

BRB No. 05-0203 BLA

EUGENE PAUL OSBORNE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PEACH TREE COAL, INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS’ PNEUMOCONIOSIS FUND)	DATE ISSUED: 09/30/2005
)	
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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Workers’ Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order (03-BLA-0224) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits 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).¹ This case involves claimant's request for modification of a claim filed on May 13, 1999. In the initial Decision and Order, Administrative Law Judge Jeffrey Tureck found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 37. Accordingly, Judge Tureck denied benefits. *Id.* By Decision and Order dated September 14, 2001, the Board affirmed Judge Tureck's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Osborne v. Teays Inc.*, BRB No. 01-0117 BLA (Sept. 14, 2001) (unpublished). The Board, therefore, affirmed Judge Tureck's denial of benefits. *Id.*

Claimant filed a request for modification on October 26, 2001. Director's Exhibit 51. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) denied claimant's request for modification. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. Employer's insurance carrier, the West Virginia Coal-Workers' Pneumoconiosis Fund, responds in support of the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),² an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the

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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Tureck found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 37. The Board subsequently affirmed these findings. *Osborne v. Teays Inc.*, BRB No. 01-0117 BLA (Sept. 14, 2001) (unpublished). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

Claimant argues that the administrative law judge erred in his consideration of the newly submitted x-ray evidence. The newly submitted evidence consists of a total of four interpretations of two x-rays. While Dr. Cappiello, a B reader and Board-certified radiologist, interpreted claimant's October 4, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 51, Dr. Binns, a similarly qualified physician, interpreted this x-ray as negative for the disease. Director's Exhibit 64. Dr. Ranavaya, a physician with no special radiological qualifications also interpreted this x-ray as positive for pneumoconiosis. Director's Exhibit 60. Dr. Zaldivar, a B reader, rendered a negative interpretation of claimant's October 9, 2002 x-ray.

In his consideration of the newly submitted x-ray interpretations of record, 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 Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 6. In regard to the interpretations of claimant's October 4, 2001 x-ray, the administrative law judge found that the interpretations of this x-ray rendered by Drs. Cappiello and Binns were entitled to greater weight than Dr. Ranavaya's interpretation, based upon the superior qualifications of Drs. Cappiello and Binns. *Id.* Because Drs. Cappiello and Binns disagreed as to whether claimant's October 4, 2001 x-ray was positive for pneumoconiosis, the administrative law judge found that this x-ray was "inconclusive." Decision and Order at 6. Because Dr. Zaldivar's negative interpretation of claimant's October 9, 2002 x-ray was the only interpretation of this film, the administrative law judge found that claimant's October 9, 2002 x-ray was negative for the presence of pneumoconiosis. *Id.* at 7. The administrative law judge, therefore, found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). He also found, in the alternative, that even if he had considered the October 4 x-ray to be positive, the evidence would be in equipoise and therefore

insufficient to establish the existence of pneumoconiosis.³ Because it is based upon substantial evidence, the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Because the record does not contain any other newly submitted evidence, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Nataloni, supra*.

Modification may also be based upon a mistake in a determination of fact. In reviewing the record as a whole on modification, an administrative law judge 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'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

In considering whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge stated that Judge Tureck had correctly determined that the weight of the x-ray evidence was negative for pneumoconiosis and that:

Judge Tureck also found the better documented, and correspondingly more probative, medical opinion did not indicate [claimant] had pneumoconiosis. As affirmed by the Benefits Review Board, his analysis on the medical opinion did not contain any factual errors.

The preponderance of the more probative evidence before Judge Tureck at the close of his June 2000 hearing and the new chest x-ray evidence presented with the present modification request establishes that pneumoconiosis is not present in [claimant's] lungs. Accordingly, based on my review of the entire record, I conclude no mistake of fact exists in Judge Tureck's denial of [claimant's] claim for black lung disability benefits, as affirmed by the [Board].

Decision and Order at 7.

³In view of his alternative finding, we need not decide whether it was rational to assign no weight to Dr. Ranavaya's positive reading of the October 4 x-ray, while assigning dispositive weight to Dr. Zaldivar's negative reading of the October 9 x-ray, since their credentials are equal.

In discussing the medical opinions of record, Judge Tureck had found that both Dr. Rasmussen and Dr. Zaldivar had conducted thorough pulmonary examinations and had provided well-reasoned opinions. Judge Tureck gave less weight to Dr. Rasmussen's opinion diagnosing pneumoconiosis and attributing claimant's disabling respiratory impairment to pneumoconiosis and smoking. Judge Tureck assigned more weight to the opinion of Dr. Zaldivar, finding no evidence of pneumoconiosis and attributing claimant's significant pulmonary impairment to smoking. For Judge Tureck, the balance was tipped in favor of Dr. Zaldivar's report by his knowledge of test results showing that claimant was still a heavy smoker: "Smoking 1½ packs of cigarettes a day clearly could produce the degree of respiratory impairment from which the claimant suffers." 2000 Decision and Order at 4.

On appeal, claimant argues that the administrative law judge did not properly review the evidence of record: that he reviewed only the x-ray evidence in determining the presence of pneumoconiosis. Brief for Claimant at 3 (unpaginated). The record supports claimant's contention. The first excerpt of the administrative law judge's decision quoted above, consisting of two sentences, constitutes the administrative law judge's entire discussion of the medical opinion evidence. The administrative law judge did not even identify the authors of the medical reports, much less analyze their contents. Thus, claimant raised the issue of the administrative law judge's failure to evaluate the medical opinion evidence on the existence of pneumoconiosis.

Claimant further argues on appeal that if the administrative law judge had reviewed the medical opinion evidence, he would have realized that Judge Tureck had erred in crediting Dr. Zaldivar's opinion because it "was based on his belief that there must be x-ray evidence of pneumoconiosis before it can effect [sic] the claimant's breathing." Brief for Claimant at 6 (unpaginated). This is a fair characterization of Dr. Zaldivar's report. He stated:

For the lungs to have been damaged by coal dust, the lungs must have reacted to the actual particles that were inhaled. Although the absence of radiograph pneumoconiosis does not exclude the diagnosis of coal workers' pneumoconiosis, it does mean that no lung damage is expected to have occurred due to reaction to coal dust since there is no reaction evident radiographically. Compared to the smoking history, the absence of reaction to the coal dust radiographically means that damage to the airways must have been caused by another agent which in this case is smoking.

Director's Exhibit 35.

Dr. Zaldivar's report suggests, as claimant contends, that the doctor does not recognize legal pneumoconiosis. He does not acknowledge that coal dust exposure can

be harmful to the lungs unless the evidence shows “actual [coal dust] particles that were inhaled.” That is consistent with the regulatory definition of clinical pneumoconiosis:

“Clinical pneumoconiosis” consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(1). For that reason, Dr. Zaldivar requires radiographic evidence to relate any impairment to pneumoconiosis. In contrast to clinical pneumoconiosis, legal pneumoconiosis is not characterized by the presence of coal dust particles in the lung; nor is it diagnosed by x-ray, biopsy or autopsy. The definition of legal pneumoconiosis reflects a congressional determination that coal mine employment can contribute significantly to chronic lung disease or to the development of a respiratory or pulmonary impairment; that disease or impairment is not recognized by the medical community as pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b).⁴ If, as claimant argues, Dr. Zaldivar does not recognize the existence of legal pneumoconiosis, his opinion on the existence of pneumoconiosis in claimant has no probative value, it is “contrary to the congressional determinations implicit in the Act’s provisions.” *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1321, 19 BLR 2-192, 2-206 (7th Cir. 1995) (quoting *Pancake v. Amax Coal Co.*, 858 F.2d 1250, 1256 (7th Cir. 1988)). The law is clear that “a physician’s opinion based on a premise ‘antithetical’ to the Act is not probative.” *Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, 21 BLR 2-34, 2-46 (4th Cir. 1997). If claimant is correct, Judge Tureck erred in relying upon Dr. Zaldivar’s opinion to find that claimant did not establish the existence of pneumoconiosis. It is, of course, for the administrative law judge to interpret medical opinion evidence and neither Judge Tureck nor the administrative law judge has proffered his interpretation of this paragraph. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The case must be remanded for the

⁴That regulation provides in relevant part:

(2) *Legal Pneumoconiosis*. “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease “arising out of coal mine employment” includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

administrative law judge to expressly address claimant's argument. If the administrative law judge agrees with claimant that Dr. Zaldivar's opinion does not address the existence of legal pneumoconiosis, Dr. Rasmussen's opinion would be sufficient to support a finding of pneumoconiosis, since it was previously held to be credible.

The dissent's explanation for refusing to consider claimant's argument on appeal is puzzling: "Claimant does not contend that there was a mistake in a determination of fact in regard to the existence of pneumoconiosis." The record reflects that Judge Tureck had denied benefits because the existence of pneumoconiosis was not established; and he had weighed the medical opinion evidence only with regard to that issue. Because claimant argues that the administrative law judge erred in failing to evaluate the medical opinion evidence to determine the presence of pneumoconiosis, and that Judge Tureck had erred in crediting Dr. Zaldivar's opinion, the only reasonable construction of claimant's argument is that the administrative law judge erred in finding Judge Tureck had not made a mistake of fact when he held that claimant had failed to establish the existence of pneumoconiosis.⁵

In sum, the case must be remanded because: claimant has properly raised the issue of whether Judge Tureck erred in finding the existence of pneumoconiosis was not established and there is evidence in the record supporting claimant's argument which the administrative law judge has not considered. If the administrative law judge agrees with claimant's interpretation of Dr. Zaldivar's opinion, he must determine whether Dr. Rasmussen's opinion establishes medical or legal pneumoconiosis and then weigh it together with the x-ray evidence of record to determine whether claimant has established a black lung claim, recognizing that "[e]vidence that does not establish medical pneumoconiosis....should not necessarily be treated as evidence weighing *against* a finding of legal pneumoconiosis." *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-173 (4th Cir. 2000). In the event the administrative law judge determines to modify Judge Tureck's opinion on the existence of pneumoconiosis, he should proceed to consider entitlement.

⁵The dissent is disingenuous in stating that claimant's argument relates to the sufficiency of the evidence to establish the cause of his totally disabling respiratory impairment as opposed to the existence of pneumoconiosis. Claimant's argument is that Dr. Zaldivar's opinion that claimant does not have pneumoconiosis is not a credible medical opinion under the Act because he does not acknowledge the existence of legal pneumoconiosis, *i.e.*, that coal mine employment can significantly contribute to lung disease or to a respiratory or pulmonary impairment, despite the absence of actual coal dust particles in the lung which would result in radiographic change.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion insofar as it affirms Administrative Law Judge Richard T. Stansell-Gamm's (the administrative law judge's) finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310(2000). However, I would also affirm the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. In this case, claimant raises two issues on appeal regarding whether the administrative law judge erred in finding that there was not a mistake in determination of fact pursuant to 20 C.F.R. §725.310 (2000):

1. Whether the ALJ erred in evaluating only the x-ray evidence in determining the presence of pneumoconiosis.

2. Whether the ALJ erred in finding that the claimant's pneumoconiosis did not contribute to his totally disabling respiratory impairment.

Claimant's Brief at 3.

Claimant's first argument, that the administrative law judge made no effort to review the medical opinion evidence, is without merit. The administrative law judge clearly addressed the medical opinion evidence of record.

Claimant's second argument focuses upon whether the evidence of record is sufficient to establish that his totally disabling respiratory impairment is due to pneumoconiosis. See Claimant's Brief at 4. Claimant's citation to *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990) and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994) further supports the fact that claimant's contentions of error relate to the issue of the cause of his total disability, rather than to the issue of the existence of pneumoconiosis. Administrative Law Judge Jeffrey Tureck, having found the evidence insufficient to establish the existence of pneumoconiosis, did not address whether claimant suffered from a totally disabling respiratory impairment or whether such an impairment, if present, was attributable to pneumoconiosis. Consequently, the issue of whether claimant's total disability is due to pneumoconiosis is not relevant in determining whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Thus, the administrative law judge appropriately did not address the issue of whether the evidence is sufficient to establish that claimant's totally disabling respiratory impairment is due to pneumoconiosis.

I would affirm the administrative law judge's denial of benefits.

ROY P. SMITH
Administrative Appeals Judge