BRB No. 09-0740 BLA

GARY L. LOONEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	
	)	
and	)	DATE ISSUED: 07/22/2010
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Request for Modification (06-BLA-0049) of Administrative Law Judge Linda S. Chapman denying employer's request to modify the award of benefits on a claim filed pursuant to the provisions of the Black Lung 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). This case, involving a claim filed on February 1, 1993, is before the Board for the eighth time. After the Board remanded this case to the administrative law judge for the sixth time,[1] the administrative law judge, in a Decision and Order on Remand dated September 12, 2003, found that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of obstructive lung disease due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the evidence together, the administrative law judge found that it established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Looney v. Harman Mining Co.*, BRB No. 04-0109 BLA (Oct. 29, 2004) (unpub.). The Board also affirmed the administrative law judge's finding that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* The Board, therefore, affirmed the award of benefits. *Id.* Subsequently, the Board denied employer's motion for reconsideration. *Looney v. Harman Mining Co.*, BRB No. 04-0109 BLA (Mar. 30, 2005) (Order) (*en banc*) (unpub.).

Employer filed an appeal with the United States Court of Appeals for the Fourth Circuit. Employer, however, subsequently requested modification pursuant to 20 C.F.R. §725.310 (2000)[2] on May 26, 2005. Director's Exhibit 188. In light of this request, the Fourth Circuit granted employer's motion to place its case in abeyance pending the

[1] The Board previously set forth the complete procedural history of this case. *See Looney v. Harman Mining Co.*, BRB No. 02-0502 BLA (Apr. 24, 2003) (unpub.); *Looney v. Harman Mining Co.*, BRB No. 00-0983 BLA (Aug. 21, 2001) (unpub.); *Looney v. Harman Mining Co.*, BRB No. 98-1550 BLA (Sept. 28, 1999) (unpub.).

[2] The recent revisions to 20 C.F.R. §725.310 do not apply to claims, such as this one, that were pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c). Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

outcome of its request for modification. *Harman Mining Co. v. Looney*, No. 05-1620 (4th Cir. July 15, 2005) (Order) (unpub.). By Order dated August 30, 2005, the Board remanded the case for processing of employer's request for modification. *Looney v. Harman Mining Co.*, BRB No. 04-0109 BLA (Aug. 30, 2005) (Order) (unpub.).

In a Decision and Order dated June 30, 2009, 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 (2000).[3] The administrative law judge, therefore, denied employer's request for modification.

On appeal, employer contends that the administrative law judge erred in failing to find that there was a mistake in a determination of fact in the previous decision awarding benefits pursuant to 20 C.F.R. §725.310 (2000). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, in which he disagrees with employer's assertion that the administrative law judge, in considering the weight to accord the medical opinion evidence, erred in considering the preamble to the regulations. In a reply brief, employer reiterates its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Impact of the Recent Amendments

By Order dated April 9, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded, and they correctly state that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the miner's claim because it was filed before January 1, 2005.

Modification

While employer may establish a basis for modification of the award of benefits by establishing either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision, 20 C.F.R. §725.310(a) (2000); *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), the burden of proof to establish a

[3] Employer does not seek modification based upon a change in conditions.

basis for modifying the award of benefits rests with employer. Claimant does *not* have the burden to reestablish his entitlement to benefits. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Employer, as the proponent of an order terminating an award of benefits, bears the burden of disproving at least one element of entitlement. *Id.*; *see also Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996).

An administrative law judge has the authority to reconsider all of the evidence for any mistake of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Although an administrative law judge may find a mistake in a determination of fact, the administrative law judge must ultimately determine whether reopening a claim will render justice under the Act. *O'Keeffe, v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971). In granting a request for modification, an administrative law judge must assess not only the factual accuracy of the prior decision, but must also consider other factors relevant to a determination of whether modification would render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-68 (4th Cir. 2007).

The Existence of Legal Pneumoconiosis, and Total Disability Due to Pneumoconiosis

Employer argues that the administrative law judge erred in failing to find a mistake of fact in regard to her earlier determination that claimant suffers from legal pneumoconiosis, in the form of disabling obstructive lung disease due to smoking and coal dust exposure.[4]

In her 2003 Decision and Order on Remand, the administrative law judge considered the medical opinions of Drs. Forehand, Robinette, and Sargent.[5] Drs. Forehand and Robinette diagnosed legal pneumoconiosis, opining that claimant suffers from obstructive lung disease due to both cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibits 15, 17, 55. Although Dr. Sargent also diagnosed an obstructive lung impairment, he opined that it was due to cigarette smoking, and was not caused, or contributed to, by claimant's coal mine dust exposure. Director's Exhibits 38, 60. After finding that Dr. Sargent's opinion was contrary to the Act and the regulations, the administrative law judge found that the opinions of Drs. Forehand and Robinette were sufficiently reasoned to support a finding of legal pneumoconiosis. 2003

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] The Board previously held that the administrative law judge permissibly found that Dr. Fino's 1994 opinion, that claimant did not suffer from a lung disease caused by his coal mine employment, was hostile to the Act. *Looney* [2003], slip op. at 3-4.

Decision and Order on Remand at 9. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Pursuant to employer's appeal, the Board held that the administrative law judge reasonably found that Dr. Sargent's opinion, that claimant did not suffer from any lung disease caused by his coal dust exposure, was "based upon an improper assumption that pneumoconiosis does not cause purely obstructive disorders." *Looney* [2004], slip op. at 4. The Board, therefore, held that the administrative law judge "properly found that Dr. Sargent's opinion was contrary to the Act and the regulations. . . ." *Id.* The Board further rejected employer's assertion that Dr. Forehand's opinion was not sufficiently reasoned. *Id.* The Board also found no error in the administrative law judge's reliance upon Dr. Robinette's opinion to support a finding of pneumoconiosis. *Id.* at 6. The Board, therefore, affirmed the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 6-7.

In support of its request for modification, employer submitted new medical opinions from Drs. Fino and Hippensteel.[6] In a report dated August 11, 2008, Dr. Fino diagnosed emphysema and chronic obstructive bronchitis due to smoking. Employer's Exhibit 11. Dr. Fino also diagnosed lung cancer due to smoking. *Id.* In a report dated August 14, 2008, Dr. Hippensteel diagnosed chronic bronchitis and emphysema due to smoking. Employer's Exhibit 12. Dr. Hippensteel also opined that claimant suffered from lung cancer due to smoking. *Id.*

The administrative law judge accorded less weight to Dr. Fino's opinion because she found that is was "premised on views that are contrary to the Department's findings in support of the regulatory amendments." Decision and Order at 16. The administrative law judge also found that Dr. Hippensteel did not adequately explain why claimant's emphysema could not have been caused, at least in part, by his coal dust exposure. *Id.* Conversely, the administrative law judge found that the diagnoses of legal pneumoconiosis rendered by Drs. Forehand and Robinette were sufficiently reasoned and documented. *Id.* at 16-17. The administrative law judge, therefore, found that the medical opinion evidence did not support employer's burden of disproving the existence

[6] Employer also submitted new x-ray and biopsy evidence. The administrative law judge found that neither the new x-ray evidence nor the new biopsy evidence supported a finding that claimant does not suffer from legal pneumoconiosis, in the form of an obstructive lung disease caused by coal dust exposure. 20 C.F.R. §718.202(a)(1), (2). Because employer does not challenge these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

of legal pneumoconiosis, in the form of an obstructive lung disease due in part to coal mine dust exposure.

Dr. Fino's Opinion

Employer contends that the administrative law judge erred in her consideration of Dr. Fino's opinion. We disagree. Dr. Fino ruled out coal dust exposure as a significant factor in claimant's emphysema, based in part on his view that the amount of emphysema due to coal dust exposure is based in part on the degree of clinical pneumoconiosis that is present.[7] Employer's Exhibit 14 at 27-28. The administrative law judge permissibly accorded less weight to Dr. Fino's opinion because it is inconsistent with the Department of Labor's recognition that coal dust can contribute significantly to a miner's obstructive lung disease independent of clinical pneumoconiosis. Decision and Order at 15, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000) (indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]"); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

[7] In assessing whether claimant's coal dust exposure contributed to his emphysema, Dr. Fino found that the "amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema." Employer's Exhibit 11. Dr. Fino explained that:

> Dr. Leigh found that a non-smoking coal miner with an average lung content (correlating with minimal or sparse pneumoconiosis) has 7-10% more emphysema that a non-smoking man not exposed to coal dust. Extrapolating this to pulmonary function results, a 10% increase above normal in the amount for emphysema correlated to a 7% reduction in the FEV1%.
>
> This reduction is not clinically significant in the average miner. However, it could be clinically significant if there was moderate or profuse pneumoconiosis present because the amount of pneumoconiosis correlates quite well with the amount of emphysema present. Therefore, it is very helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal mine dust inhalation.

Employer's Exhibit 11.

Dr. Hippensteel's Opinion

We also reject employer's contention that the administrative law judge erred in her consideration of Dr. Hippensteel's opinion. The administrative law judge noted that Dr. Hippensteel, in addressing the cause of claimant's emphysema, relied upon Dr. Naeye's review of lung tissue slides.[8] Based upon his review of the lung tissue slides, Dr. Naeye opined that claimant did not suffer from clinical pneumoconiosis.[9] Employer's Exhibits 1, 10. After noting that the "microscopic data" was negative for coal workers' pneumoconiosis, Dr. Hippensteel opined that this evidence showed that claimant's pulmonary dysfunction was "caused by his cigarette smoking and that he did not have centrilobular emphysema referable to coal workers' pneumoconiosis." Employer's Exhibit 12. The administrative law judge found that Dr. Hippensteel did not adequately explain why lung tissue evidence, interpreted as negative for clinical pneumoconiosis, demonstrated that claimant's emphysema could not have been due, at least in part, to his coal dust exposure. Decision and Order at 16. The administrative law judge acted within her discretion when she discounted Dr. Hippensteel's opinion because he failed to adequately address why claimant's coal dust exposure did not contribute to his obstructive pulmonary condition. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 21, 24. Because the administrative law judge has the discretion as the trier-of-fact to render credibility determinations, and because substantial evidence supports her finding with respect to Dr. Hippensteel, we affirm her determination to accord less weight to Dr. Hippensteel's opinion as to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[10] *See*

[8] In July 2007, Dr. Naeye examined tissue that had been removed from the upper lobe of claimant's right lung. Employer's Exhibit 1. Dr. Naeye subsequently examined tissue from claimant's left lung that was removed during surgery in August 2007. Employer's Exhibit 10.

[9] Dr. Naeye also diagnosed emphysema and chronic bronchitis, which he attributed to claimant's smoking history. Employer's Exhibit 1. However, because Dr. Naeye failed to provide any explanation for his assessment, the administrative law judge found that "Dr. Naeye's opinion regarding the etiology of [claimant's] bronchitis and emphysema is insufficiently reasoned to be probative." Decision and Order at 14.

[10] We reject employer's contention that the administrative law judge erred in not considering Dr. Sargent's opinion. The Board previously affirmed the administrative law judge's finding that Dr. Sargent's opinion was contrary to the Act and the regulations. *Looney v. Harman Mining Co.*, BRB No. 04-0109 BLA (Oct. 29, 2004) (unpub.), slip op. at 4. We also find no merit in employer's argument that the administrative law judge erred in reiterating her previous finding that the opinions of Drs. Forehand and Robinette, that claimant suffered from legal pneumoconiosis, were sufficiently reasoned. The Board

Milburn Colliery Co. v. Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that employer failed to satisfy its burden of disproving the existence of legal pneumoconiosis, or that claimant's total disability is due to legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(c). We, therefore, affirm the administrative law judge's denial of employer's request for modification. 20 C.F.R. §725.310 (2000).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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previously rejected employer's assertion that Dr. Forehand's opinion was not sufficiently reasoned and found no error in the administrative law judge's reliance upon Dr. Robinette's opinion to support a finding of pneumoconiosis. *Id.* at 4-6.