamphy's denial of benefits) was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

The newly submitted x-ray evidence consists of nineteen interpretations of six x-rays dated May 8, 2001, January 7, 2002, April 18, 2002, September 17, 2002, December 9, 2002 and December 16, 2002. Of these nineteen newly submitted x-ray interpretations, seventeen readings are negative for pneumoconiosis, Director's Exhibits 85, 86; Employer's Exhibits 4-14, and two readings are positive for pneumoconiosis, Director's Exhibit 77; Claimant's Exhibit 1. The administrative law judge properly accorded greater weight to the negative x-ray readings that were provided by physicians who are B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Drs. Miller and Forehand provided the positive readings of an x-ray dated January 7, 2002. The administrative law judge stated that "Dr. Miller is the only [B]oard certified 'B' reader to make a finding that [claimant] has pneumoconiosis based on [x]-ray evidence." Decision and Order at 18. Dr. Miller is a B reader and a Board-certified radiologist. Although Dr. Forehand is a B reader, he is not a Board-certified

radiologist. However, Drs. Scatarige, Scott and Wheeler, B readers and Board-certified radiologists, read the January 7, 2002 x-ray as negative for pneumoconiosis. In addition, the negative readings of the newly submitted x-rays dated May 8, 2001, April 18, 2002, September 17, 2002, December 9, 2002 and December 16, 2002 were provided by physicians who are B readers and/or Board-certified radiologists. Moreover, since seventeen of the nineteen newly submitted x-ray readings of record are negative for pneumoconiosis, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

In addition to considering the qualifications of the physicians who provided x-ray readings, the administrative law judge also indicated that he applied the "later evidence" rule to accord greater weight to the negative readings of x-rays dated April 18, 2002, September 17, 2002, December 9, 2002 and December 16, 2002 than to the positive readings of the January 7, 2002 x-ray by Drs. Forehand and Miller. The administrative law judge stated, "I also note that the January 7, 2002 [x]-ray was followed by a number of other studies, all of which were read as not indicative of pneumoconiosis." Decision and Order at 18. The administrative law judge also stated, "I accept that the more recent [x]-rays are relevant to show that no pneumoconiosis is established on [x]-ray." *Id.* at 19. Based on the administrative law judge's application of the "later evidence" rule, the evidence, taken at face value, shows that claimant's condition has improved. However, in *Adkins*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the reasoning of the "later is better" theory cannot apply in this situation because "[i]t is impossible to reconcile the evidence." *Adkins*, 958 F.2d at 51, 16 BLR at 2-65. Nonetheless, since the administrative law judge properly accorded greater weight to the negative readings of the January 7, 2002 x-ray by Drs. Scatarige, Scott and Wheeler than to the positive readings of the same x-ray by Drs. Forehand and Miller, based on his consideration of the qualifications of the physicians, *Worhach*, 17 BLR at 1-108; *Roberts*, 8 BLR at 1-213, we hold that any error by the administrative law judge in applying the "later evidence" rule in weighing the x-ray evidence is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy or autopsy evidence. Additionally, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. See 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. See 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim;

therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Next, the administrative law judge found the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Castle, Fino and Forehand. Dr. Forehand opined that claimant suffers from pneumoconiosis, Director's Exhibit 77, while Drs. Castle and Fino opined that claimant does not suffer from the disease, Director's Exhibit 85; Employer's Exhibits 14, 15. The administrative law judge properly accorded greater weight to the opinions of Drs. Castle and Fino than to the contrary opinion of Dr. Forehand because they are better reasoned and documented.⁴ *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to the opinions of Drs. Castle and Fino based upon of their superior qualifications.⁵ *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

⁴The administrative law judge stated that “Drs. Castle and Fino better explained how all of the evidence they developed and reviewed supported their conclusions.” Decision and Order at 20. The administrative law judge specifically noted that “[b]oth Dr. Castle and Dr. Fino, who also examined the [c]laimant, explain that the cause of the [c]laimant’s acknowledged respiratory problems is asthma and/or asthmatic bronchitis.” *Id.* at 19. As indicated by the administrative law judge, the opinions of Drs. Castle and Fino are based on examinations and reviews of medical documents, including Dr. Forehand’s medical data. *Id.* at 14, 15, 19-20; Director’s Exhibit 85; Employer’s Exhibits 14, 15. In contrast, the administrative law judge stated, “I note that although I accept that Dr. Forehand, as treating physician[,] should be entitled to considerable weight, [he] fails to note the extent and intensity of asthma in his report.” Decision and Order at 19. In addition, the administrative law judge stated that “Dr. Forehand did not examine the new [x]-ray evidence, the test results obtained by Drs. Fino and Castle, and he also relied on his interpretive reading, and I note that he is not as qualified to render an opinion as are the [B]oard certified ‘B’ reader radiologists.” *Id.* Therefore, the administrative law judge concluded that “[Dr. Forehand’s] opinion is also not well reasoned as he relies on a faulty predicate.” *Id.*

⁵The administrative law judge stated that “[b]oth [Drs. Castle and Fino] possess excellent credentials in the field of pulmonary disease.” Decision and Order at 20. The record indicates that Drs. Fino and Castle are Board-certified in internal medicine and pulmonary disease. Director’s Exhibits 26, 38, 61, 62, 85; Employer’s Exhibit 15. The record does not indicate that Dr. Forehand is Board-certified in internal medicine and pulmonary disease.

The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion is applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). Further, although the Fourth Circuit has recognized that the opinions of treating and examining physicians deserve special consideration, the court has held that there is no rule that a treating or examining physician must be accorded greater weight than the opinions of other physicians. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-2-276; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). In *Held*, the court stated that while the opinion of the miner's treating physician may have been entitled to special consideration, it was not entitled to the great weight accorded to it by the administrative law judge because the treating physician's credentials did not compare to the other top physicians. *Held*, 314 F.3d at 188, 22 BLR at 2-572. In this case, although the administrative law judge considered Dr. Forehand's status as claimant's treating physician, he did not specifically consider Dr. Forehand's opinion in light of the criteria provided in 20 C.F.R. §718.104(d). Nonetheless, since the administrative law judge properly accorded greater weight to the opinions of Drs. Castle and Fino than to Dr. Forehand's contrary opinion because they are better reasoned and documented, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294, and because of their superior qualifications, *Martinez*, 10 BLR at 1-26; *Dillon*, 11 BLR at 1-114; *Wetzel*, 8 BLR at 1-141, we hold that any error by the administrative law judge in this regard is harmless, *Larioni*, 6 BLR at 1-1278. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni*, 17 BLR at 1-84.

Modification may also be based upon a mistake in a determination of fact. 20 C.F.R. §725.310 (2000). The Fourth Circuit has held that a claimant 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 BLR 2-26 (4th Cir. 1993). By Decision and Order dated April 19, 2001, the Board affirmed Judge Malamphy's findings at 20 C.F.R. §718.202(a)(1)-(4). *Richardson v. Sea B Mining Co.*, BRB No. 00-0688 BLA (Apr. 19, 2001)(unpub.). Because claimant also represented himself during the previous appeal, the Board undertook a substantial evidence review in affirming Judge Malamphy's findings at 20 C.F.R. §718.202(a)(1)-(4). *Id.*

In considering whether there was a mistake in a determination of fact, the administrative law judge stated, "[a]fter review of the entire claim, there was no mistake in a determination of fact or law in the prior record." Decision and Order at 20.

We find no error in the administrative law judge's determination that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge