BRB No. 13-0439 BLA

ELLEN VARNEY (Widow of RALPH VARNEY)[1]	)	
Claimant-Respondent	)	
v.	)	
ROBERT COAL COMPANY	)	
and	)	
	)	DATE ISSUED: 06/19/2014
OLD REPUBLIC INSURANCE COMPANY	)	
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 Awarding Benefits in a Modification of a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

[1] Claimant is the widow of the miner, whose present claim for benefits was pending at the time of his death on January 16, 2014. On January 31, 2014, a motion to substitute the widow as claimant was filed by counsel. The motion for substitution is hereby granted, and the caption is amended accordingly. *See* 20 C.F.R. §725.360(b).

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Modification of a Subsequent Claim (2011-BLA-5575) of Administrative Law Judge Larry S. Merck (the administrative law judge) rendered on a claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).[3] In his Decision and Order, dated June 4, 2013, the administrative law judge credited the miner with twenty-one years of coal mine employment, and adjudicated this subsequent claim, filed on August 20, 2001, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the current claim was timely filed, and that the newly submitted evidence was sufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[4] Considering the entire record, the administrative law judge found that the weight of the evidence established total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b), (c). The administrative law judge concluded that there was no

[2] The miner's initial claim for benefits, filed on September 18, 1989, was finally denied, on a request for modification, by the district director on September 30, 1991, because the miner failed to establish any element of entitlement. Director's Exhibit 1.

The miner's second claim, filed on August 20, 2001, was denied by the district director on June 13, 2003, because the miner failed to establish any element of entitlement. The miner filed two subsequent requests for modification that were denied by the district director on December 22, 2004 and March 10, 2006. The miner's third request for modification was denied on May 14, 2010 by Administrative Law Judge Alan L. Bergstrom, who found that, while the evidence was sufficient to establish total respiratory disability, it was insufficient to establish the existence of pneumoconiosis and disability causation. Director's Exhibit 130. The miner's fourth request for modification is the subject of the current appeal.

[3] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 2.

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth in 20 C.F.R. §725.309(d) (2013) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

mistake in Administrative Law Judge Alan L. Bergstrom's earlier findings of fact, but found a change in condition established pursuant to 20 C.F.R. §725.310. Accordingly, benefits were awarded, commencing as of August 2010, the month and year in which the miner filed his most recent request for modification.

On appeal, employer challenges the administrative law judge's calculation of the length of the miner's coal mine employment, and his weighing of the medical opinions in finding legal pneumoconiosis and disability causation established pursuant to Sections 718.202(a), 718.204(c). Employer also contends that the administrative law judge failed to consider whether granting modification pursuant to Section 725.310 would render justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.[5]

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.[6] 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 first contends that the administrative law judge's calculation of the length of the miner's coal mine employment is irrational and fails to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer asserts that the administrative law judge's calculation is internally inconsistent, as he failed to consider the disparity in the miner's reported earnings from year to year, compared to the number of quarters of coal mine employment credited in each year. Employer's Brief at 12-13.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In calculating the length of the miner's coal mine

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that the evidence was sufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); 2012 Hearing Transcript at 20-21; Director's Exhibit 1.

employment, the administrative law judge acted within his discretion in relying upon the Social Security Administration (SSA) records and the miner's testimony to credit the miner for each calendar quarter through 1978 in which he earned $50.00 or more from a coal company, irrespective of the amount of the miner's earnings from quarter to quarter or year to year, for a total of sixty-eight quarters, or seventeen years. Decision and Order at 6; Director's Exhibit 7. As the Board has long held that this is a reasonable method of computation, the administrative law judge was not required to compare the miner's earnings from quarter to quarter or from year to year. *See Tackett v. Director, OWCP*, 6 BLR 1-839, 841 (1984); *see also Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). The administrative law judge also permissibly credited the miner with an additional four years of coal mine employment from 1978 to 1983, based on the SSA records and the miner's testimony. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-92 (1988); *Tackett*, 6 BLR at 841; Decision and Order at 6; 2009 Hearing Transcript at 17-23. Because the administrative law judge's determination is based upon a reasonable method of computation, we affirm the administrative law judge's finding that the miner established twenty-one years of coal mine employment, as supported by substantial evidence.

Employer next challenges the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4), contending that, in crediting the opinion of Dr. Forehand over the contrary opinions of Drs. Fino and Rosenberg, the administrative law judge failed to identify and resolve the conflicts in the record. Employer asserts that the administrative law judge accepted Dr. Forehand's diagnosis of legal pneumoconiosis at face value, without considering evidence that detracted from the doctor's conclusions, and that the administrative law judge misstated the opinions of Drs. Fino and Rosenberg. Employer's Brief at 13-16.

In finding the weight of the evidence sufficient to establish the existence of legal pneumoconiosis[7] at Section 718.202(a)(4), the administrative law judge accurately summarized the conflicting medical opinions of Drs. Forehand, Fino, and Rosenberg, noting that Dr. Forehand was the miner's treating physician from 2003 through 2008. [8]

[7] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[8] The administrative law judge additionally considered the miner's treatment records, and accorded little weight to the opinions of Drs. King and Sundaram, that the miner had coal workers' pneumoconiosis and a pulmonary impairment due to coal mine employment, because the physicians failed to provide specific objective findings other than a general reference to pulmonary function studies and x-ray evidence. Director's Exhibit 13; Decision and Order at 16-17. The administrative law judge also accorded little weight to Dr. Baker's diagnosis of chronic bronchitis due to coal dust and cigarette

Decision and Order at 14-33. After reviewing the underlying documentation and the physicians' explanations for their respective conclusions, the administrative law judge acted within his discretion in finding that Dr. Forehand's diagnosis[9] of an irreversible mixed obstructive and restrictive ventilatory impairment arising out of coal mine employment was documented and reasoned, and entitled to probative weight, as it was supported by the miner's occupational and medical histories, and objective test results.[10] Decision and Order at 24, 35-36; Director's Exhibits 59, 116, 117, 120, 131; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge rationally accorded

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smoking, because the doctor had recorded that the miner never smoked, and he failed to provide objective medical evidence to support his diagnosis. Director's Exhibit 10; Decision and Order at 17-18.

[9] Dr. Forehand provided a medical report and a deposition regarding an August 17, 2006 examination; provided a one-page report dated March 6, 2009; and provided a medical report for a June 10, 2010 examination. Noting that the miner's right diaphragm was sitting higher in the chest than the left diaphragm, Dr. Forehand indicated that this condition usually does not contribute to any type of respiratory impairment, and that it could be either congenital or related to the miner's coronary artery surgery. Dr. Forehand explained that the loss in the miner's FVC and FEV1 values was proportional, which is consistent with fibrotic lung disease. He opined that the miner had an abnormal exercise arterial blood gas study, because his oxygen level fell during exercise. In 2010, Dr. Forehand diagnosed a totally disabling irreversible mixed obstructive and restrictive ventilatory pattern due to coal dust exposure, as well as coronary artery disease without clinical evidence of cardiac dysfunction or congestive heart failure. In his treatment records from 2003 to 2008, Dr. Forehand noted impressions of 1) shortness of breath (SOB) stemming from airflow limitation from 2003 to 2007; 2) coal workers' pneumoconiosis with airflow limitation and SOB on exertion from 2007 to 2008; and 3) coal workers' pneumoconiosis, coronary artery disease, atrial fibrillation, and status post coronary artery bypass graft surgery in 2008. Director's Exhibits 59, 116, 117, 120, 131.

[10] Employer's argument, that the administrative law judge ignored the discrepancies in the miner's height as reported on Dr. Forehand's pulmonary function studies, has no merit, as the administrative law judge noted the conflicting reported heights and permissibly found that the miner's average height was 70.20 inches. *See K.J.M* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-41, 1-45 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983).

little weight to Dr. Fino's opinion,[11] that the miner did not have any objective evidence of a coal dust-related pulmonary condition or disability, as the physician had not interpreted the miner's pulmonary function study results in accordance with the instructions and specifications set out in 20 C.F.R. §718.103 and 20 C.F.R. Part 718, Appendix B.[12] The administrative law judge also found the doctor's opinion to be confusing, as Dr. Fino stated that he could not make "specific diagnoses and determinations of impairment" without reviewing past medical records, but he definitively ruled out coal dust as a cause of any condition or disability. Director's Exhibit 67; Decision and Order at 26; 20 C.F.R. §§718.103, 718.204(b); 20 C.F.R. Part 718, Appendix B; *see K.J.M* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-41, 1-45 (2008); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

Lastly, noting that the regulations do not require a positive x-ray in order for claimant to establish legal pneumoconiosis, the administrative law judge rationally accorded little weight to Dr. Rosenberg's opinion,[13] that the miner had a disabling

[11] Dr. Fino examined the miner on December 7, 2006, but did not see any evidence of pneumoconiosis or pulmonary fibrosis on an x-ray of the same date. Dr. Fino opined that the miner's diffusing capacity and blood gas study results were normal, while the FVC and FEV1 values were reduced. He diagnosed "reduced FVC and FEV1," and indicated that the reduction could not be attributed to fibrosis, but he suspected that it was entirely related to the miner's open heart surgery and markedly elevated right diaphragm. He found no objective evidence of a coal dust-related pulmonary condition or disability. Director's Exhibit 67.

[12] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718 for an individual of the miner's gender, age, and height. Specifically, the FEV1 and either the MVV, FVC or the FEV1/FVC values must qualify. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i).

[13] Dr. Rosenberg opined that the miner had a disabling restrictive impairment unrelated to coal dust exposure, and stated that there was no evidence of any obstructive lung disease, as the miner had no chronic wheezing or decreased airflow and his "functional assessments do not support the existence of obstruction." Dr. Rosenberg opined that the miner's restriction resulted from a complication from his bypass surgery that resulted in elevation of his right hemidiaphragm. In the current modification request, Dr. Rosenberg submitted an addendum to this opinion dated November 3, 2010 and a deposition. He reviewed Dr. Forehand's 2009 deposition and an October 2010 x-ray with sniff test performed at the Pikeville Medical Center. Dr. Rosenberg stated that while the diaphragm is not paralyzed based on the sniff test, it is in an abnormal position at a level

restrictive impairment unrelated to coal dust exposure, because he found that it was based on the absence of radiographic evidence of complicated pneumoconiosis. Dr. Rosenberg explained that, given the extent of the miner's restrictive impairment, complicated pneumoconiosis would be present if the restriction were caused by coal dust exposure, and "obviously his x-ray does not even show simple pneumoconiosis." Director's Exhibit 15 at 11; Decision and Order at 33; s*ee* 65 Fed. Reg. 79,971 (Dec. 20, 2000); 20 C.F.R. §718.201(a)(2); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115,2-129-32 (4th Cir. 2012).

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) *citing Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190, 1-192 (1989). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the weight of both the newly submitted evidence and the evidence of record as a whole was sufficient to establish legal pneumoconiosis at Section 718.202(a). Consequently, we also affirm the administrative law judge's finding that the miner established a change in an applicable condition of entitlement pursuant to Section 725.309.

Next, we reject employer's contention that the administrative law judge erred in discounting the opinions of Drs. Fino and Rosenberg, and in finding Dr. Forehand's opinion sufficient to establish disability causation pursuant to Section 718.204(c). Based on his weighing of the conflicting medical opinions on the issue of legal pneumoconiosis, the administrative law judge permissibly determined that Dr. Forehand's reasoned and documented opinion was entitled to determinative weight on the issue of disability causation. Decision and Order at 42; *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *see also Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). The administrative law judge rationally discounted the opinions of Drs. Fino and Rosenberg, that the miner's disability was unrelated to pneumoconiosis, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding.[14] *See Skukan v. Consolidation Coal*

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midway in the miner's right chest, causing a reduction in total lung capacity. Director's Exhibits 15, 124, 137; Employer's Exhibit 2.

[14] The administrative law judge accorded the opinions of Drs. Sundaram, King, and Baker little weight on the issue of disability causation, because he found them to be poorly reasoned. Decision and Order at 42-43.

Co., 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 43. Consequently, we affirm the administrative law judge's finding that the weight of the evidence established disability causation at Section 718.204(c), as supported by substantial evidence.

However, as the administrative law judge did not determine whether granting modification pursuant to Section 725.310 would render justice under the Act, we vacate his award of benefits, and remand the case for the administrative law judge to review all relevant factors and make an explicit "render justice" determination. *See Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge