BRB No. 09-0110 BLA

E.R., JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JOHNSON COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	DATE ISSUED: 10/26/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Employer's Request for Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (K& L Gates LLP), Washington, D.C., for employer.

Michael J. Rutledge and Jeffrey S. Goldberg (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-BLA-0807) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying employer's request for modification of an award of 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). The extensive procedural history of this case is set out in detail in the Board's previous Decisions and Orders. *See* [*E.R., Jr.*] *v. Johnson Coal Co.*, BRB No. 06-0267 BLA (Jan. 30, 2007)(unpub.); [*E.R., Jr.*] *v. Johnson Coal Co.*, BRB No. 02-0366 BLA (Sept. 3, 2003)(Order on Recon.)(*en banc*); [*E.R., Jr.*] *v. Johnson Coal Co.*, BRB No. 02-0366 BLA (Jan. 24, 2003)(unpub.); [*E.R., Jr.*] *v. Johnson Coal Co.*, BRB No. 00-0782 BLA (June 20, 2001)(unpub.); [*E.R., Jr.*] *v. Johnson Coal Co.*, BRB No. 97-1140 BLA (May 15, 1998)(unpub.); [*E.R., Jr.*] *v. Johnson Coal Co.*, BRB No. 93-2272 BLA (Nov. 30, 1994)(unpub.). In the last appeal, the Board affirmed, in part, and vacated, in part, the administrative law judge's Decision and Order denying modification of the award of benefits rendered by Administrative Law Judge Richard K. Malamphy, and remanded the case for a reevaluation and weighing of the evidence relevant to the issues of total respiratory disability and disability causation pursuant to 20 C.F.R. §718.204(b), (c). [*E.R., Jr.*] *v. Johnson Coal Co.*, BRB No. 06-0267 BLA (Jan. 30, 2007)(unpub.). On remand, the administrative law judge found that employer had not alleged a change in conditions, and that the award of benefits contained no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (1999).[1] In the alternative, the administrative law judge found that granting modification would not render justice under the Act. Accordingly, the administrative law judge denied employer's request for modification.

On appeal, employer challenges the administrative law judge's denial of modification, arguing that the weight of the evidence of record is insufficient to support a finding of total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c).

[1] The underlying claim herein was filed on April 11, 1989. 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations. However, 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; rather, the version of the regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c); 65 Fed. Reg. 80,057 (2000).

Employer also challenges the administrative law judge's alternative finding, that granting modification would not render justice under the Act. Claimant responds, urging affirmance of the administrative law judge's denial of modification. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge's finding, that granting modification would not render justice under the Act, is not ripe for review. Employer has filed a reply brief in support of its position.

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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that the weight of the evidence of record supports a finding of total respiratory disability at Section 718.204(b), arguing that the administrative law judge failed to properly weigh the credibility of the medical opinion evidence against the non-qualifying results of the objective studies of record. In this regard, employer contends that the administrative law judge erred in crediting the opinions of Drs. Sundaram and Potter, that claimant is totally disabled from performing his usual coal mine employment, over the contrary opinions of Drs. Fino and Westerfield, submitted by employer as evidence demonstrating that the prior finding of total disability was a mistake in fact. Employer alleges that the opinions of Drs. Fino and Westerfield are consistent with the earlier medical opinions of record in this case, and contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), by failing to consider the relative qualifications of the physicians and the underlying bases and explanations for their conclusions. Employer asserts that the administrative law judge failed to provide a valid basis for discounting Dr. Westerfield's opinion, erred in analyzing Dr. Fino's opinion, and erred in his consideration of the prior medical evidence. Employer's Brief at 26-38. We disagree.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Initially, we reject employer's

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1, 2.

contention that the administrative law judge misapplied the burden of proof on modification.[3] Contrary to employer's arguments, claimant does not have the burden of reestablishing his entitlement to benefits. Rather, employer, as the proponent of an order terminating an award of benefits, bears the burden of disproving at least one element of entitlement. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996). In this case, after finding that the objective evidence of record did not support a finding of total respiratory disability at Section 718.204(b)(2)(i)-(iii), the administrative law judge accurately summarized the conflicting medical opinions, including the respective qualifications of the physicians and the underlying bases for their conclusions, and permissibly credited the opinions of claimant's treating physicians, Drs. Sundaram and Potter,[4] in finding that employer failed to meet its burden of proving that a mistake in a determination of fact existed in Judge Malamphy's prior finding of total disability at Section 718.204(b)(2)(iv). *See Rambo*, 521 U.S. at 121; *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). In so finding, the administrative law judge reasonably determined that the opinions of Drs. Anderson, Myers, Williams, Lane, Broudy, Wright, and Jarboe, that relied on "evidence gathered in 1989 or earlier," were entitled to diminished weight, as they were minimally probative on the issue of total disability in light of Judge Malamphy's determination that claimant became totally disabled due to pneumoconiosis in 1993. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(*en banc*); Decision and Order on Remand at 20; Director's Exhibits 25, 29, 65. Similarly, the administrative law judge properly determined that because Drs. Baker and Dineen, who examined claimant in 1992, did not have access to more recent data, that fact "detracts somewhat from their opinions as well." Decision and Order on Remand at 20. After reviewing the nature and extent of Dr. Sundaram's treatment of claimant, and his familiarity with claimant's last job working on a belt line, operating a head drive machine, the administrative law judge acted within his discretion in agreeing with Judge

[3] Employer asserts that a mistake in a determination of fact is established as a matter of law if employer's evidence on modification is of equal or superior credibility to claimant's evidence. Employer's Brief at 26.

[4] Dr. Sundaram was claimant's treating physician for approximately ten years starting in August 1992. After Dr. Sundaram left the area, Dr. Potter became claimant's treating physician. Director's Exhibit 27, 65; 2004 Hearing Transcript at 20-21, 23-24. The Board affirmed Administrative Law Judge Malamphy's finding that Dr. Sundaram's opinion was reasoned, and determined that he had discretion to assign deference to the opinion based on Dr. Sundaram's status as claimant's treating physician, given that he treated claimant during hospitalizations beginning in 1993, and based on the consistency and frequency of later treatment records and the lack of contrary evidence. [*E.R., Jr.*] *v. Johnson Coal Co.*, BRB No. 97-1140 BLA (May 15, 1998)(unpub.).

Malamphy, as affirmed by the Board, that Dr. Sundaram's opinion was well reasoned and entitled to enhanced weight, based on his status as the miner's treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); 20 C.F.R. §718.104(d); Decision and Order on Remand at 23. The administrative law judge also permissibly found that Dr. Potter's assessment of disability, based on his examination and treatment of claimant, and his consideration of various test results in conjunction with the exertional requirements of claimant's usual coal mine employment, supported claimant's entitlement to benefits and further established no mistake in a prior determination of fact. *Id.* By contrast, the administrative law judge acted within his discretion in finding that the opinion of Dr. Westerfield, that there was no evidence of respiratory disability due to coal dust exposure, was entitled to less weight because the physician conflated the issues of disability and disability causation, but did not affirmatively state that claimant retained the respiratory capacity to perform his usual coal mine employment, nor did he identify claimant's job title, employment duties, and the physical requirements thereof. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); Decision and Order on Remand at 21; Director's Exhibits 85, 88, Employer's Exhibits 1, 3, 4, 6. The administrative law judge also determined that the opinion of Dr. Fino, that the valid pulmonary function study and blood gas study values obtained when claimant was not ill demonstrated that claimant had no respiratory impairment, was inconsistent with the findings of at least some degree of impairment by the majority of physicians. Finding that Dr. Fino's disability assessment was largely a restatement of the objective tests, the administrative law judge permissibly concluded that his opinion was unpersuasive and entitled to little weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order on Remand at 8, 22; Director's Exhibits 83, 89; Employer's Exhibits 2, 5. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish a mistake pursuant to Section 725.310 (1999) in Judge Malamphy's prior determination that the weight of the evidence established total respiratory disability at Section 718.204(b), notwithstanding claimant's non-qualifying objective test results.

Employer also challenges the administrative law judge's determination that the weight of the evidence supports a finding of disability causation at Section 718.204(c). Specifically, employer asserts that Dr. Westerfield's opinion, that claimant's respiratory impairment and symptoms are attributable entirely to smoking, is fully consistent with claimant's medical history, and is "at least as well reasoned as the causation opinions of Drs. Potter and Sundaram." Employer's Brief at 40. Thus, employer maintains that the administrative law judge failed to provide valid reasons for crediting the opinions of Drs. Sundaram and Potter over the contrary opinion of Dr. Westerfield. Employer's Brief at 38-41. Employer's arguments are without merit. While Dr. Westerfield stated that "cigarette smoking is the number one cause of chronic obstructive pulmonary disease," and that claimant's "symptoms are clearly due to chronic obstructive pulmonary disease

and not related to, caused by, or aggravated by coal worker's pneumoconiosis," Employer's Exhibit 6, the administrative law judge permissibly found that Dr. Westerfield's opinion was insufficient to meet employer's burden of demonstrating a mistake of fact, as it was "wholly conclusory and not supported by any reasoning." Decision and Order on Remand at 24; *see Clark*, 12 BLR at 1-155. Noting that the Board previously affirmed Judge Malamphy's finding, that disability causation was established, based on the opinion of Dr. Sundaram, as consistent with applicable law and Judge Malamphy's finding that Dr. Sundaram's opinion was the most credible opinion in the record, the administrative law judge acted within his discretion in finding that the opinions of Drs. Sundaram and Potter were well reasoned and sufficient to support a finding of disability causation at Section 718.204(c). Decision and Order on Remand at 24; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). As substantial evidence supports the administrative law judge's credibility determinations at Sections 725.310 (1999) and 718.204(c), they are affirmed.

Because employer, as the proponent of the request for modification, has failed to demonstrate a mistake in a determination of fact, as required by Section 725.310 (1999), we affirm the administrative law judge's denial of modification. Consequently, we need not reach employer's challenge to the administrative law judge's determination that the granting of modification would not render justice under the Act.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Employer's Request for 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