BRB No. 01-0785 BLA

REXFORD STAPLETON	)	
	)	
Claimant-Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
HADDIX MINING AND DEVELOPMENT CORPORATION	)	
	)	
and	)	
	)	
AMERICAN BUSINESS AND MERCANTILE INSURANCE MUTUAL COMPANY, INC.	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

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

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonsburg, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Employer appeals the Decision and Order - Granting Modification and Awarding Benefits (2000-BLA-0103) of Administrative Law Judge Daniel J. Roketenetz 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] The administrative law judge found the instant case to be a request for modification of the administrative law judge's Decision and Order - Denial of Benefits issued on October 21, 1997, denying claimant's prior request for modification.

In the original Decision and Order, Administrative Law Judge Charles W. Campbell credited claimant with fourteen years of coal mine employment and adjudicated the claim under 20 C.F.R. Part 718, based on claimant's April 16, 1987 filing date. Judge Campbell found the medical opinion evidence sufficient to establish the existence of pneumo-coniosis arising out of coal mine employment. However, he found the medical evidence of record insufficient to establish that claimant was totally disabled due to pneumoconiosis. Accordingly, Judge Campbell denied benefits. Director's Exhibit 64. In an Order issued on March 30, 1994, the Board dismissed claimant's appeal of Judge Campbell's Decision and Order as abandoned, after claimant failed to respond to the Board's March 8,

[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

1994 Show Cause Order. *Stapleton v. Haddix Mining and Development Corp.,* BRB No. 93-1803 BLA (Mar. 30, 1994)(Order)(unpub.); Director's Exhibits 65, 66.

On May 18, 1994 claimant requested modification of the denial of his 1987 claim, which was initially denied by the district director on August 2, 1995. Director's Exhibits 67, 83. The case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Daniel J. Roketenetz (the administrative law judge). Director's Exhibit 98. The administrative law judge initially found the evidence of record established an additional two years of coal mine employment and, thus, credited claimant with sixteen years of coal mine employment. 1997 Decision and Order - Denial of Benefits (1997 Decision and Order) at 6; Director's Exhibit 114. Addressing claimant's petition for modification, the administrative law judge stated that Judge Campbell, in finding that claimant established the existence of pneumoconiosis, based this finding on the "true doubt rule," which was subsequently rejected by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). 1997 Decision and Order at 5. The administrative law judge, therefore, stated that he would consider all of the evidence of record to determine whether claimant has established the existence of pneumoconiosis as well as reviewing the newly submitted evidence to determine whether claimant established that he is totally disabled due to pneumoconiosis, the element of entitlement previously adjudicated against him. In weighing the medical evidence of record, the administrative law judge found that the evidence is insufficient to establish the existence of pneumoconiosis. 1997 Decision and Order at 12. The administrative law judge thus found that claimant failed to establish a change in conditions regarding the threshold element of entitlement. *Id*. Additionally, the administrative law judge found no mistake in a determination of fact regarding claimant's entitlement to benefits. Accordingly, the administrative law judge denied benefits. In an Order dated December 12, 1997, the administrative law judge denied claimant's request for reconsideration. Director's Exhibit 116.

On September 25, 1998, claimant filed a request for modification of the 1997 denial of his claim, which was initially granted by the district director on August 9, 1999. Director's Exhibits 117, 142, 149. Employer requested a formal hearing and the case was transferred to the Office of Administrative Law Judges. Initially, the administrative law judge reaffirmed his decision to credit claimant with sixteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Addressing the merits of entitlement, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis arising out of claimant's coal mine employment pursuant to 20

C.F.R. §§718.202(a)(2) and 718.203(b). The administrative law judge further found that the evidence was sufficient to establish a total respiratory disability pursuant to Section 718.204(b).[2] Lastly, the administrative law judge found the medical evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's total respiratory disability pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that claimant established a change in conditions pursuant to Section 725.310 (2000) and also that claimant had proven the elements of entitlement under Part 718. Accordingly, the administrative law judge awarded benefits commencing as of September 1, 1998, the month in which claimant filed his current request for modification.[3]

On appeal, employer challenges the administrative law judge's award of benefits arguing that the administrative law judge erred in finding the medical evidence of record sufficient to establish that claimant's pneumoconiosis was a substantially contributing cause of his total respiratory disability pursuant to Section 718.204(c). Employer also contends that this case should be dismissed because the court lacks jurisdiction as this is claimant's second request for modification. In addition, employer generally contends that the administrative law judge's findings under Sections 718.202(a) and 718.204(b) must be vacated. In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief on the merits of this appeal.[4]

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[2] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), 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) (2000), is now found at 20 C.F.R. §718.204(c).

[3] Pursuant to claimant's motion for reconsideration, the administrative law judge reaffirmed his determination of September 1, 1998, as the date from which benefits commence, finding that the record does not support a finding of the specific date from which claimant became totally disabled due to pneumoconiosis. Decision and Order Denying Claimant's Motion for Reconsideration.

[4] The parties do not challenge the administrative law judge's decision to credit claimant with sixteen years of coal mine employment or his findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(b)(2)(i), (ii) and (iii). These findings are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,[5] has held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made, even where no specific allegation of either has been made. Furthermore, in determining whether modification has been established pursuant to Section 725.310 (2000),[6] the 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 weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

Initially, employer argues that the instant case should be dismissed for lack of jurisdiction, arguing that while "the regulations allow for modification within one-year of the denial of a claim, a claimant, may not perpetually seek benefits by filing repeated requests for modification," citing *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 134 n.6 (1997). Employer's Brief at 13. Consequently, since this is claimant's second request for modification, employer argues that the case must be dismissed for lack of jurisdiction.

Employer's contention is rejected. Modification under Section 725.310 (2000) is available, *inter alia*, within one year after the "denial of a claim." 20

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[5] The administrative law judge properly found that the miner's last coal mine employment occurred in the Commonwealth of Kentucky and, therefore, that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 4, n.2.

[6] 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.

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 Garcia v. Director, OWCP*, 12 BLR 1-24; *see also Betty B Coal Co. v. Director, OWCP [Stanley],* 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999).

Employer also generally contends that the administrative law judge "merely performed a head count" in finding that the medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Employer's Brief at 14 n.5. We disagree. The administrative law judge, in finding the evidence sufficient to establish the existence of pneumoconiosis, set forth the biopsy evidence pursuant to Section 718.202(a)(2). Decision and Order at 8-10. The administrative law judge found that Dr. Dubilier, the biopsy prosector, did not specifically mention coal workers' pneumoconiosis in his report, but that several Board-certified pathologists and pulmonary specialists, including Drs. Kleinerman, Perper, Broudy, Fino, Branscomb and Koenig, opined that the biopsy specimen showed at least a small amount of simple coal workers' pneumoconiosis. Decision and Order at 10; Director's Exhibits 126, 140, 143, 152; Claimant's Exhibit 1; Employer's Exhibits 6, 7, 10. The administrative law judge further found that Drs. Hutchins and Naeye noted the presence of coal dust pigment and anthracotic pigment, but that it was not of sufficient quantity to diagnose coal workers' pneumo-coniosis. Decision and Order at 8, 9; Director's Exhibit 148; Employer's Exhibits 8, 12. Inasmuch as the administrative law judge rationally considered the quality, as well as the quantity of the evidence, and employer does not otherwise challenge the administrative law judge's weighing of the medical evidence, we affirm his finding that a preponderance of medical opinion evidence established that claimant suffers from pneumoconiosis pursuant to Section 718.202(a)(2). 20 C.F.R. §718.202(a); *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see also Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

In addition, we reject employer's general contention that the administrative law judge's Section 718.204(b) findings should be vacated because there is no indication that the physicians who diagnosed total respiratory disability considered the exertional requirements of claimant's last coal mine employment. Employer's Brief at 14 n.5. Contrary to employer's contention, the record supports a finding that the physicians, particularly, Drs. Broudy, Fino, and Kleinerman, were aware of claimant's coal mine employment history, including his underground mining jobs of hand loading coal and drill operator, as well as his last coal mine employment on the surface at the tipple operating an end loader,

see Director's Exhibits 80, 82, 125, 140, 141, 143; Employer's Exhibits 6, 11. Inasmuch as employer does not otherwise challenge the administrative law judge's finding that claimant established a total respiratory disability, we affirm this finding. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence of record is sufficient to establish total disability causation pursuant to Section 718.204(c). Specifically, employer contends that the administrative law judge failed to adequately explain his rationale for according greater weight to the opinions of Drs. Younes and Koenig, that claimant's pneumoconiosis was a substantially contributing cause of his total respiratory disability. In addition, employer contends that the administrative law judge failed to fully explain the bases for discrediting the contrary medical opinions of Drs. Broudy, Fino and Branscomb. Some of these contentions have merit.

Initially, we agree with employer that the administrative law judge has not provided a rationale for discrediting the medical opinion of Dr. Fino, that claimant's pneumoconiosis was not a causative factor in his total respiratory disability, other than to summarily conclude that it was assigned less probative weight. *See* Decision and Order at 16. We, therefore, vacate the administrative law judge's total disability causation finding under Section 718.204(c) and remand the case to the administrative law judge for consideration of all of the relevant evidence of record. The administrative law judge must provide a specific finding regarding whether the medical opinions of record are reasoned and documented opinions as well as the weight he then accords these opinions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Particularly, on remand, the administrative law judge must provide a specific finding regarding the credibility and weight of the opinion of Dr. Fino. Director's Exhibit 140; Employer's Exhibit 7; *see Wojtowicz, supra; Clark, supra*.

Furthermore, on remand, the administrative law judge must provide a more specific explanation of his conclusion that the opinions of Drs. Younes and Koenig are entitled to greater weight based on the qualifications of the physicians. While it is a reasonable exercise of his discretion to accord greater weight to Dr. Koenig, based on his status as the Director of the Occupational Lung Disease Program at the University of Virginia, Decision and Order at 16;

Claimant's Exhibit 2, the administrative law judge must nonetheless discuss how this aspect of Dr. Koenig's credentials as well as Dr. Younes's credentials are entitled to greater weight than the credentials of the other relevant physicians of record. *See Wojtowicz, supra*; *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); *see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

However, we affirm the administrative law judge's finding that the medical opinion of Dr. Branscomb is entitled to little weight inasmuch as the administrative law judge rationally exercised his discretion in finding Dr. Branscomb's opinion was not well reasoned. Decision and Order at 17. Specifically, the administrative law judge reasonably found that the physician did not provide a sufficient explanation for his conclusions that pneumoconiosis was not a contributor to claimant's total respiratory disability and, thus, found the opinion entitled to little probative weight.[7] Decision and Order at 17; *see Clark, supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields, supra*.

Likewise, we affirm the administrative law judge's finding that Dr. Broudy's opinion that claimant's pneumoconiosis was not a causative factor in his total respiratory disability is entitled to little probative weight. The administrative law judge found that Dr. Broudy's opinion is entitled to less probative weight because it is expressed in terms of "the belief that patients with simple coal workers' pneumoconiosis generally do not suffer from a disabling impairment without some other factor contributing to the patient's pulmonary condition." Decision and Order at 16; Director's Exhibit 143 at 16-19. While employer is correct in stating that Dr. Broudy's determination is based on multiple examinations of claimant

[7] Employer does not challenge the administrative law judge's weighing of the medical opinions of Drs. Naeye, Kleinerman and Hutchins, that pneumoconiosis was not a contributing cause of claimant's total respiratory disability as well as the opinions of Drs. Green, Khalil and Ortiz, which did not include an opinion regarding total disability or disability causation. We, therefore, affirm the administrative law judge's decision to accord these opinions little probative weight. *See Skrack, supra*.

and a review of the medical evidence of record, the physician nonetheless states clearly in his deposition that:

> [the conclusion is] based on the evidence that individuals with simple coal workers' pneumoconiosis do not have significant respiratory impairment, and certainly not disabling impairment. And in those individuals with pneumoconiosis that do have disabling impairment, it is of the type that's far advanced, such as complicated pneumoconiosis or progressive massive fibrosis.

Director's Exhibit 143 at 16-17.[8] The administrative law judge, therefore, reasonably accorded less weight to this opinion as he determined that it was

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[8] Dr. Broudy, in his deposition stated:

> Q.21 All right, I understand that. Now my question is: How did you conclude that Mr. Stapleton's coal-dust exposure was not a contributing cause of his impairment?
>
> A. Well, because patients, even with simple coal workers' pneumoconiosis, do not have disabling impairment; and their lung functions usually fall within the normal range .. unless they have impairment due to some other cause.
>
> Q.22 Well, how do you rule out completely that the coal-dust exposure is not a part of the cause of Mr. Stapleton's impairment?
>
> A. Because individuals, for example, who do not have these coexisting morbidity do not have this degree of impairment even if they have simple coal workers' pneumoconiosis. That is, if they don't smoke, they don't have asthma, they're not morbidly obese, they don't have this degree of impairment even if they have simple coal workers' pneumoconiosis, that's how I .. I make my conclusion.

Director's Exhibit 143 at 18-19.

based on generalized beliefs, not specific to this patient, and thus, may be hostile to the Act. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985); *see generally Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Lastly, contrary to employer's contention that, in light of Dr. Broudy's multiple examinations, including his November 1998 examination, the administrative law judge erred in according to greater weight to the opinion of Dr. Younes because he personally examined claimant and his February 1999 opinion was the most recent medical examination of claimant. Employer's Brief at 19; *see* Director's Exhibits 35, 80, 125. However, in light of the affirmance of the administrative law judge's decision to accord less weight to Dr. Broudy's conclusion that claimant's pneumoconiosis was not a causative factor in claimant's total respiratory disability, *see* discussion, *supra*, employer's contentions herein need not be addressed.

Consequently, we vacate the administrative law judge's findings regarding disability causation under Section 718.204(c) and remand the case to the administrative law judge for further consideration of the relevant evidence of record. *See O'Keeffe, supra; Nataloni, supra.*

Accordingly, the administrative law judge's Decision and Order - Granting Modification and Awarding Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge