BRB No. 08-0675 BLA

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| R.T.H. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SHAMROCK COAL COMPANY, INCORPORATED | ) | DATE ISSUED: 05/27/2009 |
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| and | ) | |
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| SUN COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order – Denial of Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor of Labor; Rae Ellen Frank 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:

Claimant appeals the Decision and Order – Denial of Modification (05-BLA-6203) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim[1] 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 credited the parties' stipulation that the miner worked in qualifying coal mine employment for at least twenty years. Adjudicating claimant's request for modification pursuant to 20 C.F.R. Part 718,[2] the administrative law judge found that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant failed to demonstrate a mistake in a determination of fact or a change in conditions following the prior denial of this subsequent claim.[3] Accordingly, the administrative law judge denied claimant's request for modification under 20 C.F.R. §725.310, and denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find that the x-ray evidence established the existence of pneumoconiosis under Section 718.202(a)(1), and that the medical opinion evidence established total respiratory disability under Section 718.204(b)(2)(iv). Claimant additionally contends that because

[1] Claimant filed his first application for benefits on January 14, 1992, which was denied by Administrative Law Judge Donald W. Mosser on January 23, 1995, and affirmed by the Board on June 20, 1995. [*R.H.*] *v. Shamrock Coal Co.*, BRB No. 95-1084 BLA (June 20, 1995) (unpub.); Director's Exhibit 1. The Board also denied claimant's motion for reconsideration. [*R.H.*] *v. Shamrock Coal Co.*, BRB No. 95-1084 BLA (Aug. 15, 1996) (Order) (unpub.); Director's Exhibit 1. Claimant filed a second application for benefits on February 27, 2002, which the district director denied on September 13, 2003. Director's Exhibit 2. Because claimant did not further pursue this claim, it was administratively closed. Claimant subsequently filed a third application for benefits on August 20, 2004. Director's Exhibit 4.

[2] Because claimant's third application for benefits, filed on August 20, 2004, was filed within one year of the denial of the previous claim on September 13, 2003, Administrative Law Judge Thomas F. Phalen, Jr. properly construed the August 2004 claim as a petition for modification pursuant to 20 C.F.R. §725.310.

[3] Claimant's initial claim, filed on January 14, 1992, and his subsequent claim, filed on February 27, 2002, were both denied based on claimant's failure to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibits 1, 2.

the administrative law judge found that the opinion of Dr. Simpao, one of the physicians who examined claimant at the behest of the Department of Labor (DOL), was not well reasoned, the Director, Office Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim, as required by Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a). In response to claimant's appeal, employer/carrier (employer) urges affirmance of the denial of benefits. The Director, as party-in-interest, also responds, arguing that he has satisfied his obligation to provide claimant with a pulmonary evaluation that complies with the requirements of Section 413(b) of the Act.[4]

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,[5] they are binding upon this 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'Keeffe v. Smith, Hinchman and 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The applicable conditions of entitlement "shall be limited to

[4] We affirm the administrative law judge's determinations regarding length of coal mine employment and his finding that the new evidence submitted subsequent to the denial of claimant's initial 1992 claim was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 15-17.

[5] The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the modification of an award or denial of benefits based upon a demonstration of a change in conditions or a mistake in a determination of fact. Mistakes of fact may be predicated on 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); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical weight of the x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence.

Contrary to claimant's argument, however, where x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). The administrative law judge, therefore, properly considered the radiological qualifications of the physicians in weighing the x-ray readings. In assessing the probative value of the evidence submitted in support of claimant's request for modification, the administrative law judge permissibly found that the sole positive interpretation of the May 1, 2002 x-ray film by Dr. Baker, who is a B reader, was outweighed by the negative interpretation of Dr. Hayes, a Board-certified radiologist and B reader. In addition, the administrative law judge properly accorded probative weight to the readings of Drs. Dahhan, Westerfield, and Broudy, B readers, and of Dr. Scott, a Board-certified radiologist and B reader, because these physicians' negative interpretations were uncontradicted. 20 C.F.R. §718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 14; Director's Exhibits 2, 14, 17, 18; Employer's Exhibit 1. We reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence, since claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal that he engaged in a selective analysis of the x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004). Because the administrative law judge's analysis constitutes a qualitative and quantitative analysis of the newly submitted x-ray evidence, we affirm his

weighing of the conflicting readings and his resultant finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1994). Hence, we affirm the administrative law judge's determination that because the x-ray evidence submitted in support of modification failed to establish the existence of pneumoconiosis, it was insufficient to demonstrate a change in conditions. Likewise, the administrative law judge permissibly found, when comparing the evidence filed with the February 2002 claim to the evidence submitted in support of modification, that the preponderance of the x-ray evidence was negative for the existence of pneumoconiosis, and therefore, that claimant failed to demonstrate a mistake in a determination of fact under Section 718.202(a)(1). As claimant has not challenged the administrative law judge's findings pursuant to Section 718.202(a)(2)-(4), we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or a basis for modification pursuant to Section 725.310. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant argues next that, in rendering his finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred in failing to consider the exertional requirements of claimant's usual coal mine employment, working on the belt line and running a motor, in conjunction with the medical reports assessing disability. Claimant also maintains that, considering the heavy concentrations of dust exposure to which he was exposed on a daily basis, his condition precludes him from engaging in his usual employment in such a dusty environment. Claimant's arguments are without merit. The administrative law judge determined that claimant's usual coal mine employment as a beltman required him to stand for eight hours per day, lift eighty to ninety pounds up to two hundred times per day, and carry fifty pounds a distance of one hundred feet at least twelve times per day. Decision and Order at 17-18; Director's Exhibits 2, 6; Hearing Transcript at 19-20. The administrative law judge reviewed the conflicting medical opinions submitted in support of modification and their underlying documentation, and determined that the opinions of Drs. Simpao, Baker, Dahhan, and Broudy were adequately supported by the objective evidence they considered and were adequately reasoned. Thus, while the administrative law judge found Dr. Simpao's diagnosis of a totally disabling, albeit mild, respiratory impairment to be entitled to probative weight, he similarly found that the contrary opinions of Drs. Baker, Dahhan, and Broudy, that claimant had no respiratory impairment and/or retained the physiological capacity to perform his previous coal mine employment, were entitled to probative weight.[6] Upon weighing all the medical opinions, the administrative law

[6] In addition, the administrative law judge found Dr. Koura's opinion, that claimant was disabled due to his long exposure to coal dust, worthy of no weight because Dr. Koura failed to mention any objective evidence upon which he relied in reaching his

judge found that the reports of Drs. Baker, Dahhan, and Broudy were better supported by the objective evidence of record, namely the non-qualifying pulmonary function and arterial blood gas studies. The administrative law judge, therefore, properly concluded that the newly submitted medical opinion evidence was insufficient to demonstrate that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv), and that claimant failed to establish a change in conditions thereunder. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); Decision and Order at 18-19. The administrative law judge also rationally determined that the newly submitted evidence relevant to Section 718.204(b)(2)(iv), when considered in conjunction with the evidence filed with claimant's February 2002 claim, failed to establish total respiratory disability, and therefore, failed to demonstrate a mistake in a determination of fact. Moreover, we reject claimant's argument that total disability can be established under 20 C.F.R. §718.204(b)(2)(iv) because his condition precludes further exposure to heavy dust. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2) or a basis for modification pursuant to Section 725.310.

Accordingly, we affirm the administrative law judge's determination that claimant failed to establish a basis for modification of the denial of claimant's subsequent claim pursuant to Section 725.310, as this finding is rational and supported by substantial evidence. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Because the newly submitted evidence was insufficient to establish a change in at least one applicable condition of entitlement pursuant to Section 725.309(d), claimant is precluded from entitlement to benefits. *See White v. New White Coal Co.*, 23 BLR at 1-7.

Lastly, claimant notes that the administrative law judge concluded that Dr. Simpao's report was insufficiently reasoned, and therefore could not support a finding of the existence of pneumoconiosis. As Dr. Simpao conducted a pulmonary evaluation of claimant at the behest of DOL in connection with claimant's third application for benefits, filed on August 20, 2004, claimant contends that the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim, as required under the Act. Claimant's Brief at 4. In response, the Director asserts that, under the facts of this case, the complete pulmonary evaluation conducted by Dr. Baker in conjunction with the instant subsequent claim, filed on February 27, 2002, satisfies the

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conclusion. Decision and Order at 18; Claimant's Exhibit 1. Claimant has not challenged the administrative law judge's weighing of Dr. Koura's opinion. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-710; Decision and Order at 18.

Director's statutory obligation to provide claimant with a complete pulmonary evaluation. The Director maintains that the pulmonary evaluation of claimant conducted by Dr. Simpao in conjunction with claimant's August 20, 2004 application was "unnecessary," because the August 2004 filing constituted a petition for modification, rather than a subsequent claim. Further, the Director asserts that claimant adopted Dr. Simpao's report as his own affirmative medical opinion evidence and, as such, claimant is responsible for any defects or deficiencies contained therein. Consequently, the Director argues that he did not abdicate his statutory obligation to provide claimant with a complete pulmonary evaluation.

The statute requires DOL to provide a living miner with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*). Further, the Act and the regulations make no distinction regarding the duty of DOL to provide a miner with an updated pulmonary evaluation upon the filing of each new claim, whether it be his first application for benefits or a subsequent claim. *Hall*, 14 BLR at 54. In the present case, however, claimant's third application for benefits was filed on August 20, 2004, within one year of the denial of claimant's February 2002 claim on September 13, 2003. Therefore, the administrative law judge properly construed the August 2004 application as a request for modification pursuant to Section 725.310, rather than as a subsequent claim pursuant to Section 725.309. As a request for modification does not trigger the Director's responsibility to provide claimant with another complete pulmonary evaluation,[7] we reject claimant's argument that the Director failed to provide him with a complete, credible pulmonary evaluation on the basis of Dr. Simpao's evaluation.[8] *See*

[7] The administrative law judge rejected employer's argument that Dr. Simpao's report and tests should not be considered because the Director erroneously provided claimant with Dr. Simpao's pulmonary evaluation. The administrative law judge properly found that, "[w]hile the DOL technically should not have sponsored a second evaluation, this does not change the fact that the studies were conducted and included in the record." Decision and Order at 5 n.6. Hence, because claimant's designation of Dr. Simpao's October 26, 2004 report and accompanying objective tests did not exceed the evidentiary limitations pursuant to 20 C.F.R. §725.414(a), the administrative law judge considered and addressed Dr. Simpao's opinion. Decision and Order at 5.

[8] The administrative law judge did, however, find that Dr. Baker's opinion was unreasoned on the issue of the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and therefore, was insufficient to constitute an opportunity to substantiate claimant's February 2002 claim. Nevertheless, the administrative law judge concluded that a remand would be futile, as Dr. Baker's analysis with respect to the issue of total disability was reasoned and documented and, therefore, was sufficient to preclude entitlement to benefits in this case. Decision and Order at 19-20. Because claimant has

*Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1992), *alj decision summarily aff'd*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992) (court retained jurisdiction); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Accordingly, the Decision and Order – Denial of Modification of the administrative law judge 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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not challenged this determination, we affirm the administrative law judge's conclusion. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-710.