BRB No. 00-0904 BLA

LAURA CRAWFORD (Widow of EDWARD CRAWFORD)	)	
Claimant-Petitioner	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
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. Sutton, Administrative Law Judge, United States Department of Labor.

Laura Crawford, Grundy, Virginia, *pro se*.[1]

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

Jeffrey S. Goldberg (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

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the decision of Administrative Law Judge Daniel F. Sutton. In a letter dated June 14, 2000, the Board stated that claimant would be considered to be representing herself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant,[2] without the assistance of counsel, appeals the Decision and Order (99-BLA-0345) of Administrative Law Judge Daniel F. Sutton (the administrative law judge) denying benefits on a miner's claim and a survivor'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 adjudicated the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718.[4] The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Consequently, the administrative law judge found the evidence sufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[5] Accordingly, the administrative law judge denied

[2]Claimant is the widow of the miner, Edward L. Crawford, who died on September 10, 1997. Director's Exhibits 1, 4.

[3]The miner's first claim was filed November 1, 1979. Director's Exhibit 45. This claim was denied by the Department of Labor (DOL) on January 2, 1981. *Id.* Although the miner filed a request for reconsideration on March 5, 1981, the record does not indicate that the DOL considered this request. The miner's second claim was filed on January 6, 1992. Director's Exhibit 46. On May 19, 1992, the DOL denied this claim. *Id.* Inasmuch as the miner did not pursue this claim any further, the denial became final. The miner's third claim was filed on May 31, 1994. Director's Exhibit 47. On October 24, 1995, Administrative Law Judge Vivian Schreter-Murray issued a Decision and Order awarding benefits, *id*., which the Board affirmed, *Crawford v. Clinchfield Coal Co.*, BRB No. 96-0375 BLA (July 22, 1996)(unpub.). As previously noted, the miner died on September 10, 1997. Director's Exhibits 1, 4. In a letter dated October 1, 1997, employer notified the DOL that it was terminating benefits because of the miner's death. Director's Exhibit 47. On October 21, 1997, claimant filed a survivor's claim. Director's Exhibit 1. Employer filed a request for modification on May 26, 1998. *Id*.

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

[5]The revisions to the regulations at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

benefits in both the miner's claim and the survivor's claim. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has declined to respond to claimant's appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing 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 by order issued on March 9, 2001, to which employer and the Director have responded.

Employer indicated that the revisions to the regulations which are the subject of litigation would not affect the outcome of the case. The Director indicated that it is his position that the instant case would not be affected by application of the litigated regulations, and therefore, that the Board could decide the instant case. Claimant has not filed a brief in response to the Board's order.[6] Based on the briefs submitted by employer and the Director, 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.

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. *See 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).

[6]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

In the previous decision awarding benefits in the miner's claim, Administrative Law Judge Vivian Schreter-Murray found the evidence sufficient to establish the existence of pneumoconiosis. However, on modification,[7] the administrative law judge considered the newly submitted x-ray evidence and medical opinions of record, along with the previously submitted medical evidence of record, and found the evidence insufficient to establish the existence of pneumoconiosis. In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by *wholly new evidence*, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 296 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 724, 18 BLR 2-26, 2-28 (4th Cir. 1993).

In finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000),[8] the administrative law judge considered all of the relevant evidence of record. The administrative law judge stated, "[a]fter carefully reviewing Judge Schreter-Murray's findings, I do not find that she made any mistake of fact." Decision and Order at 5. Rather, the administrative law judge stated, "I agree with the BRB that Judge Schreter-Murray properly weighed the evidence before her and that her finding that pneumoconiosis had been established is supported by substantial evidence." *Id*. Nonetheless, the administrative law judge further stated, "[a]fter carefully evaluating the new x-ray interpretations and the new medical opinions in conjunction with the evidence previously submitted, I have concluded that a preponderance of the medical evidence, both

[7]The pertinent regulations provide that "[u]pon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." 20 C.F.R. §725.310(a) (2000).

[8]No substantive revisions have been made to the regulations which are relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4).

old and new, does not establish that [the miner] suffered from pneumoconiosis." *Id*. at 11. Hence, the administrative law judge stated, "I conclude that a mistake of fact was made in the determination that [the miner] had established the presence of pneumoconiosis which is necessary to establish entitlement to benefits under the Act." *Id*. at 12.

In addition to considering the medical opinion evidence previously considered by Judge Schreter-Murray, the administrative law judge also considered the newly submitted medical reports of Drs. Caffrey, Castle, Fino, Michos and Sutherland. The administrative law judge stated that "the new medical opinion evidence, with the exception of the letter from Dr. Sutherland, is completely negative for any diagnosis of coal workers' pneumoconiosis of either clinical or legal variety." Decision and Order at 11. The administrative law judge properly accorded greater weight to the opinions of Drs. Caffrey, Castle, Fino and Michos than to the contrary opinion of Dr. Sutherland because of their superior qualifications.[9] *See 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). The administrative law judge also properly accorded greater weight to the opinions of Drs. Caffrey, Castle, Fino and Michos than to the contrary opinion of Dr. Sutherland because he found them to be better reasoned.[10] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v.*

[9]Administrative Law Judge Daniel F. Sutton (the administrative law judge) observed that Drs. Caffrey, Castle, Fino and Michos "have credentials in either pulmonary medicine or pathology." Decision and Order at 12. The administrative law judge also observed that "Dr. Sutherland's qualifications are not established by the record." *Id*.

[10]The administrative law judge stated that "Dr. Sutherland relies on an early positive chest x-ray interpretation which is outweighed by later and more persuasive interpretations." Decision and Order at 12. The administrative law judge also stated, "[e]ven more troubling is his reliance on...what seems clearly to be a misunderstanding or mischaracterization of the 1991 biopsy results." *Id*. The administrative law judge observed that "the biopsy specimen was of lymph tissue, not lung tissue, which Judge Schreter-Murray found to be inadequate to support a diagnosis of pneumoconiosis." *Id*. The administrative law judge further observed that "[t]his evidence was already reviewed by Judge Schreter-Murray and correctly given little probative value regarding the existence of pneumoconiosis." *Id*. Hence, the administrative law judge concluded that "[i]n view of these deficiencies in his analysis, I have given little weight to Dr. Sutherland's opinion." *Id*. In contrast, the administrative law judge stated that "the reports of Drs. Michos, Caffrey, Castle and Fino...contain thorough reviews of the medical evidence and reasoned explanations of why the evidence is against a diagnosis of pneumoconiosis." *Id*.

Gibraltar Coal Corp., 6 BLR 1-1291 (1984). Therefore, based on his consideration of all of the relevant medical opinion evidence, the administrative law judge rationally found that "these recent medical opinions are entitled to greater weight than the earlier opinions from Drs. Sargent and Forehand because Drs. Michos, Caffrey, Castle and Fino had the significant advantage of having been able to review all of the pertinent medical records through the date of [the miner's] death." Decision and Order at 12; *see Sabett v. Director, OWCP*, 7 BLR 1-299 (1984).

Further, in addition to considering the x-ray evidence considered by Judge Schreter-Murray, the administrative law judge considered the newly submitted x-ray evidence. Of the thirty-one interpretations of the eight newly submitted x-rays of record, the twenty-three readings provided by Drs. Navani, Scott and Wheeler are negative for pneumoconiosis, Director's Exhibits 12, 14, 17, 19, 21, 24, 27; Employer's Exhibits 7-22, and the eight readings provided by Dr. Fino are positive, Employer's Exhibits 24-31. Whereas Dr. Fino is a B-reader, Drs. Navani, Scott and Wheeler are dually qualified as both B-readers and Board-certified radiologists. The administrative law judge stated, "[i]n deciding to place greater reliance on these more recent x-ray interpretations, I note that the negative radiological findings by Drs. Navani, Wheeler and Scott are supported by the results of the three CT scans of [the miner's] chest in 1997 which also revealed no evidence of coal workers' pneumoconiosis." Decision and Order at 11. Based on his consideration of all of the relevant x-ray evidence, the administrative law judge found that "[t]he earlier positive x-ray interpretations relied upon by Judge Schreter-Murray are rebutted by the interpretations of the eight new chest x-ray films from Drs. Navani, Wheeler and Scott who are all as qualified as [Dr. Francke][11] and who found no evidence of pneumoconiosis." Decision and Order at

[11]Dr. Francke, who is a dually qualified Board-certified radiologist and B-reader, read an x-ray dated June 30, 1994, as positive for pneumoconiosis. Director's Exhibit 47. In the previous Decision and Order, Judge Schreter-Murray considered Dr. Francke's x-ray reading with the other previously submitted x-ray readings. Judge Schreter-Murray stated, "[f]ocusing on the recent interpretations of chest x-rays dated February 8, 1991, May 6, 1991, July 8, 1991, February 11, 1992, June 30, 1994, and November 14, 1994..., the overwhelming

11.

preponderance of such evidence is positive for pneumoconiosis under the classification requirements set forth in §718.102(b).” [1995] Decision and Order at 4. Hence, Judge Schreter-Murray concluded that “[the miner] has established pneumoconiosis by a clear preponderance of the x-ray evidence.” *Id*.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected the application of the "later evidence" rule to x-ray evidence that cannot be reconciled by reference to its sequence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-64 (4th Cir. 1992). The court noted that the logic of the later is better theory with respect to x-ray evidence only holds where the evidence is consistent with the premise that the miner's condition has worsened.[12] *Adkins*, 58 F.2d at 52, 16 BLR at 2-65. The court also noted that if the evidence, taken at face value, shows that the miner's condition has improved, the reasoning of the later is better theory cannot apply. *Id*. Hence, the court stated, "[*i*]*t is impossible to reconcile the evidence*." *Id*. Here, in finding a mistake in a determination of fact in Judge Schreter-Murray's previous finding that the miner suffered from pneumoconiosis, the administrative law judge relied on the newly submitted negative x-ray readings in support of his finding that the miner did not suffer from pneumoconiosis. Judge Schreter-Murray previously found the x-ray evidence to be sufficient to establish that the miner suffered from pneumoconiosis. Further, as previously noted, the administrative law judge stated, "[a]fter carefully reviewing Judge Schreter-Murray's findings, I do not find that she made any mistake of fact." Decision and Order at 5. To the contrary, the administrative law judge stated, "I agree with the BRB that Judge Schreter-Murray properly weighed the evidence before her and that her finding that pneumoconiosis had been established is supported by substantial evidence." *Id*. Since the most recent negative x-ray readings relied upon by the administrative law judge cannot be reconciled with the x-ray evidence previously considered by Judge Schreter-Murray, we hold that the administrative law judge erred in relying on the newly submitted x-ray evidence in support of his finding that the miner did not suffer from pneumoconiosis. *See Adkins, supra*.

Additionally, we hold that the administrative law judge erred in according greater weight to the negative x-ray readings provided by Drs. Navani, Scott and Wheeler because he found them to be supported by CT scan evidence. The pertinent regulation does not provide for the direct consideration of x-ray evidence in conjunction with CT scan evidence at Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1).

In view of the foregoing, we vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis, and remand the case for further consideration of all of the relevant evidence of record. *See* 20 C.F.R. §718.202(a);

[12]The United States Court of Appeals for the Fourth Circuit stated, "[i]n a nutshell, the [later is better] theory is: (1) pneumoconiosis is a progressive disease; (2) therefore, claimants cannot get better; (3) therefore, a later test or exam is a more reliable indicator of the miner's condition than an earlier one." *Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-65 (4th Cir. 1992).

Island Creek Coal Co. v. Compton, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

In the event the administrative law judge again finds modification established, on remand, he must consider whether modification is in the interest of justice, which he failed to do previously.[13] *See O'Keeffe*, 404 U.S. at 255-56; *McCord v. Cephas*, 532 F.2d 1377, 1381, 3 BRBS 371, 377 (D.C. Cir. 1976).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[13]While the pertinent regulation at 20 C.F.R. §725.310 permits modification of an award of benefits based on a mistake in a determination of fact, an administrative law judge, within his discretion, must determine whether modification will render justice under the Act. *See Blevins v. Director, OWCP*, 683 F.2d 139, 142 (6th Cir. 1982)(quoting *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 464 (1968). An allegation of a mistake in fact is not "a back-door route to retrying a case because one party thinks he or she can make a better showing on the second attempt." 3 A. Larson, Workmen's Compensation Law, §81.52(b). The United States Court of Appeals for the First Circuit declared that "[t]he congressional purpose in passing the law would be thwarted by any lightly considered reopening at the behest of an employer who, right or wrong, could have presented his side of the case at the first hearing and who, if right, could have thereby saved all parties a considerable amount of expense and protracted litigation." *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 25-26, 14 BRBS 636, 639-40 (1st Cir. 1982)(*per curiam*)(quoting *McCord v. Cephas*, 532 F.2d 1377, 1380-81, 3 BRBS 371, 377 (D.C. Cir. 1976).

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I would affirm the Decision and Order Modifying Award of Living Miner's Benefits and Denying Survivor's Benefits by Administrative Law Judge Daniel F. Sutton (the administrative law judge). I believe the majority has misconstrued the administrative law judge's decision, in holding that he erred both in finding that the x-ray evidence did not establish the existence of pneumoconiosis and that the prior administrative law judge, Vivian Schreter-Murray, had made a mistake in fact.

First, contrary to the majority's interpretation, the administrative law judge did not credit the readings of the more recent x-rays on the basis of their recency, but on the quality of the evidence. The administrative law judge observed that Judge Schreter-Murray had found the weight of the x-ray evidence established pneumoconiosis based upon the credentials of the readers, *i.e.* one dually qualified physician, Dr. Franke, and one B-reader, Dr. Sargent, who diagnosed pneumoconiosis, versus one B-reader, Dr. Fino, who did not. When the administrative law judge considered the newly submitted evidence, including thirty-one interpretations of eight new x-rays, it was appropriate for him to attach significance to the fact that twenty-three of these interpretations were by three dually qualified physicians, Drs. Wheeler and Scott, retained by employer, and Dr. Navani, retained by the Director, and that all of these interpretations were negative for pneumoconiosis. Decision and Order at 7. The findings of these three doctors were also supported by Dr. Fino's findings. *Id*. Given the number of dually qualified physicians who offered numerous readings of eight x-rays, which were uniformly read as negative, it was entirely reasonable for the administrative law judge to credit this evidence as showing that claimant did not have clinical pneumoconiosis.

Second, the majority errs in holding that the administrative law judge should not have considered the x-ray evidence in conjunction with the CT scan evidence because "the pertinent regulation does not provide for the direct consideration of x-ray evidence in conjunction with CT scan evidence at Section 718.202(a)(1)." *See supra* p. 7. The administrative law judge stated:

> In deciding to place greater reliance on these more recent x-ray interpretations, I note that the negative radiological findings by Drs. Navani, Wheeler and Scott are supported by the results of the three CT scans of Mr. Crawford's chest in 1997 which also revealed no evidence of coal worker's pneumoconiosis.

Decision and Order at 11. The administrative law judge in the instant case did exactly what the Director argued he should do in *Island Creek Coal Company v. Compton*, 211 F.3d 203, 210, BLR (4th Cir. 2000), that is, he weighed together the x-ray and CT scan evidence because they are both evidence of clinical pneumoconiosis, as opposed to legal or statutory pneumoconiosis, which is established by medical opinions. Thus, it was entirely reasonable for the administrative law judge to use the CT scan evidence to confirm the findings of the x-ray evidence, to determine that the miner did not have clinical pneumoconiosis. Furthermore, in considering the x-ray evidence in conjunction with the CT scan evidence, together with the medical opinion evidence, the administrative law judge followed the teaching of the United States Court of Appeals for the Fourth Circuit in *Compton*, that all evidence relevant to the existence of pneumoconiosis, clinical and legal must be weighed together. *Compton*, 211 F.3d at 211, BLR at 2- . Since the case at bar arises in the Fourth Circuit, the administrative law judge correctly applied the law of that circuit. Hence, the majority's assertion that the administrative law judge erred in considering the x-ray evidence in conjunction with the CT scan evidence is not only illogical, it is contrary to the law.

Third, the administrative law judge did not err in finding modification warranted based upon a mistake in fact, notwithstanding his determination that Judge Schreter-Murray correctly evaluated the evidence before her. The administrative law judge determined that there was a mistake in fact in Judge Schreter-Murray's decision because the overwhelming evidence submitted on modification, x-ray readings, CT scans and medical opinions, all by highly qualified doctors, demonstrated that claimant did not have pneumoconiosis. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 724, 18 BLR 2-26, 2-28 (4th Cir. 1993). As the United States Supreme Court explained, Section 22 of the Longshore Act grants authority to correct "mistakes of fact... [which are] demonstrated by wholly new evidence...." *O'Keeffe*, 404 U.S. at 256. Hence, the administrative law judge was correct in relying upon the newly submitted evidence, showing that the miner did not have pneumoconiosis, to find that Judge Schreter-Murray had made a mistake in fact in holding that the miner had suffered from pneumoconiosis.

Accordingly, I would affirm the administrative law judge's determinations that claimant did not establish the existence of pneumoconiosis and that employer had

demonstrated a mistake in fact in the prior decision. Thus, I would affirm the administrative law judge's decision to grant modification and to deny benefits on both the miner's and survivor's claims.

REGINA C. McGRANERY
Administrative Appeals Judge