

BRB No. 10-0553 BLA

MELVIN NELSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ARCH OF WEST VIRGINIA/APOGEE)	
COAL COMPANY)	DATE ISSUED: 05/24/2011
)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Douglas A. Smoot and Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (08-BLA-6022) of Administrative Law Judge Michael P. Lesniak denying 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)). This case involves claimant's request for modification of a claim filed on January 24, 2002. In the initial Decision and Order, Administrative Law Judge Janice K. Bullard

credited claimant with 16.18 years of coal mine employment,¹ and found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 71. However, Judge Bullard found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Accordingly, Judge Bullard denied benefits. *Id.*

Claimant filed a request for modification on May 16, 2008. Director's Exhibit 72. Although Administrative Law Judge Michael P. Lesniak (the administrative law judge) found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), he found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that claimant did not establish a change in conditions, or a mistake in a determination of fact. 20 C.F.R. §725.310(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis. Claimant also argues that the administrative law judge erred in finding that the evidence did not establish that claimant's total disability was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

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).

¹ The record reflects that the miner's coal mine employment was in Virginia and West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

² Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. 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 this claim because it was filed before January 1, 2005.

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

An administrative law judge may grant modification based on a change in conditions³ or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In challenging the administrative law judge findings that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis, claimant argues that the administrative law judge failed to weigh all of the relevant evidence together, consistent with 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). In *Compton*, the Fourth Circuit held that all types of relevant evidence under Section 718.202(a) must be weighed together to determine whether a claimant suffers from pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The record contains twelve interpretations of five x-rays taken from March 6, 2002 to September 10, 2008. In his consideration of the x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. See *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 7-8.

Although Dr. Hussain, a physician with no special radiological qualifications, interpreted a March 6, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 9, Dr. Wheeler, a B reader and Board-certified radiologist, interpreted the x-ray as negative

³ In the prior decision, Administrative Law Judge Janice K. Bullard denied benefits because she found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 71. Consequently, in order to establish a change in conditions, the new evidence would have to establish the existence of pneumoconiosis.

for pneumoconiosis.⁴ Director's Exhibit 10. The administrative law judge acted within his discretion in crediting Dr. Wheeler's negative interpretation of the March 6, 2002 x-ray, over Dr. Hussain's positive interpretation, based upon Dr. Wheeler's superior qualifications. *Sheckler*, 7 BLR at 1-131; Decision and Order at 8. The administrative law judge, therefore, permissibly found that the March 6, 2002 x-ray was negative for pneumoconiosis. *Id.*

Dr. Zaldivar, a B reader, and Dr. Wheeler, a B reader and Board-certified radiologist, interpreted an October 15, 2003 x-ray as negative for pneumoconiosis. Director's Exhibits 11, 12. Because there were no other interpretations of this x-ray in the record, the administrative law judge found that the October 15, 2003 x-ray was negative for pneumoconiosis. Decision and Order at 8.

While two dually qualified physicians, Drs. Aycoth and Miller, interpreted an April 19, 2006 x-ray as positive for pneumoconiosis, Director's Exhibit 65, two equally qualified physicians, Drs. Meyer and Wiot, interpreted this x-ray as negative for the disease. Director's Exhibit 67. Similarly, while Dr. Ahmed, a B reader and Board-certified radiologist, interpreted x-rays taken on April 28, 2008 and September 10, 2008 as positive for pneumoconiosis, Director's Exhibit 72; Claimant's Exhibit 1, Dr. Wiot, an equally qualified physician, interpreted these x-rays as negative for the disease. Employer's Exhibits 1, 3. Because equally qualified physicians interpreted the April 19, 2006, April 28, 2008, and September 10, 2008 x-rays as both positive and negative for pneumoconiosis, the administrative law judge properly found that these x-rays were "inconclusive," and did not support a finding of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 7-8.

Having found that two x-rays were negative for pneumoconiosis, and that the remaining three x-rays were inconclusive as to the existence pneumoconiosis, the administrative law judge found that the x-ray evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 8.

Contrary to claimant's contention, the administrative law judge did not "simply count" the number of x-ray interpretations. Claimant's Brief at 6. In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). Because it is

⁴ Dr. Binns, a B reader and Board-certified radiologist, interpreted the March 6, 2002 x-ray for quality purposes only. Director's Exhibit 9.

supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).⁵

Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of clinical pneumoconiosis, the administrative law judge reviewed the reports of Drs. Hussain, Zaldivar, and Crisalli. The administrative law judge permissibly found that Dr. Hussain's diagnosis of pneumoconiosis was not well reasoned because it was based in part upon a positive x-ray interpretation that was called into question by the administrative law judge's earlier finding that the x-ray evidence did not support a finding of pneumoconiosis.⁶ See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 8; Director's Exhibit 9. The administrative law judge properly found that the opinions of Drs. Zaldivar and Crisalli did not support a finding of clinical pneumoconiosis.⁷ Decision and Order at 8. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁸ *Milburn Colliery Co. v. Hicks*,

⁵ Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶ In addition, as noted above, the administrative law judge permissibly found that the March 6, 2002 x-ray that Dr. Hussain interpreted as positive for pneumoconiosis was interpreted by Dr. Wheeler, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of Dr. Hussain's opinion. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

⁷ Drs. Zaldivar and Crisalli opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibit 62; Employer's Exhibit 2.

⁸ In addition to clinical pneumoconiosis, a finding of legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(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). Although Dr. Hussain diagnosed chronic obstructive pulmonary disease, his opinion is unclear as to whether he attributed the disease exclusively to claimant's cigarette smoking, or a combination of claimant's coal mine dust exposure and cigarette smoking. See Director's Exhibit 9 at 4. Although Drs. Zaldivar and Crisalli diagnosed asthma and emphysema,

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, 2-275-76 (4th Cir. 1997).

We find no merit to claimant's argument that the administrative law judge denied benefits on the basis of a negative x-ray. Claimant's Brief at 7. Rather, the administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis under any subsection at Section 718.202(a). Decision and Order at 7-8. Substantial evidence supports the administrative law judge's findings, and we affirm them, as consistent with *Compton*.

In light of our affirmance of the administrative law judge's finding that the evidence of record does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a),⁹ we affirm the administrative law judge's denial of claimant's request for modification. 20 C.F.R. §725.310(a).

they each opined that these conditions were not caused by, significantly related to, or substantially aggravated by, claimant's coal mine dust exposure. Director's Exhibit 62; Employer's Exhibit 4 at 27-28. The administrative law judge found that Dr. Hussain's opinion did not support a finding of legal pneumoconiosis. Decision and Order at 8. The administrative law judge further found that the opinions of Drs. Zaldivar and Crisalli were "well-reasoned." *Id.* The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis. *Id.* Because claimant does not challenge this finding, it is affirmed. *Skrack*, 7 BLR at 1-711.

⁹ In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we need not address claimant's contentions of error regarding the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge