BRB No. 12-0406 BLA

DAVID. C. WILMOTH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
K&J TRUCKING COMPANY/INSURANCE COMPANY OF NORTH AMERICA	)	DATE ISSUED: 04/12/2013
	)	
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 – Denying Benefits on Request for Modification of Live Miner's Claim of Alan J. Bergstrom, Administrative Law Judge, United States Department of Labor.

David C. Wilmoth, Locust Grove, Georgia, *pro se*.

Philip J. Reverman, Jr. (Boehl, Stopher & Graves), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order – Denying Benefits on Request for Modification of Live Miner's Claim (2006-BLA-05287)

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[1] At the hearing before the administrative law judge, claimant was represented by Ron Carson, a benefits counselor with Stone Mountain Health Services. On claimant's behalf, Jerry Murphree, a benefits counselor with Stone Mountain Health Services, has requested that the Board review the claim in its entirety, as he is not representing

of Administrative Law Judge Alan J. Bergstrom (the administrative law judge), rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).

Claimant filed his claim for benefits on May 31, 2002.[2] On July 29, 2004, Administrative Law Judge C. Richard Avery denied benefits, finding that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, or disability causation pursuant to 20 C.F.R. §718.204(c).[3] On January 18, 2005, claimant filed a timely request for modification pursuant to 20 C.F.R. §725.310, and submitted additional evidence.

Following a hearing on May 10, 2011, the administrative law judge accepted the parties' stipulation to twelve years of coal mine employment, and adjudicated the claim pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore was precluded from entitlement to benefits. Accordingly, claimant's request for modification was denied.

In the present appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by

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claimant on appeal. Claimant's Notice of Appeal; *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §921(c)(4)). Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). Because claimant filed his claim prior to January 1, 2005, the amendments are not applicable to this case. Director's Exhibit 2.

[3] *See* Director's Exhibit 42 at 7, 9-10.

substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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 on a change in conditions or 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'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). In considering whether a change in conditions has been established, an administrative law judge must perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *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 present case, the administrative law judge determined that claimant failed to establish either the existence of pneumoconiosis at Section 718.202 or disability causation at Section 718.204(c) in the prior decision.

At Section 718.202(a)(1), the administrative law judge reviewed the four x-rays taken since the prior denial of the claim, and determined that the x-ray dated January 25,

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

2005,[5] was interpreted as positive for pneumoconiosis by Dr. Cappiello, a dually qualified Board-certified radiologist and B reader, Director's Exhibits 46, 47, and as negative by dually qualified Dr. Spitz, Employer's Exhibit 2. The January 18, 2006 x-ray was read as positive by dually qualified Drs. Alexander and Miller, Claimant's Exhibits 2, 7, and as negative by dually qualified Dr. Wiot, Employer's Exhibit 3, and B reader Dr. Repsher, Employer's Exhibit 1. The March 19, 2007 x-ray was read as positive by dually qualified Dr. Miller, Claimant's Exhibit 1, and as negative by dually qualified Dr. Spitz, Employer's Exhibit 6. The most recent x-ray dated March 10, 2010 was read as positive by dually qualified Dr. Alexander, Claimant's Exhibit 6, and as negative by dually qualified Dr. Meyer, Employer's Exhibit 8. *See* Decision and Order at 8-9, 19. After considering the qualifications of the physicians and the fact that each x-ray received an equal number of positive and negative readings, the administrative law judge acted within his discretion in finding that this evidence was in equipoise and, thus, was insufficient to carry claimant's burden of proof. Decision and Order at 20; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge also reviewed the two x-rays taken on August 16, 2002 and January 9, 2003, which were considered in the prior denial and found to be in equipoise.[6] While claimant submitted a rereading of the August 16, 2002 x-ray by a dually qualified reader in support of modification, Claimant's Exhibit 3, the administrative law judge permissibly determined that the rereading was entitled to no weight, as the interpretation was closely similar to the original B reader interpretation of this film,[7] Director's Exhibit

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[5] In summarizing the evidence, the administrative law judge correctly listed the January 25, 2005 x-ray contained at Director's Exhibits 46, 47, *see* Decision and Order at 8, but later referred to it in his analysis as "the January 15, 2005 x-ray." *See* Decision and Order at 19.

[6] Based on the qualifications of the readers, Administrative Law Judge C. Richard Avery found that the August 16, 2002 x-ray was negative for pneumoconiosis, as it was interpreted as positive by a B reader and as negative by a dually qualified physician; and that the January 9, 2003 x-ray was positive for pneumoconiosis, as it was interpreted as positive by a dually qualified physician and as negative by a B reader. 2004 Decision and Order at 3, 6; Director's Exhibits 9-11; Employer's Exhibit 1. As the x-rays were taken only five months apart, Judge Avery concluded that the x-ray evidence was in equipoise. 2004 Decision and Order at 6.

[7] Dr. Baker interpreted the August 16, 2002 x-ray as showing "some pleural thickening; Classification is p/t, 1/0," Director's Exhibit 9, while Dr. Alexander reread the x-ray as showing "no pleural thickening; Classification is p/p, 1/0," Claimant's Exhibit 3. Decision and Order at 8.

9, and the x-ray was remote in time when compared to the more recent x-rays. Decision and Order at 19; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). As substantial evidence supports the administrative law judge's determination that the x-ray evidence is in equipoise, we affirm his finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 20; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-84-85.

We also affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), (3), as the record contains no lung biopsy evidence and the presumptions at 20 C.F.R. §§718.304, 718.305 and 718.306 are not applicable.

After determining that the medical opinions considered in the prior denial were found to be equally probative but insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4),[8] Decision and Order at 3, the administrative law judge considered the newly submitted medical opinions of Drs. Jones, Alam, Repsher and Fino, of which only those of Drs. Jones and Alam are supportive of claimant's burden.[9] Decision and Order at 21. However, the administrative law judge identified

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[8] Judge Avery determined that Dr. Baker, who diagnosed pneumoconiosis, and Drs. Dahhan and Branscomb, who found that claimant does not have pneumoconiosis, possessed equal expertise in the field of pulmonary medicine. However, Judge Avery found that Dr. Baker's opinion was not well-reasoned because the physician based his diagnosis on his own positive x-ray interpretation and claimant's history of coal dust exposure, whereas this x-ray was reread as negative by a better-qualified interpreter, and Judge Avery found no indication of how Dr. Baker's clinical findings supported his diagnosis. 2004 Decision and Order at 7; Director's Exhibit 9. Judge Avery found Dr. Dahhan's opinion "somewhat more probative than Dr. Baker's" because although Dr. Dahhan relied in part on a negative x-ray that was reread as positive by a better-qualified reader, he persuasively explained how the examination and other testing of claimant supported his conclusions. 2004 Decision and Order at 7; Director's Exhibit 10. Lastly, Judge Avery found that Dr. Branscomb's failure to address the x-ray evidence detracted from the probative value of his opinion. 2004 Decision and Order at 7; Director's Exhibit 38.

[9] Dr. Jones treated claimant for two years for diabetes, hypertension, and heart disease, and diagnosed "Black Lung" and cor pulmonale from restrictive lung disease in a report dated April 18, 2005. Decision and Order at 12, 15, 21-22; Director's Exhibit 47. Dr. Jones later testified that he did not personally diagnose Black Lung, but relied on other doctors' reports, and that his testing revealed restrictive lung disease. Employer's Exhibit 5.

various deficiencies in their opinions and ultimately found them insufficiently reasoned to support a finding of pneumoconiosis at Section 718.202(a)(4). In so finding, the administrative law judge determined that Dr. Jones originally reported that claimant had black lung based on his long history of coal mine employment, "deteriorating B-readings of x-rays," and decreasing values on pulmonary function studies. However, as Dr. Jones did not identify the dates, physicians or locations of the x-ray readings or studies he relied upon, the administrative law judge permissibly found that the opinion was entitled to limited weight. Decision and Order at 12; *see Jericol Mining, Inc. v. Napier,* 301 F.3d 703, 22 BLR 2-537, 2-547 (6th Cir. 2002). Additionally, the administrative law judge questioned Dr. Jones's reference to "deteriorating B-readings of x-rays," in light of the administrative law judge's own determination that the x-ray evidence had remained "essentially unchanged" and did not establish the existence of pneumoconiosis. Decision and Order at 12, 22; Director's Exhibit 47 at 10-11. Further, while Dr. Jones referenced a cardiologist's diagnosis of cor pulmonale resulting from restrictive lung disease, and identified Dr. Amin as claimant's cardiologist, the administrative law judge observed that "no evidence from a cardiologist has been submitted," either on modification, or in the previous proceeding. *Id*. at 12, 15, 21-22; *see* Employer's Exhibit 5 at 16, 18, 29-31. Dr. Jones also testified that he did not personally diagnose black lung, but was informed by claimant of other doctors' diagnoses of black lung, cardiomyopathy and hypoxia; and that, had he known of other doctors' reports concluding that claimant did not have black lung, he would have changed his use of the term "black lung" to "restrictive lung disease."[10] Decision and Order at 12, 15, 21-22; Director's Exhibit 47; Employer's Exhibit 5 at 7-9, 8-10, 13-14, 16, 22-24, 28-31.

Dr. Alam performed a pulmonary evaluation on May 18, 2006, and followed claimant's course until December 2007. Dr. Alam diagnosed coal workers' pneumoconiosis, sleep apnea, obesity, and hypoxemia from chronic obstructive pulmonary disease attributable to coal dust exposure and smoking. Decision and Order at 16-17, 21-22; Claimant's Exhibit 5 at 2; Employer's Exhibit 7 at 16-17, 30-31.

Dr. Repsher examined claimant on January 18, 2006 and diagnosed hypoxemia due to obesity, but found no pneumoconiosis or other pulmonary or respiratory disease or condition. Decision and Order at 13-14, 21, 22; Employer's Exhibit 1 at 3-4.

Dr. Fino performed a medical records review on October 29, 2008, and concluded that claimant's pulmonary system was functionally normal, and that he does not suffer from pneumoconiosis or any other respiratory impairment. Decision and Order at 14, 21, 22; Employer's Exhibit 4 at 2, 4-5.

[10] Dr. Jones confirmed that his medical care of claimant did not involve any diagnosis of, or treatment for, any type of black lung disease or coal workers' pneumoconiosis. Employer's Exhibit 5 at 15.

The determination of whether a medical opinion is adequately reasoned is a credibility matter reserved to the discretion of the administrative law judge as fact-finder, *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc), and requires evaluation of the documentary bases underlying the opinion. *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Because Dr. Jones relied on evidence that was not contained in the record, the administrative law judge was unable to determine whether the documentation underlying Dr. Jones's opinion supported his conclusions. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Thus, the administrative law judge rationally discounted Dr. Jones's diagnosis of pneumoconiosis. Decision and Order at 12, 22.

Similarly, the administrative law judge identified various inadequacies in Dr. Alam's medical opinion. Dr. Alam testified that changes on a May 18, 2006 x-ray were consistent with coal workers' pneumoconiosis, based on the interpretation of Dr. Datu and his own interpretation and clinical information. However, the administrative law judge determined that this x-ray was not admitted into the record, plus Dr. Alam acknowledged that he is not a Board-certified radiologist or B reader, and that Dr. Datu did not diagnose coal workers' pneumoconiosis or cardiomegaly. Decision and Order at 16, 22; Employer's Exhibit 7 at 6-15. Additionally, the administrative law judge found that Dr. Alam relied upon an inaccurate surface coal mine employment history of seventeen years, rather than twelve years. Decision and Order at 22; *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Further, the administrative law judge noted that Dr. Alam acknowledged that his diagnosis of chronic cor pulmonale from chronic lung disease was based on "swelling of the lower extremities" and the findings of a cardiologist in Georgia, but not his own testing, because "we didn't feel that it was necessary to do it again." Decision and Order at 16, 22; Employer's Exhibit 7 at 17-18. The administrative law judge also noted that Dr. Alam included hypoxemia in his findings because it was diagnosed by Dr. Jones, and claimant was on supplemental oxygen. Decision and Order at 22; Employer's Exhibit 7 at 19. Finally, the administrative law judge considered Dr. Alam's testimony that claimant's respiratory complaints, and the abnormalities demonstrated on pulmonary function testing,[11] blood gas studies and physical examination could also relate entirely to medical conditions unrelated to coal dust exposure, such as smoking, sleep apnea, heart failure, and obesity. Decision and Order at 16-17, 21-22; Claimant's Exhibit 5 at 2, 3; Employer's Exhibit 7 at 16-17, 30, 31.

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[11] The administrative law judge further noted that the August 4, 2006 pulmonary function study relied upon by Dr. Alam was not admitted into the record. Decision and Order at 17 n.15, 22; Employer's Exhibit 7 at 22, 25, 33.

Because evidence which calls into question the reliability of the tests upon which a physician's opinion is based is relevant to determining whether the opinion is documented and reasoned, the administrative law judge properly considered Dr. Alam's reliance on evidence outside the record, and his acceptance of other physicians' diagnoses and testing in evaluating claimant's health conditions. Employer's Exhibit 7 at 17-18; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Thus, the administrative law judge permissibly found that the opinion of Dr. Alam was insufficiently documented and reasoned to establish the existence of pneumoconiosis at Section 718.202(a)(4).

As substantial evidence supports the administrative law judge's determination that the evidence of record is insufficient to establish the existence of pneumoconiosis at Section 718.202(a), we affirm his denial of modification pursuant to Section 725.310, and his finding that claimant is precluded from entitlement to benefits. *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits on Request for Modification of Live Miner's Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge