

BRB No. 00-0707 BLA

ARRIE UNDERWOOD (Survivor of))	
GENERAL A. UNDERWOOD))	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Jennifer U. Toth and Mary Forrest-Doyle (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the March 22, 2000 Decision and Order Denying Benefits (99-BLA-0778) of Administrative Law Judge Thomas F. Phalen, Jr. on 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).² Initially, the miner filed a claim for benefits on April 26, 1977,

¹ Claimant is the widow of the miner, Director's Exhibit 2, who died on October 27, 1994. Director's Exhibit 40. Claimant is pursuing the miner's claim for benefits.

² 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 65 Fed. Reg. 80, 045-80, 107 (2000)(to be codified at 20

which was finally denied by the Office of Workers' Compensation Programs on May 24, 1979. 2000 Decision and Order at 2; Director's Exhibits 1, 18. The Office of Workers' Compensation Programs found that the evidence was insufficient to establish the existence of pneumoconiosis, insufficient to establish causation of the disease by coal mine work, and insufficient to establish total disability by the disease. Director's Exhibit 18. The miner filed his next claim on January 28, 1985. Director's Exhibit 2. Administrative Law Judge Jeffrey Tureck found that the miner failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1)-(4)(2000), and issued a Decision and Order Denying Benefits on April 7, 1988. Director's Exhibit 28. The Benefits Review Board affirmed the administrative law judge's denial of benefits on April 30, 1991. Director's Exhibit 29. The United States Court of Appeals for the Eleventh Circuit affirmed the Board's opinion on January 29, 1992. Director's Exhibit 53.

The miner filed a request for modification on February 1, 1993. Director's Exhibit 30. The miner died on October 27, 1994. Director's Exhibit 40. Judge Phalen (the administrative law judge) credited the miner with five and three-quarter years of coal mine employment. Decision and Order at 3. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000). The administrative law judge additionally found that there was neither a mistake of fact in the prior denial, nor was there a change in the miner's condition since the denial. Moreover, the administrative law judge found that because claimant failed to establish the element of entitlement previously adjudicated against the miner, the claim must be denied. Decision and Order at 8. Accordingly, benefits were denied.

Claimant appeals, arguing that the administrative law judge erred with respect to his finding regarding the length of the miner's coal mine employment. Claimant avers that the administrative law judge erred in finding that claimant failed to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000), in not finding disease causation pursuant to 20 C.F.R. §718.203(2000), and in not finding that the miner was totally disabled by his coal workers' pneumoconiosis under 20 C.F.R. §718.204 (2000). The Director, Office of Workers' Compensation Programs (the Director), responds, advocating affirmance of the administrative law judge's denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing

C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule in an Order issued on March 2, 2001, to which the Director and claimant have responded. The Director and claimant take the position that the new regulations will not affect the case. Based on the briefs submitted by the Director and claimant, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

Claimant may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a)(2000).³ In considering whether a change in conditions has been established pursuant to Section 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. *See Kingery v. Hunt Branch Coal Co.*, 19 BRB 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, the fact-finder has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see also Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Initially, we reject claimant's argument that the administrative law judge erred by not considering the miner's 1985 duplicate claim on the merits inasmuch as the administrative law judge's decision was based on a review of all the medical opinion evidence of record. 2000 Decision and Order at 8.

Claimant additionally argues that the administrative law judge erred in crediting the miner with only five and three-quarter years of coal mine employment instead of ten years of coal mine employment. Claimant argues that the administrative law judge did not acknowledge that Social Security earnings reports begin in 1937. Claimant contends that the administrative law judge offered no explanation for not crediting the miner's uncontradicted testimony that he began work in 1933. The Director responds, arguing that the miner testified at the 1987 hearing that his ten years of coal mine employment spanned from 1933 until 1943, and the miner also submitted his Social Security earnings record that showed coal mine employment earnings of over fifty dollars in 23 quarters from

³ While 20 C.F.R. §725.310 has been revised, the new regulation applies only to claims filed on or after January 19, 2001. *See* 65 Fed. Reg. 79920 (2000).

1937 through 1943. 1987 Hearing Transcript at 15; Director's Exhibit 28 (Claimant's Exhibit 5). The Director avers that in light of this conflicting evidence, the administrative law judge rationally found five and three-quarter years of coal mine employment from 1937 through 1943.

The Director is correct in contending that the miner's evidence regarding length of coal mine employment was inconsistent. 1987 Hearing Transcript at 15; Director's Exhibits 1-3; *see Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). In particular, the miner testified at his 1987 hearing that his coal mine employment began in 1933, Hearing Transcript at 15, but he also submitted documentary evidence alleging that his coal mine employment began in 1936. Director's Exhibits 1, 3. Therefore, we hold that it was not irrational for the administrative law judge to credit the miner's Social Security report over the miner's testimony. *See Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). We, therefore, affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established that the miner had five and three-quarter years of coal mine employment.⁴

Claimant next argues that the administrative law judge erred in finding that claimant failed to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000).⁵ In this regard, the administrative law judge noted that Dr. Hessel diagnosed pneumoconiosis in 1987, after having examined the miner in 1978, 1979, 1985 and 1987, Claimant's Exhibit 3; Director's Exhibits 4-11, and found that since the request for modification, there were opinions submitted from Drs. Hussain, Arcillas, McCoy, and Marder. The administrative law judge specifically found that Dr. Hussain eventually diagnosed a pulmonary status compatible with exposure to coal dust. Claimant's Exhibit 1; Director's Exhibits 30, 33. The administrative law judge found that Dr. Arcillas made no mention of the presence or absence of pneumoconiosis, Claimant's Exhibit 1; Director's Exhibit 30, and that Dr. McCoy did not list pneumoconiosis as a cause of death. Director's Exhibit 40. Finally, the administrative law judge found that Dr. Marder opined that the miner had chronic obstructive pulmonary disease related to coal dust exposure. Claimant's Exhibit 2; 2000 Decision and Order at 8. Claimant avers that the administrative law judge should have credited the opinion of Dr. Marder, "a well-credentialed physician" who "reviewed the entire record in this case." Claimant's Brief at 6. Claimant contends that the two reasons given by the administrative law judge for rejecting Dr. Marder's opinion are erroneous.

⁴ Claimant states that the administrative law judge erred in questioning Dr. Marder's failure to explain how five to six years of coal mine employment did not result in pulmonary disease until some forty years after the miner's last exposure, Decision and Order at 8; Claimant's Exhibit 2, as claimant asserts that the miner worked ten years. Since we affirm the administrative law judge's finding that the miner had five and three-quarter years of coal mine employment, we decline to address this argument. *See generally Cregger v. United States Steel Corp.*, 6 BLR 1-1219, 1-1222 (1984).

⁵ The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3)(2000). Since these findings are not contested on appeal, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge stated:

I do not find Dr. Marder's opinion highly persuasive. It is belied by the overwhelming negative x-ray evidence, which Dr. Marder did not address. He further failed to explain how five to six years of coal mine employment did not result in pulmonary disease until some forty years after the miner's last exposure thereto. In short, I do not find Dr. Marder's conclusion well reasoned.

2000 Decision and Order at 8. We affirm the administrative law judge's decision to discredit Dr. Marder's opinion on the basis that Dr. Marder did not explain the extreme latency of the miner's pulmonary disease. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).⁶ Inasmuch as the administrative law judge has provided a proper basis for discrediting Dr. Marder's opinion, we decline to address his alternative basis for discrediting Dr. Marder's opinion. See *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-383 (1983).

Claimant contends that the administrative law judge erred in crediting Dr. McCoy's death certificate because there is nothing in the record to indicate what relationship, if any, Dr. McCoy had to the miner, and because the death certificate only addresses the cause of death and not disability. Director's Exhibit 40. Claimant also avers that it is error to credit a death certificate where the record provides no indication that the individual signing the death certificate possessed any relevant qualifications. Contrary to claimant's suggestions, the administrative law judge did not credit Dr. McCoy's death certificate, but merely concluded that "the death certificate does not further the miner's claim." 2000 Decision and Order at 8. Thus, we reject claimant's argument.

Next, claimant avers that Drs. Hessel and Hussain have also offered opinions that the miner suffered from pneumoconiosis. With respect to Dr. Hessel, the administrative law judge followed the reasoning of Judge Tureck, who, in the prior denial, discounted the opinion of Dr. Hessel because the doctor examined the miner in 1978, 1979, 1985 and 1987, but did not diagnose pneumoconiosis until 1987 and did not provide a convincing explanation for its latent development. Claimant's Exhibit 3; Director's Exhibits 4-11, 28. The administrative law judge correctly stated that the Benefits Review Board affirmed Judge Tureck's reasoning, and that the Eleventh Circuit affirmed the Board's decision. Director's Exhibits 29, 53; 2000 Decision and Order at 8. We reject claimant's argument with respect to Dr. Hessel's opinion. See *Clark, supra*.

With respect to Dr. Hussain's opinion, the administrative law judge rationally discredited it because of Dr. Hussain's delay in diagnosing pneumoconiosis. See Claimant's Exhibit 1; *Clark, supra*. Further, the administrative law judge rationally discredited Dr. Hussain's opinion because

⁶ While claimant asserts that Dr. Marder did explain how the miner's coal mine employment in the 1930's and 1940's caused his pulmonary impairment now, claimant's assertion is unsupported by the record. See Claimant's Exhibit 2.

there was no indication that Dr. Hussain was familiar with the miner's length of coal mine employment. Decision and Order at 8; *see* Claimant's Exhibit 1; Director's Exhibits 30, 33. *See generally Barnes v. Director, OWCP*, 19 BLR 1-71, 1-76 (1995)(Smith, J., dissenting); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984). Therefore, we affirm the administrative law judge's decision to discredit Dr. Hussain's opinion.

In light of the foregoing, we affirm the administrative law judge's finding that claimant failed to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000).⁷

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁷ We, therefore, need not address claimant's argument that disease causation is established pursuant to 20 C.F.R. §718.203 (2000), and that the miner was totally disabled by his coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000), as a finding of entitlement is precluded. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).