BRB No. 08-0536 BLA

R.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 04/28/2009
	)	
and	)	
	)	
NATIONAL STEEL CORPORATION & INTERNATIONAL BUSINESS & MERCANTILE REASSURANCE	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (06-BLA-5156) of Administrative Law Judge Larry W. Price (the administrative law judge) on a

subsequent claim filed on May 15, 2001, 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). The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the administrative law judge found that the new evidence failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge also found, on reviewing the decision of Administrative Law Judge Mollie W. Neal,[1] along with the new evidence, that a mistake in a determination of fact was not made pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Consequently, claimant contends that the administrative law judge erred in finding that claimant did not establish a basis for modifying the prior decision denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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, is rational, and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the

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[1] Administrative Law Judge Mollie W. Neal issued a Decision and Order on September 24, 2004 denying benefits. Director's Exhibit 70. Judge Neal credited claimant with at least thirteen years of coal mine employment. Judge Neal found that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), (iv), thereby implicitly finding a change in an applicable condition of entitlement established at 20 C.F.R. §725.309, on the subsequent claim. *Id*. On the merits, however, Judge Neal found that the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202 and 718.203. Further, Judge Neal found that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*.

[2] The administrative law judge's finding that pneumoconiosis is not established at 20 C.F.R. §718.202(a)(2) and (3) is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 2, 3, 25, 26. Accordingly, this case arises within the

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Claimant may establish a basis for modification in his claim by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. In considering whether a change in conditions has been established pursuant to Section 725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered 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 which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In addition, the administrative law judge has the authority to consider all the evidence for any mistake of fact, including the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). In the prior decision denying benefits, Judge Neal found that the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202 and 718.203 or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[4] Consequently, the issue before the administrative law judge was whether the new medical evidence established a change in conditions by establishing the existence of any element previously adjudicated against claimant or whether Judge Neal made a mistake in a determination of fact in finding that claimant failed to establish entitlement to benefits.

Claimant first contends that the administrative law judge erred in finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record contains four interpretations of two new x-rays dated October 30, 2004 and January 25, 2007. Dr. Baker, who is a B reader, read the October 30, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 67, while Dr. Wiot, who is dually-qualified as both a B reader and a Board-certified radiologist, read the x-

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jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] Judge Neal found total respiratory disability established at 20 C.F.R. §718.204(b), on the merits.

ray as negative for pneumoconiosis, Employer's Exhibit 1. Dr. Ahmed, who is a dually-qualified radiologist, read the January 25, 2007 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, while Dr. Halbert, who is also a dually-qualified radiologist, read the x-ray as negative for pneumoconiosis, Employer's Exhibit 4.

As required by Section 718.202(a)(1), the administrative law judge considered the B reader and Board-certified radiologist status of the readers of the x-rays. 20 C.F.R. §718.202(a)(1). In so doing, the administrative law judge gave greater weight to the physicians who were dually qualified as B readers and Board-certified radiologists than to the physician who was only a B reader. However, the administrative law judge also gave diminished weight to the positive readings of the October 30, 2004 and January 25, 2007 x-rays by Drs. Baker and Ahmed, which were classified as 1/0 under the ILO-U/C system, because such a "classification means that although the physician felt it was positive for pneumoconiosis, the physician also considered [that] the film may be entirely negative." Decision and Order Denying Modification at 5. Further, the administrative law judge gave diminished weight to the positive readings of these x-rays by Drs. Baker and Ahmed, because the physicians rendered inconsistent findings regarding the appearance of the opacities they observed, *i.e.*, Dr. Baker found rounded opacities, while Dr. Ahmed found irregular shaped opacities, and Dr. Ahmed found opacities in all zones, while Dr. Baker only found opacities in selected zones. *Id*. Hence, the administrative law judge found that the negative readings of the October 30, 2004 and January 25, 2007 x-rays by Drs. Wiot and Halbert outweighed the positive readings of the same x-rays by Drs. Baker and Ahmed. Consequently, the administrative law judge found that both the October 30, 2004 and January 25, 2007 x-rays were negative for pneumoconiosis. The administrative law judge therefore found that the new x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1) and therefore did not establish a change in conditions at Section 725.310.

Claimant argues that the administrative law judge erred in discounting the positive readings of the October 30, 2004 and January 25, 2007 x-rays by Drs. Baker and Ahmed, because he found that their 1/0 classification of these x-rays means that they seriously considered that the films may be entirely negative. Claimant also argues that the administrative law judge erred in discounting the positive x-ray readings by Drs. Baker and Ahmed because he found that they gave inconsistent descriptions of the opacities. We agree. Contrary to the administrative law judge's finding, the pertinent regulations at Sections 718.102(b) and 718.202(a)(1) permit an administrative law judge to find the existence of pneumoconiosis based on a chest x-ray that is classified as Category 1/0 or greater under the ILO-U/C system. 20 C.F.R. §§718.102(b), 718.202(a)(1); *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4 (1999)(*en banc on recon*.). Furthermore, while Drs. Baker and Ahmed provided inconsistent descriptions of the opacities seen by them on the October 30, 2004 and January 25, 2007 x-rays, both of the doctors classified the profusions on these x-rays as 1/0. Consequently, the inconsistent descriptions of the

appearance of the opacities seen by Drs. Baker and Ahmed on the October 30, 2004 and January 25, 2007 x-rays did not detract from the doctors' positive readings of the x-rays. *See Cranor*, 22 BLR at 1-5.

Nonetheless, we hold that the administrative law judge's error in discounting Dr. Baker's positive reading of the October 30, 2004 x-ray in this regard was harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because the administrative law judge provided a valid alternate basis for discounting this positive reading, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, he properly accorded greater weight to the x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). As noted above, whereas Dr. Baker, who is a B reader, read the October 30, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 67, Dr. Wiot, who is dually qualified as a B reader and a Board-certified radiologist, read this x-ray as negative for pneumoconiosis, Employer's Exhibit 1. Thus, the administrative law judge properly found that Dr. Baker's positive reading of the October 30, 2004 x-ray was outweighed by Dr. Wiot's negative reading of the same x-ray, because Dr. Wiot's radiological qualifications are superior to those of Dr. Baker. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Furthermore, the administrative law judge's error in discounting Dr. Ahmed's positive reading of the January 25, 2007 x-ray, on the grounds that a 1/0 classification of the x-ray means that the reader seriously considered that the film may be entirely negative and that Drs. Baker and Ahmed gave inconsistent descriptions of the appearance of opacities, was harmless. *See Larioni*, 6 BLR at 1-1278. Dr. Ahmed's positive reading of the January 25, 2007 x-ray and Dr. Halbert's negative reading of the same x-ray were, at best, in equipoise, as the administrative law judge relied on the qualifications of the readers and both doctors are dually qualified as B readers and Board-certified radiologists. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Claimant's Exhibit 1; Employer's Exhibit 4. Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and thereby failed to provide a basis for modifying the prior decision on this ground.

Claimant next contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[5] The new medical opinion evidence

[5] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Legal pneumoconiosis includes any

consists of the reports of Drs. Sikder, Baker, and Jarboe. Dr. Sikder opined that claimant's CT scan showed evidence of silicosis and coal workers' pneumoconiosis.[6] Claimant's Exhibit 2. Dr. Sikder further opined that claimant has a severe chronic obstructive pulmonary disease (COPD). *Id*. Dr. Baker opined that claimant has both clinical and legal pneumoconiosis.[7] By contrast, Dr. Jarboe opined that claimant did not have either clinical or legal pneumoconiosis.[8]

The administrative law judge discounted Dr. Sikder's diagnosis of clinical pneumoconiosis because it was based on a positive CT scan interpretation that was contrary to the administrative law judge's finding that the CT scan evidence as a whole was negative for pneumoconiosis. Decision and Order Denying Modification at 7. The administrative law judge also found that Dr. Sikder did not diagnose legal pneumoconiosis because "[Dr.] Sikder never connected [c]laimant's pulmonary problems with coal dust exposure." *Id*. at 11. Further, the administrative law judge found that Dr. Baker's opinion that claimant has clinical and legal pneumoconiosis was not well-reasoned or well-documented. *Id*. at 6. In addition, the administrative law judge found that Dr. Jarboe's opinion that claimant did not have clinical or legal pneumoconiosis outweighed Dr. Baker's contrary opinion, because Dr. Jarboe's opinion was better reasoned. *Id*. at 11. Consequently, the administrative law judge found that the new

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chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R §718.201(a)(2).

[6] In the August 27, 2007 report, Dr. Sikder observed that "[claimant] has silicosis and coal workers' pneumoconiosis on his CT chest and a lung nodule which is indeterminate." Claimant's Exhibit 2. Dr. Sikder also observed that "[claimant] has significant coal dust exposure and the lung nodule mentioned certainly could represent coal workers' pneumoconiosis versus silicosis." *Id*.

In the October 30, 2007 report, Dr. Sikder noted that "[claimant's] CT Chest shows evidence of Coal Workers['] Pneumoconiosis/Silicosis." *Id*.

[7] In reports dated September 8, 2001 and October 30, 2004, Dr. Baker opined that claimant has coal workers' pneumoconiosis, chronic obstructive pulmonary disease related to coal mine dust exposure, and chronic bronchitis related to coal mine dust exposure. Director's Exhibit 75.

[8] In a report dated February 18, 2007, Dr. Jarboe opined that claimant did not have coal workers' pneumoconiosis or legal pneumoconiosis. Employer's Exhibit 2. Dr. Jarboe opined that claimant has a moderately severe airflow obstruction caused by cigarette smoking, and not by the inhalation of coal mine dust. *Id*.

medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Initially, we will address claimant's arguments regarding the issue of clinical pneumoconiosis. Claimant argues that the administrative law judge improperly relied on Dr. Wiot's CT scan interpretation to discount Dr. Sikder's diagnosis of clinical pneumoconiosis. Specifically, claimant asserts that the administrative law judge erred in admitting Dr. Wiot's CT scan interpretation into the record in rebuttal of Dr. Sikder's CT scan interpretations because the regulations do not provide for the rebuttal of treatment records. Contrary to claimant's assertion, however, a party has a right to cross-examine a physician whose report is made part of the record at 20 C.F.R. §725.414(a)(4), if the report is material and cross-examination is necessary for both the fair adjudication of a claim and a full and true disclosure of the facts. *L.P. v. Amherst Coal Co.*, 24 BLR 1-55 (2008) (Decision and Order on Reconsideration *En Banc*).

The administrative law judge considered the four CT scan interpretations by Drs. Sikder, Skeens, and Wiot, and found that "Dr. Sikder was the only one to find evidence of CWP on the CT scan." Decision and Order Denying Modification at 7. Dr. Sikder's and Dr. Skeens's reports interpreting CT scans were admitted into the record as treatment records. *See* 20 C.F.R. §725.414(a)(4). In an August 27, 2007 report, as discussed, *supra*, Dr. Sikder opined that claimant's CT scan showed evidence of silicosis and coal workers' pneumoconiosis. Claimant's Exhibit 2. In a September 21, 2007 report, Dr. Skeens found that the CT scan interpretation showed a left basilar opacity measuring 1.0 centimeter in diameter that was likely chronic and benign in nature, and he found that there was no mediastinal lymphadenopathy.[9] Claimant's Exhibit 3. In a December 27, 2007 report, Dr. Wiot found that the September 18, 2007 CT scan interpretation from Potter Clinic showed no evidence of coal workers' pneumoconiosis. Employer's Exhibit 7. Similarly, in another December 27, 2007 report, Dr. Wiot found that the March 22, 2007 CT scan interpretation from Potter Clinic showed no evidence of coal workers' pneumoconiosis. *Id*.

The administrative law judge properly accorded greater weight to Dr. Wiot's negative CT scan interpretations than to the contrary CT scan interpretation by Dr. Sikder, because of Dr. Wiot's superior qualifications.[10] Decision and Order Denying Modification at 7; *see Dillon*, 11 BLR at 1-114. Thus, the administrative law judge acted

[9] The administrative law judge noted that "Dr. Skeens was silent as to the presence of pneumoconiosis." Decision and Order Denying Modification at 7.

[10] Dr. Wiot is a Board-certified radiologist. Employer's Exhibit 1. Dr. Sikder is Board-certified in internal medicine. Claimant's Exhibit 5. The record does not contain the credentials of Dr. Skeens.

within his discretion in discounting Dr. Sikder's diagnosis of clinical pneumoconiosis because it was based on a positive CT scan interpretation that was contrary to the administrative law judge's finding that the CT scan evidence, as a whole, was negative for pneumoconiosis. *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). Consequently, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Sikder's diagnosis of clinical pneumoconiosis.

Claimant also asserts that the administrative law judge erred in discounting Dr. Baker's opinion that claimant has clinical pneumoconiosis. Contrary to claimant's assertion, the administrative law judge properly found that Dr. Baker's opinion that claimant has clinical pneumoconiosis was not well-reasoned or well-documented, because it was based solely on a chest x-ray and a history of coal mine dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion that claimant has clinical pneumoconiosis.

Next, we address claimant's arguments regarding the issue of legal pneumoconiosis. Claimant asserts that the administrative law judge erred in finding that Dr. Sikder did not diagnose legal pneumoconiosis. In reports dated August 27, 2007 and October 4, 2007, Dr. Sikder opined that claimant has severe COPD. Claimant's Exhibit 2. Further, in the August 27, 2007 report, Dr. Sikder noted that claimant has significant tobacco exposure and coal mine dust exposure. *Id*. However, Dr. Sikder did not opine that claimant's COPD was caused by his coal mine dust exposure. Thus, we reject claimant's assertion that the administrative law judge erred in finding that Dr. Sikder did not diagnose legal pneumoconiosis. *See* 20 C.F.R. §718.201; *see also Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999).

Claimant also asserts that the administrative law judge erred in failing to credit Dr. Sikder's opinion based on his status as claimant's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Rather, the Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id*. As discussed *supra*, the administrative law judge properly discounted Dr. Sikder's opinion diagnosing clinical pneumoconiosis because it was based on a positive CT scan interpretation that was contrary to the administrative law judge's finding that the CT scan evidence, as a whole, was negative for pneumoconiosis. *Snorton*, 9 BLR at 1-107. Moreover, the administrative law judge properly found that Dr. Sikder did not diagnose legal pneumoconiosis. 20 C.F.R. §718.201. Thus, we reject claimant's assertion that the

administrative law judge erred in failing to credit Dr. Sikder's opinion based upon his status as claimant's treating physician. 20 C.F.R. §718.104(d)(5).

Claimant further asserts that the administrative law judge erred in discrediting Dr. Baker's opinion diagnosing legal pneumoconiosis because it was based on an inaccurate smoking history.[11] Claimant's Brief at 14. However, the administrative law judge did not find that Dr. Baker's new opinion diagnosing legal pneumoconiosis was not well-reasoned because it was based on an inaccurate smoking history. Rather, in determining that Dr. Baker's opinion on legal pneumoconiosis was not well-reasoned, the administrative law judge concluded that Dr. Baker failed to "specifically identify the objective medical evidence that enabled him to conclude that exposure to coal mine dust was a significant factor." Decision and Order Denying Modification at 6. Instead, the administrative law judge found that he "simply relied on the comparison of the durations of both factors [smoking and coal mine employment] to determine the extent of the damage caused by each one." *Id*. The administrative law judge properly concluded, therefore, that Dr. Baker's opinion on the issue was entitled to diminished weight because "reliance on the simple ratio of length of coal mine employment versus cigarette smoking history, absent any other noted distinction based on objective medical evidence[,] is an insufficiently reasoned basis for diagnosing legal pneumoconiosis." *Id*.; *see Henley v. Cowan & Co.*, 21 BLR 1-147, 1-150-1 (1999). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Baker's opinion on legal pneumoconiosis on the ground that it was not well-reasoned.

Claimant additionally asserts that the administrative law judge erred in crediting Dr. Jarboe's opinion that claimant did not have legal pneumoconiosis over Dr. Baker's contrary opinion, as Dr. Jarboe's opinion was based on an erroneous smoking history. Claimant's Brief at 14, 22.

In the February 18, 2007 report, Dr. Jarboe noted that claimant estimated that he smoked a half pack of cigarettes per day for sixteen to seventeen years. Employer's Exhibit 2. However, Dr. Jarboe observed that "the carboxyhemoglobin was 6.2% which is compatible with smoking between 1 and 2 packs of cigarettes a day." *Id*. Dr. Jarboe therefore found that "while [claimant] states that he smokes a half pack of cigarettes a day, his carboxyhemoglobin level is compatible with smoking between 1 and 2 packages daily." *Id*. Further, during a deposition dated March 15, 2007, Dr. Jarboe noted that claimant told him that he smoked about a half pack of cigarettes per day for sixteen or

[11] In his new report dated October 30, 2004, Dr. Baker noted that claimant has a cigarette smoking history of one pack per day for fifteen years. Director's Exhibit 75. In a previously submitted report dated September 8, 2001, however, Dr. Baker opined that claimant smoked one-half of a pack of cigarettes per day, on and off, for ten years. Director's Exhibit 13.

seventeen years, which would be an eight pack-year smoking history. Employer's Exhibit 3 (Dr. Jarboe's Deposition at 9-10). However, in reviewing the smoking histories in previous medical records, Dr. Jarboe found that "[t]hey would indicate that [claimant's] been a much heavier smoker than what he told me."[12] Employer's Exhibit 3 (Dr. Jarboe's Deposition at 10-11). Dr. Jarboe additionally found that, based on claimant's carboxyhemoglobin of 6.2 percent, "[claimant] is smoking somewhere probably around a pack and a half of cigarettes a day." Employer's Exhibit 3 (Dr. Jarboe's Deposition at 28).

Although the administrative law judge did not make a specific smoking history finding, he implicitly relied on Judge Neal's previous finding that claimant smoked one pack of cigarettes a day for at least fifteen years. Decision and Order Denying Modification at 8-9. In considering Dr. Jarboe's opinion, the administrative law judge stated that "[Dr. Jarboe] also noted that, despite [c]laimant's claim of a smoking habit of half a pack per day, the carboxyhemoglobin level indicated that [c]laimant is smoking between one and two packs per day." *Id.* at 8-9. Because the administrative law judge reasonably found that Dr. Jarboe indicated that claimant had a much heavier smoking history than claimant gave to the doctor, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1989), we reject claimant's assertion that the administrative law judge erred in crediting Dr. Jarboe's opinion that claimant did not have legal pneumoconiosis over Dr. Baker's contrary opinion, because Dr. Jarboe's opinion was based on an erroneous smoking history.

In addition, claimant asserts that Dr. Jarboe's opinion was hostile to the premises that support the regulations. Specifically, claimant argues that "[t]he implication of Dr. Jarboe's opinion is that if a miner does not have x-ray evidence of significant pneumoconiosis he has no dust retention in his lungs, and this results in the finding that the miner's lung disease is not due to coal mine dust." Claimant's Brief at 21. Claimant maintains that the preamble of the regulations referred to the scientific conclusion in the study by Attfield and Hodous that demonstrated, even in miners with no radiographic evidence of clinical pneumoconiosis, a clear relationship between dust exposure and a decline in lung function. *Id.* Contrary to claimant's assertion, Dr. Jarboe did not state that he would not diagnose pneumoconiosis in the absence of a positive x-ray interpretation. *Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985). Rather, Dr. Jarboe merely explained that he opined that claimant's pulmonary emphysema was not caused by coal dust exposure because the

[12] In his November 6, 2007 report, Dr. Jarboe reviewed Dr. Sikder's August 27, 2007 report and noted that claimant's "[s]moking history was that he had consumed 1 pack of cigarettes a day for 20 years. (This differs significantly from the history given to me. He told me he had smoked 16 or 17 years and averaged [a] half-pack [of] cigarettes a day)." Employer's Exhibit 2.

x-ray did not indicate evidence of dust retention in claimant's lungs. Employer's Exhibit 2. Thus, we reject claimant's assertion that Dr. Jarboe's opinion is hostile to the premises that support the regulations.

Claimant also asserts that the administrative law judge erred in finding that Dr. Jarboe's opinion that claimant did not have legal pneumoconiosis outweighed Dr. Baker's contrary opinion. Specifically, claimant argues that Dr. Baker's opinion that claimant has legal pneumoconiosis is more reasoned than Dr. Jarboe's opinion because Dr. Baker recognized that both smoking and coal mine dust exposure contributed to claimant's breathing problem. Contrary to claimant's assertion, the administrative law judge properly accorded greater weight to Dr. Jarboe's opinion than to Dr. Baker's contrary opinion, because Dr. Jarboe's opinion was better reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In considering Dr. Baker's opinion with respect to the issue of legal pneumoconiosis, the administrative law judge stated:

> Dr. Baker's conclusion that [c]laimant's exposure to coal mine dust was a significant contributing cause of his mild obstructive impairment is not well reasoned because he did not specifically identify the objective medical evidence that enabled him to conclude that exposure to coal mine dust was a significant factor. Instead, Dr. Baker simply relied on the comparison of the durations of both factors to determine the extent of the damage caused by each one. Such reliance on the simple ratio of length of coal mine employment versus cigarette smoking history, absent any other noted distinction based on objective medical evidence, is an insufficiently reasoned basis for diagnosing legal pneumoconiosis.

Decision and Order Denying Modification at 6.

With regard to Dr. Jarboe's opinion that claimant did not have legal pneumoconiosis, the administrative law judge noted that Dr. Jarboe offered several reasons in support of his conclusion that claimant's respiratory impairment was not caused by coal dust exposure. *Id*. at 10. The administrative law judge initially noted that Dr. Jarboe relied on x-rays that indicated the absence of dust retention in support of his opinion that claimant's pulmonary emphysema was not related to coal dust exposure, as Dr. Jarboe opined that coal dust exposure can cause emphysema only in proportion to the amount of dust retained in the lungs.[13] *Id*. at 11. The administrative law judge next noted

[13] The administrative law judge stated that "[a]lthough [Dr. Jarboe] admitted during his deposition that x-ray evidence does not actually show the retention of dust in the lung, he testified that studies have shown that the level of fibrosis exhibited in x-rays was correlated to the amount of dust retained in the lungs." Decision and Order Denying Modification at 11.

that Dr. Jarboe concluded that claimant's progressive impairment was due to chronic cigarette smoking, as opposed to coal dust exposure, based on the absence of coal dust retention in claimant's lungs.[14] *Id*. The administrative law judge then noted that Dr. Jarboe opined that the pattern of the results on FVC and FEV1 were typical of impairment caused by smoking.[15] *Id*. Lastly, the administrative law judge noted that Dr. Jarboe observed that the residual volume showed a significant increase (*i.e.*, 164% of predicted), and that elevations of that magnitude were most often caused by cigarette smoking and/or asthma.[16] *Id*. Thus, because the administrative law judge acted within his discretion in finding that Dr. Jarboe's opinion that claimant did not have legal pneumoconiosis was better reasoned than Dr. Baker's contrary opinion, *Clark*, 12 BLR at 1-155, we reject claimant's assertion that the administrative law judge erred in finding that Dr. Jarboe's opinion outweighed Dr. Baker's contrary opinion. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and therefore did not provide a basis for modifying the prior decision denying benefits.

Because the administrative law judge properly found that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we affirm the administrative law judge's finding that the new evidence did not establish a change in conditions at 20 C.F.R. §725.310; *Kingery*, 19 BLR at 1-11; *Napier v. Director, OWCP*,

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[14] The administrative law judge noted that "a progressive impairment will not be caused by coal dust exposure absent *demonstrable* evidence of dust retention in the lungs." Decision and Order Denying Modification at 11.

[15] The administrative law judge noted that "Dr. Jarboe explained that [c]laimant's FVC remained in the normal range, while his FEV1 was severely reduced." Decision and Order Denying Modification at 11. The administrative law judge additionally noted that "[Dr. Jarboe] also opined that coal dust exposure typically causes a more proportionate reduction in FVC and FEV1." *Id*. Further, the administrative law judge noted that "[Dr. Jarboe] later testified that the combination of an FVC and a reduced FEV1 is defined as obstructive impairment and that a restrictive impairment is characterized by a proportionate reduction in FVC and FEV1." *Id*.

[16] The administrative law judge noted that "[w]hile it is know[n] that the inhalation of coal dust and the presence of coal workers' pneumoconiosis can cause elevations of residual volume, these are usually in the range of 110 to 120% of the predicted normal." Decision and Order Denying Modification at 11.

17 BLR 1-111 (1993); *Nataloni*, 17 BLR at 1-84. Likewise, we affirm the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. The Sixth Circuit has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *Worrell*, 27 F.3d at 230, 18 BLR at 2-296. In considering whether there was a mistake in a determination of fact, the administrative law judge stated, "[w]eighing all the evidence together, I find that the evidence before Judge Neal fails to prove that [claimant] suffers from pneumoconiosis." Decision and Order Denying Modification at 4. Hence, the administrative law judge found that "Judge Neal did not make a mistake in a determination of fact." *Id*. In addition, the administrative law judge found that "the newly submitted evidence when considered along with the evidence before Judge Neal does not indicate a mistake in a determination of fact and modification of his denial of benefits on that ground must be denied." *Id*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-113. As we detect no error in the administrative law judge's determination that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310, we affirm it.

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