

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 April 2011

CASE NO.: 2008-BLA-00013

In the Matter of:

BOBBY D. MANN,
Claimant

v.

TURNER BROTHERS, INC.,
Employer

and

OLD REPUBLIC INSURANCE COMPANY, INC.,
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

**DECISION AND ORDER DENYING
CLAIMANT'S THIRD PETITION FOR MODIFICATION**

This proceeding arises from Claimant's petition for modification of a denial of benefits filed under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 and the regulations issued thereunder, found at Title 20 of the Code of Federal Regulations. The Act provides benefits to miners who are totally disabled due to pneumoconiosis and to eligible survivors of miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung disease, is a chronic dust disease of the lungs, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL BACKGROUND

Claimant filed his request for modification on January 14, 2008, from an Order of the Tenth Circuit Court of Appeals granting Appellant's Motion to Dismiss. The claim was on appeal to the Tenth Circuit from a Decision and Order of the Benefits Review Board dated September 27, 2007, affirming an Administrative Law Judge Decision and Order Denying Benefits, dated October 4, 2005. The October 4, 2005 Administrative Law Judge Decision and Order Denying Benefits, is itself, a denial of a request for modification.

Claimant has pursued black lung benefits over a lengthy period. Since 1974 he has filed four separate claims and three requests for modification of the denial of the most recent claim. The following is a procedural history, repeated for the most part from the history set forth in the October 4, 2005 Decision and Order.

I

First Claim

Claimant filed his first claim for benefits on September 23, 1974. (DX 31). The claim was denied by letter dated April 16, 1979, based on insufficient years of coal mine employment as well as a failure to demonstrate any element of entitlement. Again, on August 14, 1979, the claim was denied on the same grounds. By letter dated October 21, 1981, Claimant's representative inquired as to the status of the claim. In a letter dated November 5, 1981, the claims examiner stated:

Mr. Mann's claim is now closed. It may not now be reopened since it was denied over two years ago. All appeal rights have been run.

(DX 31).

II

Second Claim

A second claim was filed on May 4, 1983. (DX 30). By proposed decision dated September 29, 1983, the district director found that Claimant established 10.6 years of coal mine employment, but benefits were denied for failure to establish any element of entitlement. By letter dated November 4, 1983, Claimant requested a hearing. It appears that an informal conference was held where the district director denied benefits and Claimant did not subsequently request a hearing.

III

Third Claim

The miner submitted a claim for the third time on November 17, 1986. (DX 1). On February 13, 1987, the district director proposed to deny the claim for failure to demonstrate any element of entitlement. (DX 15). By letter submitted on April 16, 1987, Claimant requested that the record be held open for submission of additional evidence. (DX 16).

On April 20, 1987, the district director advised Claimant that he must specifically request a hearing within 30 days of the date the claim was denied, or he could submit additional evidence for reconsideration within one year of the denial. (DX 20). Later, in response to a status inquiry by Employer, the district director stated the following:

Mr. Mann has appealed the denial of his claim. It will be prepared for formal hearing and forwarded to the Office of Administrative Law Judges. (DX 26). On August 5, 1987, the claim was referred to this Office for adjudication. (DX 32).

Initial referral to this Office

Without a hearing, on March 17, 1988, an administrative law judge issued a Decision and Order - Rejection of Claim on grounds that Claimant did not establish a "material change in conditions" since the denial of his April 12, 1983 claim as required by 20 C.F.R. § 725.309. (DX 33). Claimant appealed by letter dated April 8, 1988. (DX 34). On October 7, 1991, the Benefits Review Board (Board) remanded the claim for a formal hearing in accordance with *Lukman v. Director, OWCP*, 896 F.2d 248 (10th Cir. 1990). (DX 36).

Decision by Administrative Law Judge Amery

A hearing was conducted by Administrative Law Judge Robert S. Amery on July 19, 1994. (DX 40). He issued a Decision and Order - Rejection of Claim on February 16, 1995 after finding that Claimant established the presence of coal workers' pneumoconiosis through medical opinion evidence, but failed to demonstrate that he was totally disabled. (DX 46). Judge Amery also credited Claimant with 15 years of coal mine employment after finding that he started work in the mines at the age of 18 years and stopped working in 1985. Judge Amery further noted that Claimant last worked as a supervisor where he was on a "dead run" for 13 hours a day and had to supervise men and do lifting. Finally, Judge Amery found that Claimant had smoked cigarettes for 40 years, but had reduced his habit from one pack per day to one-half a pack per day around 1983.

Appeal to the Benefits Review Board

By letter dated March 13, 1995, Claimant appealed Judge Amery's decision. (DX 47). By Decision and Order dated February 15, 1996, the Board affirmed Judge Amery's findings regarding the length of coal mine employment and presence of coal workers' pneumoconiosis as unchallenged on appeal. (DX.49). The Board also affirmed Judge Amery's finding that Claimant did not establish total disability.

Appeal to the Tenth Circuit Court of Appeals

Claimant appealed the Board's Decision to the Tenth Circuit Court of Appeals by letter dated March 11, 1996. (DX.50). On February 11, 1997, the circuit court issued a decision in *Mann v. Director, OWCP*, 107 F.3d 21 (10th Cir. 1997) (unpub.), wherein it affirmed the Board's Decision. (DX 52).

By letter dated March 17, 1997, Claimant stated that he wanted to appeal the decision of the Tenth Circuit. (DX 55). No further action was taken with regard to Claimant's request in this proceeding.

Petition for modification of Tenth Circuit's denial of benefits

On March 9, 1998, Claimant filed a claim for the fourth time. (DX 56). The district director proposed to deny benefits on July 24, 1998 for failure to demonstrate any element of entitlement. By letter dated August 11, 1998, Claimant requested a hearing. (DX 64).

On July 9, 1999, the district director acknowledged that the Department had taken no action with regard to Claimant's appeal request. As a result, he concluded that Claimant's letters would constitute petitions for modification. (DX. 70 -73).

Award of benefits by the district director

An informal conference was convened and, by Memorandum of Conference and Stipulation dated September 5, 2000, the district director concluded that Claimant had presented evidence sufficient to establish entitlement to benefits. (DX 81). Employer requested a hearing by letter dated September 15, 2000. (DX 82). The claim was referred to this Office for adjudication on March 9, 2001. (DX 85).

Decision by Administrative Law Judge Pamela Lakes Wood

On December 10, 2002, Administrative Law Judge Pamela Lakes Wood issued a *Decision and Order Denying Benefits*. (DX.100). Judge Wood concluded that, although the evidence demonstrated that the miner suffered from a totally disabling respiratory impairment, the evidence did not support a finding that he suffered from simple or complicated coal workers' pneumoconiosis and benefits were denied.

Appeal to the Benefits Review Board

Claimant appealed Judge Wood's denial of benefits and, by Decision and Order dated September 24, 2003, the Board affirmed the denial. (DX 106). By undated letter received on October 7, 2003, Claimant expressed his disagreement with the Board's Decision. (DX108). Again, by letter received October 15, 2003, Claimant requested reconsideration and asserted that it was "error for Judge Wood to allow the employer to re-open the issue of the existence of pneumoconiosis." (DX 109).

On January 22, 2004, the Board denied the Claimant's motion for reconsideration in an *Order on Motion for Reconsideration*.

Second Petition for modification

On February 2, 2004, Claimant filed a second petition for modification. (DX 113). On May 12, 2004, the district director requested that Claimant specify the mistake in a determination of fact made by Judge Wood or the Board. (DX 121).

On August 11, 2004, the district director issued a Proposed Decision and Order Denying Request for Modification. (DX 138). By letter dated August 25, 2004, Claimant requested a hearing. (DX.143). On October 4, 2005, the undersigned Administrative Law Judge issued a *Decision and Order Denying Living Miner's Benefits*. (DX 167). The decision held that further review of the evidence considered by Judge Wood as well as the new evidence on modification leads to the conclusion that Claimant had not established a change in condition or mistake of fact, as Claimant had a totally disabling respiratory impairment but did not suffer from coal worker's pneumoconiosis.

Appeal to the Benefits Review Board

Claimant appealed the denial of benefits to the Board, and on September 27, 2006, the Board issued a Decision and Order affirming the denial. (DX.175). Claimant's request for reconsideration was denied by Order of the Board dated December 19, 2006. (DX 177).

Appeal to the Tenth Circuit Court of Appeals

Claimant appealed the Board's Decision to the Tenth Circuit Court of Appeals. On February 21, 2007, the circuit court issued an Order granting Appellant's motion to dismiss. (DX 178).

Third Petition for Modification

Claimant filed a Petition for modification on January 14, 2008, from the circuit court's February 21, 2007 order, asserting a mistake of fact, and attaching chest x-rays, pulmonary function tests, blood gas studies and an examination of Claimant. (DX 179).

On January 24, 2008, the district director issued a Proposed Decision and Order Denying Request for Modification. (DX181). By letter dated January, 29, 2008, Claimant requested a hearing. (DX 182). The claim was referred to this Office for adjudication on March 27, 2008. (DX 190).

A hearing took place on June 10, 2010, in Fort Smith, Arkansas. At the hearing, Employer controverted the issues: modification; existence of pneumoconiosis; causal relationship; total disability; and disability causation. Employer agreed that Claimant worked as a coal miner for 15 years. Admitted into evidence were Director's Exhibits (DX) 1-192; and Employer's Exhibits (EX) 1-28.

PETITIONS FOR MODIFICATION UNDER § 725.310

The modification provisions at Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932(a), provide the statutory authority to modify orders. A decision awarding or denying benefits in a black lung claim may be modified (increased, decreased, or terminated) at the behest of the claimant, employer, or district director upon demonstrating either: (1) a change in conditions or (2) a mistake in a determination of fact. 20 C.F.R. § 725.310. Modification may be sought at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim. 20 C.F.R. § 725.310(a).

Pursuant to 20 C.F.R. § 725.310, to determine whether a "change in conditions" is established, the fact-finder must conduct an independent assessment of the newly submitted evidence (*i.e.*, all evidence submitted subsequent to the prior denial) and consider it in conjunction with the previously submitted evidence to determine if the weight of the new evidence is sufficient to demonstrate an element or elements of entitlement previously adjudicated against the claimant. *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994); *Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-

82 (1993); *Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *aff'd on recon.*, 16 B.L.R. 1-71 (1992).

Even if a "change in conditions" is not established by the newly submitted evidence, the entire record must be reviewed *de novo* to determine whether a "mistake in a determination of fact" has been made. See e.g., *Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *aff'd on recon.*, 16 B.L.R. 1-71 (1992); *Dingess v. Director, OWCP*, 12 B.L.R. 1-141 (1989); *Cooper v. Director, OWCP*, 11 B.L.R. 1-95 (1988). In considering a petition for modification, the fact-finder is vested "with broad discretion 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).

NEW MEDICAL EVIDENCE

As the initiator of modification proceedings in this case, Claimant bears the burden of establishing a basis for modification of the denial of benefits. *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-34 (1996). Claimant's petition for modification is supported by new medical evidence, including a pulmonary function test dated December 17, 2007; an arterial blood gas test on the same date; readings of two chest x-rays dated December 17, 2007, read by Dr. W. T. Huskison; and an undated clinic note by Dr. Sarikun Tjandra. (DX 179).

The district director had both December 17, 2007 chest x-rays reread by Dr. Shiv Navani, a Board-certified radiologist and B-reader, and the pulmonary function tests reviewed by Dr. Timothy Kennedy, a Board-certified pulmonologist. Dr. Navani's readings and Dr. Kennedy's report are dated January 18, 2008. (DX 180).

This claim was denied by Judge Wood and later by the undersigned Administrative Law Judge because Claimant failed to show the existence of pneumoconiosis. Thus, newly submitted evidence must be considered in conjunction with the previously submitted evidence to determine if the weight of the new evidence is sufficient to demonstrate the presence of pneumoconiosis.

Section 718.202 provides four ways for establishment of pneumoconiosis. Under subsection 718.202(a)(1) pneumoconiosis may be established by chest x-rays. Subsection 718.202(a)(2) provides a finding may be made by biopsy or autopsy evidence. No biopsy evidence is present here. Subsection 718.202(a)(3) provides that pneumoconiosis may be established by one of several presumptions that are not applicable to the present claim. Section 1556 of the Patient Protection and Affordable Care Act ("PPACA") reinstates the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), but only for claims filed on or after January 1, 2005. The present claim was filed before January 1, 2005.

Section 718.202(a)(4) provides for establishing pneumoconiosis if a physician exercising reasoned medical judgment, notwithstanding a negative chest x-ray, finds the miner suffers from pneumoconiosis as defined in section 718.201. Pneumoconiosis as defined in section 718.201 means a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. This definition includes both clinical pneumoconiosis and legal pneumoconiosis.

Claimant's petition for modification includes readings of two chest x-rays dated December 17, 2007, read by Dr. W. T. Huskison as 1/0. Dr. Shiv Navani reread the x-rays at the request of the Office of Workers' Compensation Programs as negative for pneumoconiosis. Dr. Navani is a Board-certified radiologist and B-reader. The qualifications of Dr. Huskison are unknown to the record. Dr. Navani's readings are given more weight than the readings of Dr. Huskison because of his superior qualifications in the interpretation of x-rays for pneumoconiosis. The December 17, 2007 chest x-rays were also read by Dr. Jerome F. Wiot, a Board-certified radiologist and B-reader at the request of Employer. Dr. Wiot read the x-rays as 0/0, negative for pneumoconiosis, confirming Dr. Navani's readings. (DX 1, 2).

Employer also had a chest x-ray that was taken of Claimant on November 14, 2008, read by Dr. Lawrence Repsher, Dr. Debra Russell, and Dr. Christopher Meyer. Dr. Repsher read the x-ray as negative for pneumoconiosis. Dr. Russell interpreted the x-ray as showing bullous changes, and fairly dense 4.2 cm pulmonary nodule of left lower lobe. She recommended a CT to determine if the nodule represents a calcified granuloma versus non calcified pulmonary mass. Dr. Meyer read the x-ray as negative for pneumoconiosis. He noted the oval nodule at the left lung base but considered it to be a manifestation of coal workers' pneumoconiosis. Dr. Repsher is a B-reader; Dr. Meyer is a Board-certified radiologist and B-reader; and Dr. Russell's qualifications are not of record. These readings of Drs. Repsher and Meyer corroborate Dr. Navani's interpretation that Claimant does not have x-ray evidence of pneumoconiosis. Thus, the evidence offered in this modification proceeding supports a finding that Claimant does not have clinical pneumoconiosis.

A review of the chest x-ray evidence in the claim prior to this modification proceeding also shows no evidence of pneumoconiosis as none of the studies in that claim, dated April, 2002, May, 2002, and November, 2003, resulted in findings of pneumoconiosis. (See chart of x-ray readings at page 12 of October 5, 2005 Decision and Order.) (DX 167). Further, as stated in the October 5, 2005 Decision and Order, the finding by Judge Amery of no x-ray evidence of pneumoconiosis was affirmed by the Board and the Tenth Circuit, and Judge Wood's determination of no clinical pneumoconiosis based on the chest x-ray evidence before her was affirmed by the Board. Thus, a review of the newly submitted chest x-ray readings in conjunction with the previously submitted readings shows that Claimant does not have clinical pneumoconiosis.

Claimant's petition for modification does not include any report from a physician providing a reasoned medical opinion finding pneumoconiosis under § 718.202(a)(4). Claimant offers an undated clinic note by Dr. Sarikun Tjandra. (DX 179). But Dr. Tjandra's assessment of "shortness of breath secondary to multiple problems, possible chronic obstructive pulmonary disease with history of smoking 50 pack years, possible black lung disease, coal mine lung" is far too equivocal to be considered a reasoned opinion. Nor can it be considered a documented opinion as it provides no basis for its assessment of causation except for a reference to cigarette smoking and coal mine employment history.

The record in this petition for modification includes an interpretation by Dr. Christopher Meyer of a November 14, 2008 CT scan. Dr. Meyer interpreted the CT scan as showing: no evidence of coal worker's pneumoconiosis; sequelae of prior granulomatous disease with focal areas of calcified parenchymal nodules; discrete well defined oval mass in left lower lobe,

suggesting a benign etiology such as a large granuloma, hamartoma or residual of prior hematoma, but neoplastic process cannot be excluded; and severe centrilobular emphysema.

Employer offers the reports and deposition testimony of Drs. Repsher and Peter G. Tuteur. Dr. Repsher provided a pulmonary evaluation of Claimant in a May 11, 2009 report. (EX 12). Dr. Repsher is Board-certified in pulmonary disease and internal medicine. (EX 13). Dr. Repsher examined Claimant on April 8, 2009, at the Aspen Motel at Fort Smith Arkansas; saw him in consultation on November 2, 1999; and evaluated his condition based on extensive medical records on two other occasions. His report noted a 25 year coal mine employment history beginning in 1947, and a cigarette smoking history from age 15 until November of 1999 of two packs per day, and a one pack a day habit until he finally quit in 2002. Dr. Repsher's report reviewed Claimant's medical records. They showed the recognition of nodule in left lower lobe of lung as far back as June 1983, and a diagnosis of emphysema in 1993. A physical examination showed breath sounds markedly diminished, although no rales, rhonchi or wheezes. Chest x-ray was read by Dr. Meyer as 0/0, no evidence of pneumoconiosis. Dr. Repsher referenced Dr. Meyer's CT scan as negative for pneumoconiosis but prior granulomatous disease with a well defined oval mass in left lobe. Dr. Repsher administered arterial blood gas tests but found them to be medically invalid for interpretation due to "extremely poor effort and cooperation." Arterial blood gas test results showed lower level of normal PO₂. The serum nicotine and cotinine levels suggested a 1 to 2 pack per day cigarette smoking history. Dr. Repsher diagnosed COPD, severe, "overwhelmingly most likely due to his long, heavy, and probable continued" cigarette smoking habit. Dr. Repsher found no evidence of medical or legal pneumoconiosis, or any other pulmonary condition caused or aggravated by employment with exposure to coal dust. Dr. Repsher reasoned that Claimant has no radiographic evidence of pneumoconiosis. He opined that the left lobe mass is "overwhelmingly most likely due to" pulmonary tuberculosis, although it could be benign neoplasm, but "extraordinarily unlikely to be result of complicated pneumoconiosis."

Dr. Repsher testified by deposition on May 24, 2010. (EX 28) He reiterated the findings and conclusions of his May 11, 2009 report. He testified that his pulmonary evaluation revealed no coal workers' pneumoconiosis. Instead, he found Claimant to be totally disabled from COPD caused by cigarette smoking, and the abnormalities observed on x-ray to be caused by slowly progressive tuberculosis. (EX 28 at 30, 31). Dr. Repsher testified that Claimant had developed nodules in both lungs and mediastinum many of which have calcified. He also noted one larger nodule that slowly continues to grow, probably a very slowly progressing pulmonary tuberculosis. (EX 28 at 13, 14). He testified that it is "absolutely not" related to the inhalation of coal mine dust. (EX 28 at 17). His reading of the chest x-ray showed no small opacities in background. (EX 28 at 25). On cross-examination, Dr. Repsher was asked by Claimant's wife if he had told her at the completion of Claimant's examination: "Don't never let this man have heart surgery or lung surgery. He's got all the features of complicated black lung." (EX 28 at 42, 43). Dr. Repsher responded that he "absolutely categorically denies that." (*Id.*) Claimant's wife also asked Dr. Repsher if he had a drink on the plane when he was traveling to Claimant's examination. Dr. Repsher answered that he did not, although he may have had one on the way home. (EX 28 at 43, 44).

Employer also offered a report and deposition testimony of Dr. Peter G. Tuteur. Dr. Tuteur is Board-certified in Internal Medicine and Pulmonary Medicine. (EX 20). The report, dated March 29, 2010, is based on medical reports and records supplied to him by Employer.

Those documents include Dr. Repsher's May 11, 2009 medical report, extensive treatment and hospital records, pulmonary function tests dating back to 1989, arterial blood gas tests from 2002 to 2009, three CT scan reports, sixteen chest x-ray reports from twelve different reviewers, deposition transcript from Dr. Joseph Renn, and a transcript of Dr. Tuteur's own deposition given earlier in the claim. (EX 19). Dr. Tuteur diagnosed cigarette smoke-induced advanced chronic obstructive pulmonary disease manifested by emphysema and chronic bronchitis. He found that the condition was in no way related to, aggravated by, or caused by the inhalation of coal mine dust. He considered Claimant to be impaired by his pulmonary condition, but found the impairment to be caused by chronic inhalation of cigarette smoking over six decades.

Dr. Tuteur testified by deposition on May 18, 2010. (DX 27). He testified that Claimant was totally disabled from advanced lung disease, but that the record contained no competent evidence that legal or medical pneumoconiosis played any part in the lung disease. (DX 27 at 13, 26). Dr. Tuteur recognized that Claimant had two risk factors for his pulmonary disability, coal dust exposure and cigarette smoking history, but found the cause to be solely cigarette smoking. His review of chest x-ray reports showed 64 readings, only two which read category 1 profusion pneumoconiosis, and one of the positive readings was by Dr. Navani, who read a subsequent x-ray as negative for pneumoconiosis. (DX 27 at 25, 66). Dr. Tuteur also referenced and applied two medical articles to Claimant's pulmonary function test results, to show with a reasonable degree of medical certainty that Claimant's pulmonary condition is caused by cigarette smoking without contribution from a coal dust exposure. (DX 27 at 42, 43, 47-48). Dr. Tuteur found that the lesion in the left lower lobe had been present for about twenty years, and that it was not related to coal dust exposure. (DX 27 at 30, 31).

Employer submitted extensive medical records regarding the care and treatment of Claimant. They include records from Hussain's Family Practice (EX 14, 15, 21), Sequoyah Hospice Inc (EX 16, 23), Eastern Oklahoma Medical Plaza (EX 17, 22), Local Hospice in Sallisaw, Ok. (EX 18), St. Edward Mercy Hospital (EX 24), Dr. Tjandra (EX 25), and Dr. Alemparte. (EX 26). These records reveal treatment for pulmonary disease. Records from Hussain's Family Practice show treatment for pulmonary disease. Records from Local Hospice show that he was admitted with COPD and emphysema, and list medications for treatment of COPD. The records from Sequoyah Hospice continually show the diagnosis of COPD, black lung and emphysema and list pulmonary medications such as symbicort inhaler. Records from Eastern Oklahoma Medical and St. Edward Mercy Hospital provide the diagnosis of emphysema, COPD, and black lung. Although the records establish the existence of a severe and disabling pulmonary condition, they do not provide a reasoned opinion of its cause. They list the diagnosis of black lung, history of black lung, or miner's disease, but provide no explanation for the diagnosis. Dr. Tjandra's clinic note on December 13, 2007, stating, "shortness of breath secondary to multiple problems, possible black lung disease, coal mine lung," is typical, as it draws its conclusion solely from coal mine employment and a pulmonary disease. These records and the diagnoses therein are insufficient to establish that Claimant's pulmonary condition is caused by his coal mine employment.

As the evaluations of Drs. Repsher and Tuteur conclude that Claimant does not have pneumoconiosis, the CT scan does not show pneumoconiosis, and the medical treatment records are insufficient to establish that Claimant's coal mine employment caused or contributed to his pulmonary disease, Claimant has not met his burden of establishing the existence of coal workers' pneumoconiosis.

MISTAKE OF FACT

Even if a "change in conditions" is not established by the newly submitted evidence, the entire record must be reviewed *de novo* to determine whether a "mistake in a determination of fact" has been made.

A review of the entire record shows that pneumoconiosis is not established by chest x-rays under § 718.202(a)(1). As previously discussed, the negative readings by Drs. Navani, Repsher, Wiot and Meyers in the present case show no pneumoconiosis. Those readings are corroborative of the undersigned's October 5, 2009 Decision and Order finding that Claimant does not suffer from pneumoconiosis. None of the chest x-rays in that claim was positive for pneumoconiosis. Those x-ray readings along with the readings submitted in the prior case before Judge Wood were found to establish the absence of pneumoconiosis. The October 4, 2005 Decision and Order's finding of no pneumoconiosis, and Judge Wood's Decision and Order finding no pneumoconiosis were both affirmed by the Board. Thus, the record as a whole shows no clinical pneumoconiosis.

A finding of complicated pneumoconiosis would support entitlement to benefits under § 718.202(a)(3). Dr. Navani in his interpretation of a 1999 x-ray diagnosed a size A opacity. However, Dr. Navani's subsequently read the December 17, 2007 x-ray as negative for complicated pneumoconiosis. Drs. Tuteur, Repsher, Wiot and Myers all noted a lesion at the left base of the lung, but all the physicians rejected coal dust exposure as a cause of the lesion. Dr. Tuteur noted that the CT scans identified the left lower lobe lesion as having been present for about twenty years, but not related to coal dust exposure. He thought it to be a very slowly progressing pulmonary tuberculosis. Dr. Repsher referenced one larger nodule that he considered to be a very slowly progressing pulmonary tuberculosis, that is "absolutely not" related to the inhalation of coal mine dust. Dr. Wiot considered it to be not a manifestation of coal workers' pneumoconiosis but most likely representing either a hamartoma or a larger granuloma. Dr. Myers characterized it as a discrete well defined oval mass in left lower lobe suggesting a benign etiology. Thus, all the recent evidence shows that the lower lung mass, although initially diagnosed by Dr. Navani as representing complicated pneumoconiosis, is not coal dust related.

A review of the entire record shows that pneumoconiosis is not established by reasoned medical judgment under § 718.202(a)(4). Claimant's petition for modification does not include any physician's report supporting a finding of pneumoconiosis. The one CT scan reading is negative for pneumoconiosis. The medical opinions in this claim, those of Drs. Repsher and Tuteur, conclude that Claimant does not have pneumoconiosis. The October 4, 2005 Decision and Order based its finding of no pneumoconiosis principally on the report and deposition of Dr. Renn finding no pneumoconiosis. Dr. Renn is Board-certified in internal medicine and pulmonary medicine, and his report was found to have offered additional medical support for Judge Wood's determinations that Claimant does not have pneumoconiosis. Dr. Renn's finding was credited over medical treatment reports of Dr. R.B. Winters, Dr. William Webb, Dr. Harold Blankenship and Dr. Dale Asbury at St. Edward Mercy Medical Center. These reports from time to time list black lung or history of black lung as a diagnosis but, as stated in Judge Wood's decision, these notations appear to be based on an occupational history, or information obtained from Claimant, rather than medical testing. They are neither well documented or well reasoned.

Judge Wood considered the opinions of Drs. Heard, Repsher, Tuteur and Renn along with opinions previously in the record of Dr. Frank Bradley, Larry Pillstrom, David Nichols, C.D. Cook, J. Earl White, Repsher and Wiot under § 718.202(a)(4). She found that the weight of the medical opinion evidence supported a finding that Claimant does not have pneumoconiosis, as she credited the opinions of Drs. Pillstrom, Repsher, Heard, Tutuer and Renn as being well-reasoned and well-documented in contrast with the opinions of the other physicians she considered to be either conclusory in nature (Dr. Cook's 1986 opinion and Dr. White's 1987 opinion) or based on positive x-ray evidence contrary to preponderance of evidence (Dr. Bradley's 1979 opinion and Dr. Nichols June 1994 opinion). Judge Wood's decision finding that Claimant does not suffer from coal worker's pneumoconiosis is well-reasoned and supported by the record before her, and corroborated by the physicians' reports considered in the proceeding here.

Thus, a further reflection of the evidence of record pursuant to this petition for modification, shows no mistake of fact as it does not show that Claimant has pneumoconiosis.

CONCLUSION

Claimant has failed to prove by a preponderance of the evidence that the October 4, 2005 Decision and Order Denying Benefits should be modified, as he has not shown that his pulmonary impairment is caused by coal dust exposure.

ORDER

IT IS ORDERED THAT the request for modification filed by the Claimant on January 14, 2008, is hereby DENIED.

A
THOMAS M. BURKE
Administrative Law Judge