BRB No. 01-0168 BLA

CHARLES W. BLAKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
METEC LEASING, INCORPORATED	)	
	)	DATE ISSUED:
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer and carrier.

Edward Waldman (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, DOLDER and McGRANERY,

Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer and carrier (employer) appeal the Decision and Order - Award of Benefits (99-BLA-0810) of Administrative Law Judge Daniel J. Roketenetz (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). Claimant filed a request for modification of Administrative Law Judge Daniel L. Leland's March 24, 1997 Decision and Order in which he denied benefits finding that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202 (2000). Director's Exhibit 141. In considering claimant's request for modification under 20 C.F.R. §725.310 (2000), the administrative law judge found that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) (2000) and that it arose from claimant's coal mine employment under 20 C.F.R. §718.203(b) (2000). He further found that all the physicians of record agreed, and employer stipulated, that claimant was totally and permanently disabled due to a respiratory impairment under 20 C.F.R. §718.204(c) (2000), and the administrative law judge so found. Decision and Order at 14. The administrative law judge also found that claimant was totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b) (2000)

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[1]The Department of Labor 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations. By Order dated August 10, 2001, the Board rescinded its order requesting supplemental briefing.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R.

pursuant to *Black Diamond Coal Mining Co. v. Director, OWCP* [*Marcum*], 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge failed to make any findings on modification under 20 C.F.R. §725.310 (2000) and asserts, alternatively, that the instant claim should be treated, not as a request for modification, but as a duplicate claim under 20 C.F.R. §725.309 (2000). Employer further contends that the administrative law judge erred in finding that the medical opinions establish that claimant has pneumoconiosis and is totally disabled due to the disease. Employer also asserts that the administrative law judge's award of benefits was based on claimant's persistence in pursuing benefits and not on claimant's condition, rendering the result of the case unfair and a violation of employer's due process rights which warrants employer's dismissal. Claimant responds, urging affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), filed a brief addressing the procedural and due process issues raised by employer. The Director supports the administrative law judge's findings on these issues. Employer has filed a reply brief.

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, they are binding upon this Board and may not be disturbed. 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).

Employer contends that the administrative law judge failed to make any finding regarding claimant's burden to establish modification of the prior denial under 20 C.F.R. §725.310 (2000) and thereby committed reversible error. Specifically, employer argues that the administrative law judge did not determine whether reopening the case would render

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§718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3]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, 65 Fed. Reg. 80, 057.

[4]By Decision and Order dated March 24, 1997, Judge Leland denied claimant's previous request for modification and the claim based on his finding that the evidence of record failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202 (2000). Director's Exhibit 141. Claimant timely filed the instant request for modification on March 20, 1998, Director's Exhibit 148, and submitted additional medical evidence. A hearing was held before the administrative law judge on September 28, 1999.

justice under the Act, or whether claimant established a change in conditions or a mistake in a determination of fact, and thus, his decision does not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a).

We affirm the administrative law judge's granting of claimant's request for modification of the prior denial as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge initially addressed claimant's burden on modification, noting that the prior denial was based on claimant's failure to establish the existence of pneumoconiosis. Decision and Order at 2. The administrative law judge then stated that he would review the newly submitted evidence in conjunction with the old evidence to determine:

> whether the Claimant can now show he suffers from pneumoconiosis, whether the pneumoconiosis arose out of his coal mine employment and whether he is total [sic] disabled due to the disease. The entire record will be reviewed to determine whether a mistake in a determination of fact occurred in the prior denial of modification.

Decision and Order at 6. The administrative law judge then found that the record evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) (2000) but that the medical opinions established the existence of the disease at 20 C.F.R. §718.202(a)(4) (2000). Having further found that claimant established that his pneumoconiosis arose out of his coal mine employment and that he was totally disabled due to the disease, the administrative law judge awarded benefits. Employer correctly contends that the administrative law judge did not explicitly find that claimant met his burden on modification either by establishing the existence of pneumoconiosis where he had previously failed to establish the existence of the disease, or by establishing his entitlement to benefits. Implicit in the administrative law judge's consideration of claimant's burden under 20 C.F.R. §725.310 (2000) and his finding of the existence of pneumoconiosis and ultimate award of benefits is, however, a determination that claimant met his burden at 20 C.F.R. §725.310 (2000). Likewise, while the administrative law judge did not make an explicit determination that to reopen the case would render justice under the Act, s*ee Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254 (1971), such a finding is implicit in the administrative law judge's ultimate award of benefits under the Act.

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[5]Inherent in an administrative law judge's authority to reopen a case on modification under 20 C.F.R. §725.310 (2000) is the discretion to find that the new evidence was not discovered and proffered in a timely manner and to conclude, therefore, that reopening the case is not justified. *See, e.g., Wilkes v. F & R Coal Co.*, 12 BLR 1-1 (1988); *see generally McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). In the instant case, there is no suggestion from any party that claimant was dilatory or otherwise

Employer next argues that the administrative law judge's credibility determinations in weighing the medical evidence and awarding benefits are contrary to those previously reached by Administrative Law Judges James W. Kerr, Jr. and Daniel L. Leland, and are thus erroneous. Employer further asserts that the administrative law judge had no jurisdiction to modify the Board's 1991 Decision and Order in *Blake v. Metec, Inc.*, BRB No. 88-3853 BLA (Oct. 29, 1991)(unpublished) wherein the Board upheld Judge Kerr's crediting of the opinions of Drs. Tuteur and Branscomb over the contrary opinion of Dr. Butler, one of claimant's treating physicians, Director's Exhibit 68, or the Board's 1993 Decision and Order in *Blake v. Metec, Inc.*, BRB No. 92-1975 BLA (Nov. 19, 1993)(unpublished) wherein the Board upheld Judge Kerr's crediting of the opinions of Drs. Tuteur and Branscomb. Director's Exhibit 80. Employer asserts that in considering claimant's entitlement to benefits on modification, the administrative law judge was bound by those evidentiary results.

Employer's contentions lack merit. In reviewing a request for modification, the factfinder 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, supra*, 404 U.S. 256. Thus, contrary to employer's contention, it was permissible for the administrative law judge to make credibility determinations which differed from those previously reached by other factfinders, even where those previous determinations were affirmed by the Board. Further, in the instant case, claimant seeks modification not of the Board's prior decisions but of Judge Leland's March 24, 1997 Decision and Order denying benefits. Director's Exhibits 141, 148.

Employer next contends that the instant request should not be adjudicated as a request for modification. Specifically, employer argues that because the instant request for modification was filed on March 20, 1998, more than one year after the Board's November 19, 1993 Decision and Order affirming Judge Kerr's Decision and Order denying benefits, *see* Director's Exhibit 80, it should be adjudicated as a duplicate claim under 20 C.F.R. §725.309(d) (2000). Employer asserts that the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 134 n.6 (1997), recognized that the Act does not provide for multiple modification requests.

Employer's contentions lack merit. Modification under 20 C.F.R. §725.310 (2000) is available, *inter alia*, within one year after the "denial of a claim." 20 C.F.R. §725.310 (2000). Moreover, a new petition for modification may be filed within one year of the denial of a prior petition for modification; the modification process is, therefore, available multiple times. *See Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). Further, the pertinent prior denial is not the Board's 1993 Decision and Order but Judge Leland's March 24, 1997 Decision and Order. Claimant's March 20, 1998 request for

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acted in bad faith in pursuing modification of the prior denial.

modification of Judge Leland's decision was thus timely and invoked the provisions of 20 C.F.R. §725.310 (2000).

Employer next contends that the administrative law judge erred in finding the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) (2000). Employer argues that the administrative law judge provided no rationale for according greater weight to the opinions of claimant's treating physicians. Employer further argues that the record provides no support for favoring the opinions rendered by claimant's treating physicians.

Employer's contention is refuted by the record. The record shows that the administrative law judge provided several reasons for assigning greater probative weight to the opinions of Drs. Butler, Rogness and Connolly, claimant's treating physicians who diagnosed pneumoconiosis. Director's Exhibits 26, 85, 101, 109; Claimant's Exhibits 2, 7. The administrative law judge specifically found that these physicians had documented their familiarity with, and treatment of, claimant's condition over significant periods of time. *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); Decision and Order at 12, 13. He further properly found that the opinions rendered by Drs. Butler, Rogness and Connolly were well-reasoned and well-documented "being based not only on their lengthy treatment of the patient, but on accurate coal mining, smoking and medical histories, as well as [on] an abundance of objective medical data of record." *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 13. We, therefore, reject employer's arguments in this regard and affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). *See* 20 C.F.R. §718.202(a)(4).

Employer further contends that the administrative law judge erred in finding that claimant established disability causation. Employer argues that the administrative law judge accorded greatest weight to the opinions of Drs. Butler, Russakoff, Cohen and Connolly by again summarily relying on his preference for the opinions of claimant's treating physicians. Employer also argues that the administrative law judge erred in according less weight to the opinions of Drs. Tuteur and Branscomb on the basis that they did not find the existence of pneumoconiosis established. Employer asserts that neither physician premised his opinion regarding disability causation on the fact that he did not find pneumoconiosis established.

We reject employer's contentions as they lack merit. The record refutes employer's

[6]Employer asserts that in weighing the evidence relevant to the issue of disability causation, the administrative law judge mistakenly identified Dr. Cohen as a treating physician, whereas Dr. Cohen never examined claimant. Employer argues that the administrative law judge thereby misconstrued the facts of the case. Employer's Brief at 27 n.4. Contrary to employer's assertion, the administrative law judge did not identify Dr. Cohen as a treating physician. *See* Decision and Order at 14.

argument that the administrative law judge mechanically credited the opinions of claimant's treating physicians, either at 20 C.F.R. §718.202(a)(4) (2000), *see* discussion, *supra*, or at 20 C.F.R. §718.204(b) (2000), *see* Decision and Order at 14. In finding that claimant established disability causation, the administrative law judge accorded greatest probative weight to the opinions of Drs. Russakoff, Butler, Cohen and Connolly that claimant's disability was due to his pneumoconiosis. He properly found that Dr. Butler was claimant's treating physician from 1986 to 1996 and that Dr. Connolly was claimant's most recent treating physician. *See Tedesco, supra; Onderko, supra.* The administrative law judge also properly found that Dr. Cohen was a pulmonary specialist; in fact, the record shows that Dr. Cohen is Board-certified in internal medicine in the subspeciality of pulmonary disease. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Claimant's Exhibit 3. Further, Dr. Russakoff opined that claimant's severe respiratory impairment was secondary to his pneumoconiosis, which arose out of his coal mine employment, and to his chronic obstructive pulmonary disease with emphysema. Director's Exhibit 6. The administrative law judge permissibly credited Dr. Russakoff's opinion based on his finding that it was consistent with the opinions of Drs. Butler, Cohen and Connolly and supported claimant's burden on disability causation. *See* 20 C.F.R. §718.204(c). Further, the administrative law judge did not err in finding that the opinions of Drs. Tuteur and Branscomb were less probative of the issue of the cause of claimant's disability since these physicians found that claimant did not have pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *Garcia v. Director, OWCP*, 869 F.2d 1413, 12 BLR 2-231 (10th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *but see Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). Inasmuch as the administrative law judge's finding that claimant met his burden on disability causation is supported by substantial evidence, it is affirmed. *See* 20 C.F.R. §718.204(c).

Lastly, employer argues that if the Board affirms the administrative law judge's award of benefits, employer should not be held liable for the payment of benefits because the protracted procedural history of this case has resulted in a violation of employer's right to due process. Employer argues that the administrative law judge granted modification of the prior denial, not because of a mistake in a determination of fact or a change in conditions, but rather, in recognition of claimant's persistence in his pursuit of benefits. Employer further asserts that it should be dismissed as it has been denied its fair day in court where, as here, claimant filed multiple requests for modification, making the outcome of the case unreliable. Employer's Brief at 29.

Employer's contentions lack merit. The record reveals that employer had an opportunity to develop evidence and defend against claimant's application for benefits at each stage of adjudication. Notwithstanding employer's arguments, we hold that employer has not been deprived of a fair opportunity to mount a meaningful defense. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999); *Island Creek*

Coal Co. v. Holdman, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *cf. Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Moreover, there is no support in the record for employer's bald assertion that the administrative law judge's award of benefits was based on claimant's persistence and not on the medical evidence before him. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107, 108 (1992).

Based on the foregoing, we affirm the administrative law judge's granting of claimant's request for modification and his award of benefits.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits, is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

REGINA C. McGRANERY
Administrative Appeals Judge

[7]In its reply brief, employer includes, in a footnote, the following statement:

> There is no evidence in this case that pneumoconiosis is a progressive disease, and this case was tried based upon the regulations in effect as of January 18, 2001. To the extent the new regulations are found to apply, this case should be remanded so that the parties can submit new proof responsive to the new regulations on the progressivity of pneumoconiosis.

Employer's Reply Brief at 9 n.2. Employer's suggestion that this case involves the issue of the progressivity of pneumoconiosis is contrary to the facts. Rather, this case involves a claimant who established, on modification, the existence of pneumoconiosis where he had previously failed to establish the existence of the disease. Employer's request for a remand of the case on this basis is thus denied.

I concur in the result only.

NANCY S. DOLDER
Administrative Appeals Judge