BRB No. 14-0259 BLA

KERMIT FRANCIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OAKWOOD MINING COMPANY	)	DATE ISSUED: 10/29/2014
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification and Errata Decision and Order on Modification and Denial of Request for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer-carrier (employer) appeals the Decision and Order on Modification and Errata Decision and Order on Modification and Denial of Request for Reconsideration (2011-BLA-06208) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim[1] filed on August 23, 2004, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[2] In his initial Decision and Order, issued on November 17, 2010, the administrative law judge credited claimant with twenty-nine years of underground coal mine employment and found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, therefore, denied benefits. Upon considering claimant's May 11, 2011 request for modification, the administrative law judge found, in a Decision and Order on Modification issued on August 9, 2013, that claimant established a change in conditions at 20 C.F.R. §725.310 by establishing the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b). The administrative law judge further found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c), and awarded benefits. Following the administrative law judge's Decision and Order on Modification, the Director, Office of Workers' Compensation Programs (the Director), and employer filed motions for reconsideration. On September 4, 2013, the administrative law judge issued an order changing the caption of the case to identify Tri-Dean Mining Company as the employer defending the claim and denying employer's request for reconsideration as moot because employer had filed an appeal with the Board.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, requesting that, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §556 (e), as incorporated into the Act by 30 U.S.C. §932 (a), the Board take official notice of

[1] Claimant's initial claim, filed on September 29, 1997, was denied by the district director on July 2, 1998, because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant's request for modification was denied by the district director on January 20, 1999, as claimant did not establish a change in conditions or a mistake in a determination of fact. *Id.*

[2] The amended Section 411(c)(4) presumption of total disability due to pneumoconiosis does not apply to this claim, as it was filed before January 1, 2005. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(a).

documents[3] pertaining to the credibility of Dr. Wheeler's x-ray interpretations, adding that if the Board grants his request, employer should be given an opportunity to respond.[4] The Director has indicated that he will not otherwise respond to employer's appeal, unless requested to do so by the Board.[5] Employer subsequently filed a reply brief, asserting that, if the Board takes notice of the documents offered by the Director concerning Dr. Wheeler, employer agrees that remand is necessary for the submission of alternative interpretations of the x-rays by a physician other than Dr. Wheeler.

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, rational, and in accordance with applicable law.[6] 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).

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 modification of an award or denial of benefits in a miner's claim, based on a change in conditions or a mistake in a determination of fact. In

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[3] The Director, Office of Workers' Compensation Programs (the Director), listed the documents as follows: 1) BLBA Bulletin 14-09, issued June 2, 2014; 2) New Article, *Breathless and Burdened,* Part 2, Center for Public Integrity, dated October, 30, 2013; 3) ABC News Report, *For Top-Ranked Hospital, Tough Questions about Black Lung and Money*, dated October 30, 2013; 4) "Statement from Johns Hopkins Medicine Regarding ABC News Report about our B-readers for Pneumoconiosis (Black Lung), " dated November 1, 2013.

[4] The Director also filed a Motion to Amend Caption, which the Board granted, changing the caption to reflect that Oakwood Mining Company is the employer challenging claimant's entitlement to benefits. *Francis v. Oakwood Mining Co.*, BRB No.14-0259 BLA (July 30, 2014)(unpub. Order).

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Therefore, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, 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 that defeated an award in the prior decision. *See 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). But it is not necessary to allege specific error made by the administrative law judge in order to establish a basis for modification. Rather, the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The 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, 256 (1971); *see King v. Jericol Mining, Inc*., 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

I. 20 C.F.R. §718.202(a)(1) – Clinical Pneumoconiosis[7]

Employer argues that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis and that, because this finding was incorrect, it rendered irrational the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis. In employer's view, the administrative law judge's determination that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a) is erroneous for several reasons: the administrative law judge improperly discredited two of Dr. Wheeler's x-ray readings; he disregarded the x-ray reading by Dr. Halbert; he failed to consider Dr. Wheeler's digital x-ray reading, and an exhibit in claimant's medical records, and to weigh that evidence with the analog x-ray evidence.

[7] The regulation at 20 C.F.R. §718.201 provides:

> "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

In analyzing the analog x-ray evidence, the administrative law judge determined that full weight should be assigned to readings by Drs. Alexander, Wheeler, and Halbert, based on their dual qualifications as Board-certified radiologists and B readers. Decision and Order on Modification at 5. The administrative law judge also found that the record contained four x-rays, which had been read by the dually qualified radiologists. *Id*. The March 3, 2005 x-ray was read as positive by Dr. Alexander and as negative by Dr. Wheeler, and the administrative law judge credited both unequivocal opinions. *Id*.; Director's Exhibit 19; Claimant's Exhibit 1. The administrative law judge found that the May 6, 2006 x-ray was also read as positive by Dr. Alexander and as negative by Dr. Wheeler, but the administrative law judge discounted Dr. Wheeler's negative interpretation as equivocal when considered in light of the doctor's notations: "underexposure lower half left lung blurs fine detail. Repeat with good technique and lateral or 30 degree obliques if clinically indicated or get CT scan if interstitial lung disease has been reported on this x-ray." Decision and Order on Modification at 6, *quoting* Employer's Exhibit 1; *see* Claimant's Exhibit 2.

The administrative law judge focused on Dr. Wheeler's statement that the x-ray should be repeated with good technique, as the lower part of the lung was underexposed, and that a CT scan might be in order. Decision and Order on Modification at 6. The administrative law judge's analysis of the March 19, 2013 x-ray evidence was similar. *Id*. Dr. Alexander provided a positive interpretation and Dr. Wheeler provided a negative interpretation, which the administrative law judge determined was equivocal based on his notation that " . . . underexposure blurs fine detail in lateral mid and lower lungs and scapulae on lungs blurs underlying peripheral detail. Get CT scan for better evaluation if clinically indicated or if interstitial lung disease has been reported on this film." *Id*., *quoting* Employer's Exhibit 4; *see* Claimant's Exhibit 6. The administrative law judge stated that Dr. Wheeler's reading identifying blurring in "a significant part of the x-ray is compromised" and could not be deemed unequivocal. Decision and Order on Modification at 6. Lastly, the administrative law judge credited Dr. Halbert's negative interpretation of the December 6, 2012 x-ray. *Id*. Upon considering the analog x-ray evidence as a whole, the administrative law judge concluded that Dr. Alexander had provided three unequivocal positive interpretations, which was more than the unequivocal interpretations that employer had provided – one from Dr. Wheeler and one from Dr. Halbert. *Id*. Accordingly, the administrative law judge held that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id*.

We reject employer's arguments that the administrative law judge improperly discredited two of Dr. Wheeler's analog x-ray readings and that he overlooked Dr. Halbert's analog x-ray interpretations. With respect to the administrative law judge's discrediting of Dr. Wheeler's analog x-ray readings, determining the credibility and probative value of the medical evidence falls within the administrative law judge's discretion in his role as fact-finder and the reviewing authority must defer to the

administrative law judge's assessment, unless it is plainly irrational. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In this case, the administrative law judge did not abuse his discretion in questioning the reliability of Dr. Wheeler's finding that the analog x-rays dated May 6, 2006 and March 19, 2013, were negative for pneumoconiosis, in view of the doctor's comments on both readings regarding the blurring of significant portions of the lungs and suggesting the advisability of CT scans. *See Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 1-185, 12 BLR 2-121, 2-126 (6th Cir. 1989).

Based on the administrative law judge's permissible analysis of the analog x-ray readings, the March 3, 2005 x-ray evidence was in equipoise; the May 6, 2006 x-ray was positive for pneumoconiosis; the December 6, 2012 x-ray was negative; and the March 19, 2013 x-ray was positive. Consequently, we affirm the administrative law judge's determination that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), as a preponderance of the x-ray readings was positive for pneumoconiosis. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

We similarly reject employer's argument that the administrative law judge erred in failing to consider Dr. Wheeler's reading of a 2006 digital x-ray and a CT scan reading in claimant's medical records. The administrative law judge properly determined that the digital x-ray reading is considered "other evidence" pursuant to 20 C.F.R. §718.107, which requires the party proffering the evidence to establish "that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." Decision and Order on Modification at 6 n.5, *quoting* 20 C.F.R. §718.107(b). Because employer has not identified any evidence in the record that would meet its burden at 20 C.F.R. §718.107(b), the administrative law judge's omission of Dr. Wheeler's digital x-ray reading from consideration under 20 C.F.R. §718.202(a) does not constitute error. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(en banc).

In view of our affirmance of the administrative law judge's consideration of the x-ray evidence, we need not address the Director's request that the Board take official notice of documents pertaining to the credibility of Dr. Wheeler's x-ray interpretations. Furthermore, we hold that there is no merit in employer's argument that the administrative law judge's decision should be vacated, and the case remanded for the administrative law judge to consider the radiological reading that appears at Claimant's Exhibit 4-65. Employer argues that it was prejudiced by the administrative law judge's failure to consider this exhibit because it is an April 21, 2012 reading of a CT scan of

claimant's chest, which indicated that, other than an opacity in the right mid-lung, likely representing a calcified pleural plaque, claimant's lungs were clear. Employer's Brief at [14] (unpaginated). Employer further maintains that, since "a CT scan is considered superior to a plain x-ray to diagnose [coal workers' pneumoconiosis], the fact that no [coal workers' pneumoconiosis] was diagnosed is significant." *Id.*

A review of Claimant's Exhibit 4-65 indicates that it is labeled as an "AP portable" radiograph,[8] not a CT scan. In light of employer's erroneous identification of Claimant's Exhibit 4-65, we must reject its argument that the administrative law judge erred in failing to weigh CT scan evidence with the other evidence relevant to the existence of clinical pneumoconiosis. We affirm, therefore, the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a), and a change in conditions at 20 C.F.R. §725.310. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Worrell*, 27 F.3d at 230, 18 BLR at 2-299.

II. 20 C.F.R. §718.204(c) – Total Disability Causation

Relying on his findings at 20 C.F.R. §718.202(a)(1), the administrative law judge gave less weight to the opinions of Drs. Fino and Rosenberg, because they found that claimant does not have clinical pneumoconiosis, which was contrary to his finding. Decision and Order on Modification at 9. The administrative law judge credited Dr. Klayton's opinion, that claimant's totally disabling restrictive impairment was caused by dust exposure in coal mine employment, and determined that claimant established total disability causation at 20 C.F.R. §718.204(c). *Id.* The administrative law judge further found that claimant demonstrated a basis for modification at 20 C.F.R. §725.310. *Id.*

Employer contends that the administrative law judge's rationale for giving less weight to the opinions of Drs. Fino and Rosenberg was not proper, as the administrative law judge's finding, that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), was incorrect. In addition, employer maintains that the administrative law judge did not adequately evaluate Dr. Klayton's opinion, that claimant is totally disabled due to pneumoconiosis.

We reject employer's argument that the administrative law judge abused his discretion in giving less weight to the opinions of Drs. Fino and Rosenberg at 20 C.F.R. §718.204(c) because they did not diagnose clinical pneumoconiosis, contrary to his

[8] An "AP portable radiograph" is a radiographic examination of the chest performed with a portable x-ray machine in the room of an immobilized patient. "AP portable chest radiograph." The Free Dictionary, http://medical-dictionary.thefreedictionary.com (20 Oct. 2014).

finding at 20 C.F.R. §718.202(a)(1). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). In addition, a review of Dr. Klayton's four-page report reveals that, contrary to employer's allegation, the administrative law judge's crediting of his diagnosis of a disabling impairment caused by pneumoconiosis is rational and supported by substantial evidence.[9] *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 835, 22 BLR at 2-325-26. Hence, the administrative law judge properly credited Dr. Klayton's opinion attributing claimant's totally disabling respiratory impairment to his several decades of coal dust exposure, and properly discredited the contrary physicians. *Id*. We affirm, therefore, the administrative law judge's finding that claimant established total disability causation at 20 C.F.R. §718.204(c), and further affirm the award of benefits.

[9] Dr. Klayton's written report includes the following:

> PULMONARY DIAGNOSIS: Coal workers' pneumoconiosis on the basis of 41 years of coal mine employment, a daily productive cough of 19 years duration, moderately severe restrictive lung disease with reduced MVV on spirometry, severe hypoxemia on resting arterial blood gases and a chest x-ray showing: p opacities over all lung zones with profusion 1/1.
>
> ETIOLOGY OF THE PULMONARY DIAGNOSIS: Coal dust (patient has never smoked).
>
> IMPAIRMENT: [Claimant] is totally disabled based upon the severity of his restrictive lung disease on pulmonary function tests and the severity of his hypoxemia on resting arterial blood gases.
>
> Claimant's Exhibit 6 at 3.

Accordingly, the administrative law judge's Decision and Order on Modification and Errata Decision and Order on Modification and Denial of Request for Reconsideration is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge