BRB No. 00-0772 BLA

FELIX LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:_____
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Office of Edmond Collett), Hyden, Kentucky, for claimant.

Sarah M. Hurley (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (99-BLA-1333) of Administrative Law Judge Rudolf L. Jansen denying benefits on a miner's claim filed pursuant to the provisions

[1]Claimant is Felix Lewis, the miner, who filed his present claim for benefits on April 12, 1994. Director's Exhibit 1. This claim was denied on May 21, 1997 by the Benefits Review Board. Director's Exhibit 23. Thereafter, claimant filed a request for modification on February 10, 1998. Director's Exhibit 24. Claimant's first claim for benefits, filed on May 2, 1973, was finally denied by the United States Department of Labor on February 7, 1980. Director's Exhibits 15-195, 15-121. Claimant filed a second claim for benefits on October 17, 1984, which was finally denied on June 23, 1988. Director's Exhibits 15-270, 15–4.

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).[2] The administrative law judge credited the miner with eleven years of coal mine employment pursuant to the parties' stipulation, 2000 Hearing Transcript at 7. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 7-9. Therefore, the administrative law judge found the new evidence insufficient to establish a material change in conditions. Decision and Order at 8-9. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) (2000) and Section 718.202(a)(4) (2000). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. Claimant's Brief at 5-6. The Director, Office of Workers' Compensation Programs, (the Director), responds urging affirmance of the denial of benefits.[3]

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[2]The Department of Labor 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]We affirm the administrative law judge's findings pursuant to Section 718.202(a)(2)-(a)(3) (2000) and 718.204(c)(1)-(c)(3) (2000) as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which the Director has responded.[4] Claimant has not filed a response.[5] Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

This case involves modification of a duplicate claim. *See* n.1, *supra*. The miner's third claim was denied because Administrative Law Judge Gerald M. Tierney found that claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 18. Claimant appealed, and the Benefits Review Board affirmed Judge Tierney's denial of benefits, and claimant, subsequently, requested modification.[6] Director's Exhibits 19, 23, 24. In considering a request for modification on a duplicate claim, which has been denied based upon a failure to establish a material change in conditions, an administrative law judge should initially address, before considering the merits, whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990). If it is sufficient to do so, claimant will have established a change in conditions

[4]The Director in her brief, dated March 29, 2001, asserts that the regulations at issue in the lawsuit do not affect the outcome of this case.

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[6]The Board noted that although Judge Tierney mischaracterized the claim as a request for modification, he applied the standard for determining a material change in conditions at Section 725.309 (2000) when considering the new evidence. Director's Exhibit 23 at 2 n.2.

pursuant to 20 C.F.R. §725.310 (2000).[7]

In the present case, the administrative law judge noted that this case involves modification of a duplicate claim. Decision and Order at 3. The administrative law judge stated that he must consider the new evidence submitted in support of claimant's request for modification, in conjunction with the old evidence, to determine if it is sufficient to meet the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), along with the modification provisions of 20 C.F.R. §725.310 (2000). Decision and Order at 4-5. As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge properly applied the *Ross* standard to determine whether claimant has established a material change in conditions. In *Ross*, the Sixth Circuit court held that in order to establish a material change in conditions, an administrative law judge must determine whether the new evidence is sufficient to prove one of the elements of entitlement that formed the basis of the prior denial. *See Ross, supra*. Judge Tierney denied this claim because claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 18. Therefore, the administrative law judge considered the new evidence to determine if claimant established a material change in conditions pursuant to Section 718.202(a) (2000) and Section 718.204(c) (2000). Decision and Order at 5-9.

[7]Although substantive revisions have been made to the amended regulations governing Section 725.309 and 725.310, these revised regulations apply only to new claims filed after January 19, 2001.

Pursuant to Section 718.202(a)(1) (2000), the administrative law judge noted that the new evidence contains three readings of two x-rays. Decision and Order at 7. The administrative law judge noted that Dr. Chaney, who is neither a B-reader[8] nor a Board-certified radiologist, interpreted the January 30, 1998 x-ray as positive and that Dr. Sargent, a B-reader and Board-certified radiologist, interpreted this x-ray as negative. *Id.* The administrative law judge also noted that Dr. Varghese interpreted a January 21, 1999 x-ray as showing chronic obstructive pulmonary disease.[9] The administrative law judge relied on the x-ray interpretation of the best qualified reader, Dr. Sargent, and found that claimant failed to establish the existence of pneumoconiosis or a material change in conditions by the x-ray evidence. Decision and Order at 7. The administrative law judge also found no mistake in Judge Tierney's consideration of the x-ray evidence. *Id.*

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3-4. Contrary to claimant's assertion, it was permissible for the administrative law judge to consider the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge also considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit inasmuch as the administrative law judge considered all the x-ray evidence submitted with claimant's request for modification. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46

[8]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[9]The report for this x-ray interpretation is not in the record. Because the administrative law judge did not find this x-ray probative, Decision and Order at 7, we deem the administrative law judge's consideration of this x-ray harmless error, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

(6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because the x-ray evidence fails to establish the existence of pneumoconiosis, the administrative law judge properly concluded that claimant failed to establish a material change in conditions based on this evidence, *see* 20 C.F.R. §718.202(a)(1), hence, we affirm the administrative law judge's finding. *See Staton, supra*; *Johnson, supra*; *Creech, supra.*

Pursuant to Section 718.202(a)(4) (2000), the administrative law judge noted that although Dr. Varghese diagnosed chronic obstructive pulmonary disease, he did not state whether this condition was attributable to the miner's coal mine employment. Decision and Order at 8. Therefore, the administrative law judge properly found that Dr. Varghese's opinion was not probative regarding the existence of pneumoconiosis. *Id*; *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987). With regard to Dr. Chaney's opinion, the administrative law judge noted that this physician found coal workers' pneumoconiosis. Decision and Order at 8. However, contrary to claimant's contentions, the administrative law judge permissibly gave "very little weight" to Dr. Chaney's opinion because he found that this physician "provided no explanation of how he arrived at [his] conclusion and he used an imprecise coal mining history."[10] *Id*; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986). Therefore, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions based on the medical opinion evidence because this evidence fails to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(4).[11] *See*

[10]In his report, Dr. Chaney indicated the claimant had "many years" of coal mine employment. Director's Exhibit 24.

[11]The administrative law judge noted pursuant to Section 718.202(a)(4) (2000) and

Maddaleni v. Pittsburg & Midway Coal Mining Co., 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Section 718.204(c)(4) (2000) that "[n]o reasoned medical opinions were submitted in conjunction with the claim reviewed by Judge Tierney." Decision and Order at 8, 9. However, as the Director asserts, the administrative law judge erred in making this observation. Director's Brief at 4 n.3. The record contains a 1994 opinion of Dr. Wicker in which this physician states that there is no evidence of pneumoconiosis and that the miner appears to have the respiratory capacity to perform his previous coal mine employment. Director's Exhibit 5. Judge Tierney did not discredit this opinion. Director's Exhibit 18.

Pursuant to Section 718.204(c) (2000),[12] claimant contends that the administrative law judge erred in failing to compare Dr. Chaney's assessment of the miner's pulmonary condition with the exertional requirements of his usual coal mine employment.[13] Claimant's Brief at 5-6. Regarding the issue of total respiratory disability, the administrative law judge found that neither Dr. Varghese nor Dr. Chaney addressed in his opinion whether claimant retains the respiratory capacity to perform his usual coal mine employment.[14] Decision and Order at 9. Dr. Varghese did not render an opinion regarding claimant's respiratory capacity. Director's Exhibit 31. Dr. Chaney noted on the miner's pulmonary function study that he had "borderline obstruction" and "mild restriction." Director's Exhibit 24. The administrative law judge found Dr. Chaney's notation on the miner's pulmonary function study "to be inadequate to establish total disability or a material change in conditions." Decision and Order at 9.

As the administrative law judge determined, Dr. Chaney's notations were too vague and lacking in detail for the administrative law judge to infer a finding of total respiratory disability from a review of the exertional requirements of the miner's usual coal mine employment. *See Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *see also Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*) *aff'd on recon.*, 9 BLR 1-104 (1986). Thus, contrary to claimant's contention, the administrative law judge did not err in finding that Dr. Chaney's notations on claimant's pulmonary function study were "inadequate" to establish total respiratory disability. *See Gee*, *supra*; *Wright*, *supra*; *see also Mazgaj*, *supra*; *Budash*, *supra*.

Inasmuch as an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met its burden of proof, *see*

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[12]In the amended regulations, 20 C.F.R. §718.204 has been renumbered. The regulation at 20 C.F.R. §718.204(c)(1)-(c)(4) (2000), which discusses the methods for establishing total respiratory disability, is 20 C.F.R. §718.204(b)(2)(i)-(b)(iv) in the amended regulations. The regulation at 20 C.F.R. §718.204(b) (2000), which discusses total disability due to pneumoconiosis, is 20 C.F.R. §718.204(c) in the amended regulations.

[13]Citing *Bentley v. Director, OWCP*, claimant asserts that the administrative law judge erred in failing to mention his "age, education or work experience in conjunction with [the administrative law judge's] assessment that the claimant was not totally disabled." Claimant's Brief at 6. Contrary to claimant's contention, his age, education, and work experience are not relevant to establishing total respiratory disability at 20 C.F.R. Part 718.

[14]The administrative law judge noted that claimant's usual coal mine employment "involved roof bolting and running a belt line." Decision and Order at 3.

Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge properly found that claimant failed to establish a material change in conditions based on the medical opinion evidence because this evidence fails to establish that claimant has a total respiratory disability, *see* Section 718.204(c)(4).

Because the administrative law judge properly determined that claimant failed to establish a material change in conditions, *see Ross*, *supra*, on this modification of a duplicate claim, *see Nataloni*, *supra*; *Kovac*, *supra*, we affirm his denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge