BRB No. 04-0659 BLA

HARLAN R. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
T.T. & T. COAL COMPANY	)	DATE ISSUED: 04/19/2005
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
OAK RIDGE COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Harlan R. Ratliff, Wellington, Kentucky, *pro se*.

Carl M Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer, Oak Ridge Coal Company.[1]

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

[1] On November 24, 2004, the Board issued an Order noting the withdrawal of Hoskins Law Offices, PLLC as counsel for Oak Ridge Coal Company.

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

PER CURIAM:

Claimant, without the assistance of counsel,[2] appeals the Decision and Order Denying Modification (03-BLA-0093) of Administrative Law Judge Thomas M. Burke on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[3] The administrative law judge found that this claim constitutes a petition for modification of a denial of benefits on a duplicate claim.[4] Decision and Order at 4. The administrative law

[2] Susie Davis, a benefits counselor with the Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] On November 23, 2004, the Director, Office of Workers' Compensation Programs, filed a motion to hold this case in abeyance. On December 8, 2004, the Board issued an Order granting the motion and holding the case in abeyance for 60 days pending a determination of whether a surety bond covered the claim against the potential employer, Oak Ridge. On February 7, 2005, the Director filed a status report stating that he was unable to determine whether there was a surety bond covering Oak Ridge's potential liability in this case and that, "Oak Ridge should be retained as at least a nominal party so that the Director may use any award of benefits against Oak Ridge as further proof of his claims in bankruptcy against Horizon and its subsidiary Zeigler Coal Company, of which Oak Ridge was a subsidiary." The Board thus lifted the abeyance in an Order issued on March 1, 2005.

[4] Claimant initially filed a claim for benefits on July 26, 1984, Director's Exhibit 56, which was denied as administratively closed and deemed abandoned by the district director on November 6, 1987, Director's Exhibit 56. Claimant took no further action until the filing of a second claim on July 23, 1991. Director's Exhibit 1. On June 30, 1997, Administrative Law Judge Clement J. Kichuk issued a Decision and Order denying benefits. Director's Exhibit 72. Administrative Law Judge Kichuk found that claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment and thus failed to establish a material change in conditions. Subsequent to a pro se appeal by claimant, the Board affirmed the denial of benefits. *Ratliff v. T.T. & T. Coal Co.*, BRB No. 97-1505 BLA (Jul. 21, 1998) (unpub.). On July 21, 1999, claimant filed a request for modification, Director's Exhibit 82. On April 28, 2004, the

judge further determined that claimant established a coal mine employment history of 18.31 years. Decision and Order at 5. In considering the responsible operator issue, the administrative law judge determined that T.T. & T. Coal Company was the primary operator and that Oak Ridge Coal Company was the secondary operator. Decision and Order at 5. In considering entitlement, the administrative law judge found that the newly submitted evidence failed to establish a change in conditions relating to the previous determinations that claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Decision and Order at 6-14. The administrative law judge further determined that review of the entirety of the evidence of record did not support a finding that the previous findings constituted a mistake in the determination of fact. Decision and Order at 11, 14. As claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment, the administrative law judge, accordingly, denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer, Oak Ridge Coal Company, in response, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief also urging affirmance of the denial of benefits.[5]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The standard of review in the instant case is whether the evidence submitted in support of the duplicate claim and the evidence submitted in support of modification, if any, is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Where, as here, a miner files a claim for benefits more than one year after the final denial of a

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administrative law judge issued the Decision and Order Denying Modification from which claimant now appeals.

[5] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination as not adverse to claimant and unchallenged on appeal by the other parties. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm, as unchallenged, the administrative law judge's finding regarding the responsible operators in this case. *See Skrack*, 6 BLR 1-710.

previous claim, the subsequent request for modification must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). Claimant has timely requested modification of the previous determination that claimant failed to establish a material change in conditions, thereby invoking the administrative law judge's authority to consider whether there was a change in conditions since the denial of the duplicate claim. 20 C.F.R.§725.310; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Hess*, 21 BLR at 1-143; *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). However, this in no way diminished claimant's burden to prove a material change in conditions before he is entitled to adjudication of the merits of his claim. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 998, 19 BLR 2-10, 2-20 (6th Cir. 1994). Consequently, the issue before the administrative law judge pursuant to claimant's modification request was whether all of the evidence in the duplicate claim plus that submitted on modification established the requisite material change in conditions pursuant to Section 725.309(d). *See Hess*, 21 BLR at 1-143.

In finding that the newly submitted x-ray evidence, *i.e.*, that evidence submitted since the prior denial, failed to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge permissibly concluded that the weight of the readings rendered by physicians with the dual-qualifications of B-reader and board-certified radiologist,[6] was negative for the existence of the disease. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). Specifically, the administrative law judge found that the June 6, 2002, x-ray interpreted as positive by Dr Patel, a B-reader and board-certified radiologist, Director's Exhibit 110, was re-read as negative by Dr. Barnett, a physician with the same dual-qualifications, Director's Exhibit 112, as well as by a B-reader, Dr. Westerfield, Director's Exhibit 108. The administrative law judge further found while Drs. Sundaram and Potter, who do not have any specialized qualifications in reading x-rays, rendered positive interpretations of an August 15, 2000 x-ray, Director's Exhibit 87, their readings were outweighed by the negative interpretation of the same film rendered by Dr. Sargent,

[6] 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 for Occupational Safety and Health. See 20 C.F.R. '718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

a B-reader and board-certified radiologist, Director's Exhibit 89. Decision and Order at 8. We thus affirm the administrative law judge's determination that the newly submitted x-ray evidence does not establish a change in conditions pursuant to Section 718.202(a)(1).[7] We further affirm the administrative law judge's determination that, based on review of the entirety of evidence of record, there was no mistake in the prior determination that the x-ray evidence did not establish the existence of pneumoconiosis as the weight of such evidence was negative for pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In concluding that the newly submitted medical opinion evidence did not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge permissibly concluded the newly submitted medical reports of Drs. Hippensteel, Castle and Westerfield, all of whom opined that claimant did not suffer from pneumoconiosis, Director's Exhibits 103, 107, 108, were entitled to the greatest weight because of the superior qualifications of Drs. Hippensteel and Castle, in particular, see *Gray v. SLC Coal Co.*, 126 F.3d 382, 387, 21 BLR 2-615, 2-625-26 (6th Cir. 1999); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986), and because the physicians provided the best reasoned and documented opinions of record, as they took into account claimant's coronary condition, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Decision and Order at 11. Further, the administrative law judge found that while Dr. Sundaram, who opined that claimant suffered from pneumonconiosis, Director's Exhibit 87, was claimant's treating physician, the physician's opinion was not entitled to controlling weight pursuant to 20 C.F.R. §718.104(d), as the physician did not document the frequency or extent of his treatment of claimant, nor did he discuss the impact of claimant's coronary condition on his overall condition. Therefore, the administrative law judge rationally concluded that Dr. Sundaram's opinion was not entitled to dispositive weight based on his status as claimant's treating physician. 20 C.F.R. §718.104(d); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-624 (6th Cir. 2003); *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 2-495 (6th Cir. 2002). Further, with regard to the newly submitted medical opinion evidence, the administrative law judge permissibly concluded that the opinion of Dr.

[7] Claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3), as there is no autopsy or biopsy evidence of record and there is no evidence of complicated pneumoconiosis in this living miner's claim filed subsequent to January 1, 1982. 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

Rasmussen diagnosing the existence of pneumoconiosis, Director's Exhibit 110, was entitled to lesser weight, as the opinion was based upon the positive x-ray interpretation of Dr. Patel, which was later re-read as negative. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). We therefore affirm the administrative law judge's determination that newly submitted medical opinion evidence does not establish a change in conditions pursuant to Section 718.202(a)(4). We further affirm the administrative law judge's determination that, based on review of the entirety of evidence of record, there was no mistake in the prior determination that medical opinion evidence did not establish the existence of pneumoconiosis as the administrative law judge permissibly found that the medical opinion evidence best supported by the underlying documentation of record was negative for the existence of the disease, *see Clark*, 12 BLR 1-149; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. Decision and Order at 12. We thus affirm the administrative law judge's determination that claimant has not established the existence of pneumoconiosis.

In finding that the newly submitted evidence failed to support a finding of total disability pursuant to Section 718.204(b), the administrative law judge found that the newly submitted pulmonary function study evidence, Director's Exhibits 108, 110, was non-qualifying[8] and that there was no new blood gas study evidence submitted. Further, the administrative law judge permissibly found that while the newly submitted opinion of Dr. Sundaram stated that claimant was unable to return to coal mine employment, the physician's opinion was entitled to little weight as the physician did not explain the basis for his conclusion, *see Clark*, 12 BLR 1-149; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. Decision and Order at 12-14. The administrative law judge permissibly concluded that the reports of Drs. Rasmussen and Westerfield, as corroborated by the opinions of Drs. Castle and Hippensteel, all of whom opined that claimant could return to coal mine employment, were best supported by the objective evidence of record, *see Clark*, 12 BLR 1-149; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. Decision and Order at 14. We therefore affirm the administrative law judge's determination that the newly submitted medical evidence of record did not establish a change in conditions pursuant to Section 718.204(b)(2)(i)-(iv). Likewise, we affirm the administrative law judge's determination that review of the entirety of relevant evidence did not demonstrate a mistake in the prior determination that claimant did not establish a totally disabling respirator impairment. The administrative law judge, in a permissible exercise of his discretion, found that the weight of the pulmonary function study evidence and blood gas study evidence was non-qualifying and that the medical opinions finding total disability were unsupported by

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

objective data, *see Clark*, 12 BLR 1-149; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. Decision and Order at 14. We therefore affirm the determination that the evidence of record does not support a finding of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv); *see generally Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

Because substantial evidence supports the administrative law judge's determination that claimant has not established pneumoconiosis or a totally disabling respiratory impairment, claimant has failed to establish modification by showing a material change in conditions, *see Ross*, 42 F.3d 993. 998, 19 BLR 2-10, 2-20, and claimant is therefore precluded from establishing entitlement pursuant to Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge