

BRB No. 05-0694 BLA

DERALD W. WILSON)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 07/27/2006
)	
FREEMAN UNITED COAL MINING)	
COMPANY)	
)	
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 on Modification Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Vernon L. Plummer II (Plummer Law Offices), Shelbyville, Illinois, for claimant.

Shannon L. Clark (Gould & Ratner), Chicago, Illinois, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification Denying Benefits (03-BLA-0195) of Administrative Law Judge Richard D. Mills (the administrative law judge) 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 administrative law judge found the instant case involves a request for modification of the

denial of claimant's 1996 application for benefits.¹ Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found initially that the parties stipulated to twenty years of coal mine employment and that employer conceded that claimant is totally disabled. Decision and Order at 4; Hearing Transcript at 34. The administrative law judge then noted that the prior claim was denied based on the determination by Administrative Law Judge Donald W. Mosser that while claimant established a total respiratory disability, the evidence failed to establish the existence of pneumoconiosis. Considering the previously submitted evidence, in conjunction with the new evidence, the administrative law judge found that there was no mistake in a determination of fact in Judge Mosser's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge then weighed the newly submitted evidence and found that it failed to establish the existence of pneumoconiosis and, thus, that claimant failed to establish a change in conditions. Consequently, the administrative law judge found that the newly submitted evidence and the old evidence failed to establish the existence of pneumoconiosis and, thus, that claimant failed to establish either a mistake in a determination of fact in the prior Decision and Order or a change in conditions pursuant to 20 C.F.R. §725.310 (2000).² Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical evidence of record failed to establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. In particular, claimant contends that the administrative law judge erred in his weighing of the biopsy evidence pursuant to Section 718.202(a)(2) as well as the medical opinion evidence pursuant to Section 718.202(a)(4). In response, employer urges affirmance of the

¹ Claimant filed his initial claim for benefits on May 16, 1996. Director's Exhibit 1. Following a formal hearing, Administrative Law Judge Donald W. Mosser denied benefits, finding that while the parties conceded the existence of a totally disabling respiratory impairment, the evidence failed to establish the existence of pneumoconiosis or that claimant's total disability is due to pneumoconiosis. 1999 Decision and Order at 14-15, 17; Director's Exhibit 35. Claimant appealed to the Board, which vacated the denial of benefits and remanded the case for further consideration. *Wilson v. Freeman United Coal Mining Co.*, BRB No. 00-0300 BLA (Dec. 15, 2000)(unpub.); Director's Exhibit 39. On remand, Judge Mosser again found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). 2001 Decision and Order on Remand at 4; Director's Exhibit 45. Accordingly, benefits were denied.

² The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond in this appeal.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, because claimant's most recent employment occurred in Illinois, jurisdiction lies within the United States Court of Appeals for the Seventh Circuit, Director's Exhibit 2. However, in weighing the evidence pursuant to Section 718.202(a), the administrative law judge applied the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and weighed all of the evidence together, like and unlike, before ultimately concluding that claimant failed to establish the existence of pneumoconiosis. Decision and Order on Modification at 14. Because the Seventh Circuit has not issued a decision agreeing with the holding in *Compton*, the law in the Fourth Circuit is not compatible with the law in the Seventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*). In this case arising within the jurisdiction of the Seventh Circuit, the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) may be established by four alternative methods. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). However, we need not remand the case as the administrative law judge has provided adequate findings under each of the individual subsections of Section 718.202(a) and, therefore, we will review his findings under the separate subsections.

In determining whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge considered the newly submitted evidence, in conjunction with the previously submitted evidence, to determine whether claimant established either a mistake in a determination of fact or a change in conditions in Judge Mosser's 2001 Decision and Order pursuant to Section 725.310 (2000). Addressing the previously submitted evidence, the administrative law judge found that the preponderance of the x-ray evidence by the better qualified physicians was negative for pneumoconiosis and that the 1981 pathology report by Dr. Johnson, was

entitled to little weight because it was ambiguous and inconclusive. Decision and Order on Modification at 13, 14. In addition, the administrative law judge found the old medical opinion evidence did not establish the existence of pneumoconiosis, based on his determination that the opinions of Drs. Main and Fino, that claimant is not suffering from pneumoconiosis, were entitled to greater weight than the opinions of Drs. Drake and Cohen. Decision and Order on Modification at 13. Consequently, the administrative law judge found that the evidence previously submitted before Judge Mosser did not establish the existence of pneumoconiosis and, therefore, concluded that there was no mistake of fact in Judge Mosser's determination that claimant failed to establish the existence of pneumoconiosis. Decision and Order on Modification at 13, 14.

The administrative law judge then considered the newly submitted medical evidence and found that the recent medical opinions of Drs. Main and Fino, that claimant is not suffering from pneumoconiosis, are entitled to greater weight than the contrary opinions of Drs. Eagleton and Cohen that were not reasoned and documented. Decision and Order on Modification at 14. Consequently, the administrative law judge found that the post-modification evidence does not establish a change in conditions as it fails to establish the existence of pneumoconiosis. *Id.* Therefore, the administrative law judge found that the evidence of record, old and new, fails to support modification pursuant to Section 725.310 (2000).

In challenging the administrative law judge's weighing of the medical evidence, claimant contends that the administrative law judge erred in finding the biopsy evidence failed to establish the existence of pneumoconiosis. Specifically, claimant contends that the 1981 biopsy report by Dr. Johnson meets the requirements for admissibility of a biopsy report, as set forth at 20 C.F.R. §718.106, and that the report contains a diagnosis of anthracosis, which is sufficient to establish the existence of pneumoconiosis. Claimant further contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). These contentions lack merit.

Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that the biopsy evidence did not establish the existence of pneumoconiosis, finding that the lone report by Dr. Johnson was ambiguous. Decision and Order on Modification at 13. In reassessing the biopsy evidence, the administrative law judge found that Judge Mosser determined that Dr. Johnson's report was not a credible opinion as there was no final diagnosis of anthracosis. Rather, Judge Mosser found that, while Dr. Johnson included anthracosis and anthracotic pigment in the lymph nodes in the "Gross Description" of his 1981 biopsy report, the physician did not include these findings in his final "Diagnosis" nor did he relate these findings to claimant's coal mine employment. 1999 Decision and Order at 13; Director's Exhibit 52 at 0014. The administrative law judge stated that his findings on modification were that the biopsy

evidence, which was obtained in conjunction with claimant's surgery for lung cancer, was ambiguous as to Dr. Johnson's diagnosis and therefore insufficient to establish the existence of pneumoconiosis. See 20 C.F.R. §§718.201, 718.202(a)(2). Decision and Order on Modification at 13. Consequently, because the administrative law judge reasonably exercised his discretion in finding that the biopsy report did not provide a definitive diagnosis of anthracosis, cf. *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*) (Dolder, Smith, J.J. Concurring and dissenting), the evidence is not sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). As claimant does not otherwise challenge the administrative law judge's findings regarding the evidence previously submitted before Judge Mosser, we affirm his finding that claimant failed to establish a mistake in a determination of fact in Judge Mosser's findings.

Pursuant to Section 718.202(a)(4), the administrative law judge rationally accorded little weight to the medical report of Dr. Eagleton, as he found Dr. Eagleton's report was cursory and his conclusions were not supported by the objective evidence of record. Decision and Order on Modification at 14; Claimant's Exhibit 4. In particular, the administrative law judge found that Dr. Eagleton relied on the 1981 biopsy report, which the administrative law judge found was not a credible diagnosis of pneumoconiosis and that the preponderance of the x-ray readings were interpreted as negative by highly qualified physicians. Decision and Order on Modification at 6, 7, 13, 14; Claimant's Exhibit 4; *Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002); *Peabody Coal Co. v. Lewis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Moreover, we reject claimant's contention that the administrative law judge erred in failing to accord greater weight to Dr. Eagleton's opinion based on his extensive knowledge of claimant's health issues, due to his years as claimant's treating physician. The Seventh Circuit has repeatedly stated its disapproval of any "mechanical rule" that greater weight be accorded a treating physician. Rather, the court has held that there must be a "medical reason" for crediting a treating physician. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Consolidation Coal Co. v. OWCP, [Sisson]*, 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992). Herein, the administrative law judge permissibly gave little weight to the opinion of Dr. Eagleton, claimant's treating physician, as this doctor failed to adequately explain his diagnoses of pneumoconiosis. *McCandless*, 255 F.3d 465, 22 BLR 2-311; *Sisson*, 54 F.3d 434, 19 BLR 2-155.

With regard to Dr. Cohen's report diagnosing the existence of pneumoconiosis, the administrative law judge permissibly found it unreasoned and undocumented, because Dr. Cohen relied on inaccurate employment and smoking histories, and failed to identify

adequately the reasoning or data which supported his diagnosis. Decision and Order on Modification at 9-11, 14; Director's Exhibit 48; *Livermore*, 297 F.3d 668, 22 BLR 2-399; *Clark*, 12 BLR 1-149; *Tackett*, 12 BLR 1-11. *Peabody Coal Co. v. Benefits Review Board [Wells]*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Moreover, as we have affirmed the administrative law judge's finding that the opinions of Drs. Eagleton and Cohen, the only opinions supportive of claimant's burden of establishing the existence of pneumoconiosis, are not credible and entitled to little weight, we need not address claimant's arguments concerning the contrary medical opinion evidence. Therefore, we affirm his finding that the newly submitted medical opinions are insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and, thus, that claimant has failed to establish a change in conditions pursuant to Section 725.310 (2000).

Since claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), the element of entitlement previously adjudicated against claimant, we affirm the administrative law judge's finding that the evidence of record, old and new, is insufficient to support modification pursuant to Section 725.310 (2000).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge