BRB No. 11-0290 BLA

EDWARD CHAPPELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 01/31/2012
	)	
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 of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Request for Modification (09-BLA-5518) of Administrative Law Judge Theresa C. Timlin rendered on a subsequent claim[2] filed pursuant to the provisions of the Black Lung

[1] The miner died on March 15, 2009. Decision and Order at 3.

[2] The miner filed his first claim on December 21, 1992. Director's Exhibit 1. On November 30, 1994, Administrative Law Judge James W. Kerr, Jr., issued a

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).[3] The administrative law judge credited the miner with thirty-six years

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Decision and Order denying benefits because the miner failed to establish the existence of pneumoconiosis and total respiratory disability. *Id.* The Board affirmed Judge Kerr's denial of benefits. *Chappell v. Drummond Co.*, BRB No. 95-0754 BLA (Mar. 6, 1996)(unpub.). The miner filed his second claim (a duplicate claim) on August 23, 1999. Director's Exhibit 1. It was denied by the district director on October 6, 1999 and May 10, 2000 because the miner failed to establish any of the elements of entitlement and because there was no material change in conditions since the denial of the previous claim. *Id*. By letter dated May 25, 2000, the miner requested a formal hearing. *Id*. On December 18, 2000, however, Administrative Law Judge Gerald M. Tierney issued an Order granting the miner's request to dismiss the case. *Id*. By letter dated January 29, 2001, the miner informed the Department of Labor of new medical evidence, which it construed as a request for modification. *Id*. On September 12, 2002, Judge Tierney issued a Decision and Order denying benefits on modification. *Id.* By letter dated September 20, 2003, the miner filed a request for modification. *Id*. On March 22, 2005, Administrative Law Judge Alice M. Craft issued a Decision and Order denying the miner's request for modification because it was untimely. *Id*. The miner filed this claim (a subsequent claim) on July 21, 2006. Director's Exhibit 3. It was denied by the district director on January 8, 2007 because the miner failed to establish any of the elements of entitlement. Director's Exhibit 17. By letter dated February 19, 2007, the miner filed a request for a formal hearing. Director's Exhibit 18. On August 12, 2008, Administrative Law Judge Adele Higgins Odegard issued an Order remanding the case to the district director for adjudication as a request for modification. Director's Exhibit 33. On December 15, 2008, the district director denied the miner's request for modification. Director's Exhibit 38. By letter dated January 16, 2009, the miner requested an appeal of the denial, which the Department of Labor construed as a request for modification. Director's Exhibits 39, 41. On March 4, 2009, the district director denied the miner's request for modification. Director's Exhibit 42. By letter dated March 26, 2009, the miner's counsel filed a request for a formal hearing. Director's Exhibit 43. The case was assigned to Administrative Law Judge Theresa C. Timlin (the administrative law judge).

[3] Congress recently enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, the effective date of the amendments. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Relevant to this miner's claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner

of coal mine employment,[4] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge also found that the new evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. However, the administrative law judge found that the new autopsy evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Consequently, the administrative law judge found that the evidence established a change in conditions pursuant to 20 C.F.R. §725.310. On the merits, the administrative law judge found that the evidence did not establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2)(i)-(iv). The administrative law judge also found that, because the evidence did not establish total respiratory disability, claimant was not entitled to the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish a mistake in a determination of fact at 20 C.F.R. §725.310. Claimant also contends that the reports of Drs. Scott and Caffrey should be stricken from the record. In addition, claimant contends that the pulmonary function and arterial blood gas studies dated August 23, 2006 should be stricken from the record. Further, claimant challenges the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant additionally challenges the administrative law judge's finding that the evidence did not establish total respiratory disabling at 20 C.F.R. §718.204(b)(2)(iv). Lastly, claimant challenges the administrative law judge's finding that invocation of the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act was not established. Employer responds, urging affirmance of the administrative law

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establishes at least fifteen years of qualifying coal mine employment, and he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

[4] The record indicates that the miner was employed in the coal mining industry in Alabama. Director's Exhibit 4. Accordingly, the law of the United States Court of Appeals for the Eleventh Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

judge's denial of benefits.[5] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[6]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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, 1-112 (1989).

Under Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. See 20 C.F.R. §725.310. The intended purpose of allowing modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."[7] *O'Keeffe v. Aerojet-General*

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[5] Claimant filed a brief in reply to employer's response brief, reiterating his prior contentions.

[6] Because the administrative law judge's length of coal mine employment finding, and her findings that the new autopsy evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), that the new evidence established a change in conditions pursuant to 20 C.F.R. §725.310, and that the evidence did not establish total respiratory disability on the merits pursuant to 20 C.F.R. §718.204(b)(2)(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] Modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination; it should be granted only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (the purpose of modification under the Longshore Act, also applicable to the Black Lung Benefits Act, is to "render justice."); *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007).

Shipyards, Inc., 404 U.S. 254 (1971); *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

Initially, we will address claimant's contention that the administrative law judge erred in finding that the evidence did not establish a mistake in a determination of fact at 20 C.F.R. §725.310. Claimant asserts that "[t]he miner is entitled to past-due benefits because of a mistake in facts [sic] which overlooked his prior award of Social Security and long-term disability benefits due to pneumoconiosis." Claimant's Brief at 17. Specifically, claimant argues that the Administrative Procedure Act (APA) was violated because the regulatory provision regarding decisions by other governmental agencies pursuant to 20 C.F.R. §410.470 was ignored. Claimant maintains that, under Section 410.470, the Social Security Administration's grant of benefits for pneumoconiosis precludes a denial of black lung benefits.

Contrary to claimant's assertion, the administrative law judge properly found that documents regarding disability benefits by the Social Security Administration and an insurance company were not probative on the issue of pneumoconiosis. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In finding that the evidence of record did not establish a mistake in a determination of fact, the administrative law judge considered an award of disability benefits granted by the Social Security Administration. The administrative law judge specifically stated:

> The Social Security Disability documents that [the miner] submitted here do not specify the grounds on which disability benefits were granted, thus [the miner] has not shown that the decision was made under §223 of the Social Security Act. [The miner's] Social Security documentation makes no mention of pulmonary impairment, pneumoconiosis, or §223, therefore it is not probative on the issue of whether [the miner] suffered from pneumoconiosis.

Decision and Order at 4. Further, in finding that the insurance documentation was not relevant to a determination of pneumoconiosis, the administrative law judge stated:

> [The miner] also argues that he received workers' compensation due to a knee injury and pneumoconiosis. In support of this argument, he submitted a life insurance application stating that he was receiving long-term disability benefits from Equicor due to a right knee injury and pneumoconiosis. The document first appeared in the record on December 28, 1992. (DX 1-30-4). However, the

> application is not supported by medical evidence, and [the miner] did not submit any direct evidence or supporting documentation from Equicor regarding the basis for his disability payments.

Id. at 4-5.

The Board has held that, while determinations made by other agencies serve as relevant evidence to Department of Labor adjudication, such determinations are not binding. *See* 20 C.F.R. §718.206; *Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41, 1-46 (1994). It is a matter within the administrative law judge's discretion to determine what weight to give to a state workers' compensation board decision. *Clark*, 12 BLR at 1-152. In this case, the administrative law judge permissibly found that the Social Security Administration disability award was not probative because it did not mention pneumoconiosis or a pulmonary impairment as the cause of the disability. *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). In addition, the administrative law judge permissibly found that the state award was not relevant to a determination of pneumoconiosis because it was not documented, as the record contains no evidence to identify the medical or legal criteria that formed the basis for the award. *Clark*, 12 BLR at 1-152. Thus, we reject claimant's assertion that the administrative law judge erred in failing to consider the prior award of benefits by the Social Security Administration and the prior long-term disability benefits due to pneumoconiosis by the state.[8]

Claimant also contends that employer is collaterally estopped from challenging the prior finding of total respiratory disability, based on the award of benefits by the Social Security Administration and the award of state disability benefits. As discussed *supra*, the administrative law judge permissibly found that the award of disability benefits by the Social Security Administration and the award of long-term disability benefits by the state were not probative. *Clark*, 12 BLR at 1-152; *Wenanski*, 8 BLR at 1-489. Thus, we reject claimant's assertion that employer is collaterally estopped from challenging the prior finding of total respiratory disability, based on the award of disability benefits by the Social Security Administration and the award of long-term disability benefits by the state.

[8] We also reject claimant's assertion that the administrative law judge violated the Administrative Procedure Act by ignoring the regulatory provision regarding decisions by other governmental agencies pursuant to 20 C.F.R. §410.470. Contrary to claimant's assertion, the regulations contained in 20 C.F.R. Part 718, rather than the regulations contained in 20 C.F.R. Part 410, apply to this case.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish a mistake in a determination of fact at 20 C.F.R. §725.310.

Next, we address claimant's contention that the reports of Drs. Scott and Caffrey should be stricken from the record. Claimant asserts that the reports of Drs. Caffrey and Scott have material omissions. On August 17, 2009, the administrative law judge issued a Notice of Hearing for November 19, 2009. By Order dated November 9, 2009, however, the administrative law judge cancelled the hearing and permitted the parties to submit additional evidence no later than January 5, 2010 and to submit closing statements no later than February 4, 2010. By Order dated December 22, 2009, the administrative law judge granted employer's request for additional time to file medical evidence, by ordering that the evidentiary matter in this case must close on February 4, 2010 and that the parties must submit closing briefs on or before February 18, 2010. Employer submitted Dr. Scott's negative reading of the December 12, 2008 x-ray and Dr. Caffrey's February 1, 2010 report into the record.[9] In her Decision and Order, the administrative law judge stated that "[s]ince the parties agreed to a decision on the record, no hearing was held." Decision and Order at 3. The administrative law judge considered Dr. Scott's negative reading of the December 12, 2008 x-ray and Dr. Caffrey's February 1, 2010 report.[10]

A party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the action represented an abuse of her discretion. *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting). Section 725.455(b) provides that an administrative law judge, in deciding whether to admit evidence in an administrative proceeding,

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[9] As the record indicates that Dr. Scott read the December 12, 2000 x-ray, the administrative law judge's chart indicating that the date of this x-ray is December 20, 2000 is a typographical error. Employer's Exhibit 4; Decision and Order at 6.

[10] In considering Dr. Caffrey's report at Section 718.202(a)(2), the administrative law judge stated, "[h]ere, Dr. Cafferey's [sic] report contains an autopsy report based on his review of tissue sample slides, a rebuttal to Dr. Aguilar's report, and an opinion based on other evidence." Decision and Order at 9. The administrative law judge then stated, "I will consider those portions based on clinical evidence, rather than pathological evidence, separately as a physician's report." *Id*. The administrative law judge further noted that "Dr. Cafferey's [sic] medical opinion based on evidence outside the autopsy report can be considered as medical opinion evidence because it does not exceed the evidentiary limitations set forth in the regulations." *Id*. at 9 n.6.

is not bound by common law or statutory rules of evidence. 20 C.F.R. §725.455(b). Instead, a less stringent standard is applicable to evidence submitted in administrative hearings under the pertinent provisions of the APA, 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Subject to the constraints of 20 C.F.R. §§725.414 and 725.456, the administrative law judge is required to admit timely developed evidence. While relevancy is the critical issue in the admission of evidence under the APA, there is a preference for the admission of evidence, even where relevancy is questionable, with discretion given to the trier-of-fact to determine the weight to be assigned the evidence. *See Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). In light of these principles and the circumstances of this case, we hold that the administrative law judge acted within the broad discretion granted to her in resolving procedural issues in determining that Dr. Scott's negative reading of the December 12, 2000 x-ray and Dr. Caffrey's February 1, 2010 report constituted relevant evidence that should be admitted into the record. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Thus, we reject claimant's assertion that the reports of Drs. Scott and Caffrey should be stricken from the record.

Claimant also contends that the pulmonary function and arterial blood gas studies dated August 23, 2006 should be stricken from the record. Claimant asserts that the values produced by these studies are skewed and inflated because the miner took breathing medication before they were administered. Contrary to claimant's assertion, the administrative law judge properly considered the August 23, 2006 pulmonary function and arterial blood gas studies administered by Dr. Hasson. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Strako v. Ziegler Coal Co.*, 3 BLR 1-136 (1981); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972 (1980). Both of these studies yielded non-qualifying values.[11] Director's Exhibit 9. The Board has held that a party must submit medical evidence that a condition suffered by a miner, or circumstances surrounding the testing, affected the results of the study and rendered it unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Cardwell v. Circle B Coal Co.*, 6 BLR 1-788 (1984). In this case, claimant does not point to any specific medical evidence in the record that supports his assertion that the pulmonary function and arterial blood gas studies dated August 23, 2006 are unreliable. Thus, we reject claimant's

[11] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

assertion that the pulmonary function and arterial blood gas studies dated August 23, 2006 should be stricken from the record. *Vivian*, 7 BLR at 1-361-62; *Cardwell*, 6 BLR at 1-789-90.

Turning to the merits of entitlement, claimant contends that the administrative law judge erred in finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner is suffering or suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

At Section 718.304, the administrative law judge considered the autopsy reports of Drs. Aguilar[12] and Caffrey, as well as Dr. Loveless's reading of an x-ray. Dr. Loveless, a B reader and Board-certified radiologist, classified the large opacities found on the January 29, 2009 x-ray as category A. Claimant's Exhibit 2. In a questionnaire dated September 21, 2009, Dr. Aguilar opined that the autopsy showed progressive massive fibrosis or massive lesions in the lungs,[13] and

[12] Claimant asserts that Dr. Aguilar was the miner's "last treating physician." Claimant's Brief at 12. However, claimant does not point to any evidence of record indicating that Dr. Aguilar treated the miner prior to his death. We, therefore, are unpersuaded that Dr. Aguilar was the miner's treating physician.

[13] The term "massive lesions" means lesions revealed on autopsy or biopsy that support a diagnosis of complicated pneumoconiosis. *Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 986, 24 BLR 2-72, 2-91-92 (11th Cir. 2007).

that the nodules or tumors were equivalent to large opacities greater than one centimeter in diameter that would be classified as category A, B, or C in the ILO classification system. Claimant's Exhibit 4. Further, in an attached narrative autopsy report, Dr. Aguilar observed that "[a] 1.3 cm. pink-tan hard warty nodule was found in the right main bronchus," and that "[t]he mass was connected to a stony hard mass in the upper lobe and pericardium," and that "[t]he parenchymal mass was light tan and streaked with anthracotic pigment." *Id*. By contrast, in an autopsy report dated February 1, 2010, Dr. Caffrey opined that the miner had a very mild degree of simple coal workers' pneumoconiosis, and that "[t]here are absolutely no lesions that are macronodules or lesions of progressive massive fibrosis in all of the lung tissue that [Dr. Aguilar] took that [he] sectioned and reviewed microscopically."[14] Consultation Report of Dr. Caffrey. Dr. Caffrey stated that "[Dr. Aguilar], in his gross examination, did not describe any mass lesions and did not describe any nodules or masses of coal workers' pneumoconiosis." *Id*. Dr. Caffrey further stated that "[t]he 1.3 cm[.] hard warty nodule [Dr. Aguilar] described in the right lung was the carcinoma," and that "[i]t was not a lesion of CWP." *Id*.

In weighing all of the relevant evidence together, the administrative law judge found that an intervening pathology undermined Dr. Loveless's category A classification of the large opacities on the January 29, 2009 x-ray. The administrative law judge specifically stated:

> Dr. Loveless, the B-reader who saw large opacities, checked the box stating that these opacities were consistent with pneumoconiosis but did not definitively state that pneumoconiosis was the cause. He also marked that [the miner] had lung cancer, but did not rule out [the] possibility that he had seen a cancerous tumor rather than a pneumocotic opacity.

Decision and Order at 12. Further, the administrative law judge found that Dr. Aguilar did not explain his conclusions that he saw massive lesions and that the tumors or nodules would qualify as large opacities, and that his narrative autopsy report does not support them. In addition, the administrative law judge found that Dr. Caffrey saw no evidence of fibrosis and that he stated unequivocally that the tumors in the miner's lungs were cancerous, and not pneumocotic.[15] The

[14] Dr. Caffrey opined that none of the slides of the miner's lung tissue samples showed any micronodules or macronodules of coal worker's pneumoconiosis, and that there definitely was no lesion of complicated coal workers' pneumoconiosis. Consultation Report of Dr. Caffrey.

[15] The administrative law judge noted that "Dr. Cafferey [sic] disagreed

administrative law judge therefore found that the evidence did not establish the presence of complicated pneumoconiosis.

Claimant argues that the administrative law judge erred in giving little weight to Dr. Aguilar's autopsy report. Specifically, claimant asserts that the administrative law judge erred in favoring Dr. Caffrey's opinion over Dr. Aguilar's contrary opinion, as Dr. Aguilar is the autopsy prosector.

Contrary to claimant's assertion, the administrative law judge was not required to assign controlling probative weight to Dr. Aguilar's opinion based on his status as the autopsy prosector, *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992), or to reject Dr. Caffrey's medical opinion as that of a non-examining physician, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Rather, an administrative law judge exercises broad discretion in assessing the persuasiveness and reasoning of a medical opinion. *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Here, the administrative law judge found that, because Dr. Aguilar recorded only gross anatomical findings, with no mention of microscopic findings, it was not possible to determine whether he reviewed tissue slides. Thus, the administrative law judge concluded that the report was not in full compliance with the standards at 20 C.F.R. §718.106(a) and assigned it less weight on that basis.[16] In addition, the administrative law judge permissibly found that Dr. Aguilar's narrative autopsy report was inconsistent with his responses in the questionnaire.[17] *See Sparks*, 213 F.3d at 193, 22 BLR at

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with Dr. Aguilar's statement that [the miner] showed massive fibrosis because there was no evidence of massive fibrosis in Dr. Aguilar's report, and Dr. Cafferey [sic] did not see any evidence of fibrosis on the slides he reviewed." Decision and Order at 10. The administrative law judge further stated that, "[a]lthough Dr. Cafferey's [sic] own report does show that [the miner] suffered from some fibrosis, as he did find evidence of simple pneumoconiosis, it also supports his opinion that there was no massive fibrosis." *Id.*

[16] No party contests this factual finding.

[17] The administrative law judge noted that, although Dr. Aguilar answered "Yes" in the questionnaire to a question regarding whether the autopsy showed progressive massive fibrosis or massive lesions in the miner's lungs, the doctor did not record any evidence of fibrosis in the narrative autopsy report. Decision and Order at 8. Further, after noting that Dr. Aguilar indicated on the questionnaire

2-262-63; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Therefore, the administrative law judge acted within her discretion in finding that Dr. Aguilar failed to adequately explain and document his conclusions. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 991, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we reject claimant's assertion that the administrative law judge erred in giving little weight to Dr. Aguilar's opinion. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg*, 12 BLR at 1-79; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. *See Cornelius*, 508 F.3d at 987, 24 BLR at 2-95; *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985).

Further, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).[18] The administrative law judge considered the opinions of Drs. Caffrey, Hasson, and Bradley. Dr. Caffrey opined that, "because of the paucity of coal dust in [the miner's] lungs[,] it is my opinion that this amount of coal dust and the rare lesion of simple coal workers' pneumoconiosis would not have caused [the miner] any discernible pulmonary disability." Consultative Report of Dr. Caffrey. Further, Dr. Caffrey opined that "[t]he amount of simple coal workers' pneumoconiosis was so minimal that it

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that there were nodules or tumors equivalent to large opacities greater than one centimeter in diameter that would qualify as category A, B, or C under the ILO classification system, the administrative law judge stated that "[Dr. Aguilar] did not expand on this statement to clarify whether the abnormalities were cancerous tumors or were nodules of pneumoconiosis, nor does his autopsy report make this distinction." *Id*. at 9. Additionally, the administrative law judge stated that Dr. Aguilar's answer in the questionnaire was undocumented because "Dr. Aguilar did not conduct a microscopic review to determine the composition of these nodules or tumors." *Id*.

[18] Because none of the pulmonary function study or arterial blood gas study evidence of record yielded qualifying values, we affirm the administrative law judge's finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (ii). Director's Exhibits 1, 9.

would not have impaired [the miner's] pulmonary capacity."[19] *Id*. Dr. Hasson opined that the miner had a mild pulmonary impairment. Director's Exhibit 9. By contrast, Dr. Bradley opined that the miner could not return to work because of his pulmonary impairment and age. Claimant's Exhibit 5.

The administrative law judge discounted Dr. Bradley's opinion because she found that it was not well-documented or reasoned. Decision and Order at 16, 17. In addition, the administrative law judge found that the new opinions of Drs. Caffrey and Hasson were entitled to probative weight. *Id*. at 16. The administrative law judge therefore found that claimant did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Claimant asserts that the administrative law judge should have given greater weight to the opinions of Drs. Bradley and Bush,[20] based on their status as the miner's treating physicians. 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."[21] 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

[19] Claimant asserts that Dr. Caffrey's opinion is hostile to the Act. Contrary to claimant's assertion, Dr. Caffrey did not opine that simple pneumoconiosis cannot be totally disabling. Consultative Report of Dr. Caffrey. Because Dr. Caffrey did not foreclose all possibility that simple pneumoconiosis can be totally disabling, *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988), we reject claimant's assertion that Dr. Caffrey's opinion is hostile to the Act.

[20] Dr. Bush, in a report dated July 20, 1989, observed that the miner continues to have difficulties such as obstructive lung disease and degenerative arthritis, and opined that "[the miner] continues to be 100% disabled and certainly unable to sustain gainful employment." Medical Report of Dr. Bush. Contrary to claimant's assertion, however, Dr. Bush's report was never admitted into the record. *Chappell*, BRB No. 95-0754 BLA, slip op. at 3. Thus, we reject claimant's assertion that the administrative law judge erred in failing to consider Dr. Bush's opinion.

[21] The criteria set forth at 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations.

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). Moreover, there is neither a requirement, nor a presumption, that treating physicians' opinions be given greater weight than the opinions of other expert physicians. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*recon. en banc*).

In this case, the administrative law judge acknowledged that, in a December 12, 2000 report, "[Dr. Bradley] wrote that he had been treating [the miner] for 11 months for coal workers [sic] pneumoconiosis and COPD," Decision and Order at 11, but she did not address whether Dr. Bradley's opinion was entitled to greater weight on this basis. Rather, the administrative law judge considered the credibility of Dr. Bradley's opinion based on its reasoning and documentation. The administrative law judge specifically stated:

> Dr. Bradley was the only physician who either examined [the miner] or reviewed [the miner's] records and opined that he was totally disabled. [Administrative Law Judge Gerald M. Tierney] considered Dr. Bradley's opinion in his decision, but found that it was not well-supported because Dr. Bradley offered no rationale for his opinion. Instead, he merely provided short, conclusory answers to a questionnaire. Thus, [Judge Tierney] found that the physicians' [sic] opinions did not establish total disability. I have considered Dr. Bradley's report and adopt [Judge Tierney's] conclusion.

Id. at 16. Thus, because the administrative law judge permissibly found that Dr. Bradley was not well-documented or reasoned, *Clark*, 12 BLR at 1-155, we reject claimant's assertion that the administrative law judge should have given greater weight to Dr. Bradley's opinion, based on his status as the miner's treating physician.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

Furthermore, because the administrative law judge properly found that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b), we also affirm the administrative law judge's finding that claimant was not entitled to

the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

In light of our affirmance of the administrative law judge's findings that claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, that claimant was not entitled to the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge