BRB No. 99-0685 BLA

CARMEL AKERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CORBIN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
Primary Employer/Carrier-Respondents	)	
	)	
RACCOON ELKHORN COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
	)	
Secondary 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 Request of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonburg, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for Raccoon Elkhorn Coal Co., Inc. and Old Republic Insurance Co., Inc., secondary employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Modification Request (98-BLA-0654) of Administrative Law Judge Robert L. Hillyard 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). In the initial Decision and Order, Administrative Law Judge Charles W. Campbell adjudicated this claim pursuant to 20 C.F.R. Part 718, credited claimant with twenty-nine years and eight months of qualifying coal mine employment, and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 45. Claimant appealed and the Board affirmed the denial of benefits. *Akers v. Corbin Coal Co.*, BRB No. 90-1525 BLA (Jul. 28, 1992) (unpub.); Director's Exhibit 56. Subsequently, claimant appealed to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, which affirmed the Board's decision. *Akers v. Corbin Coal Co.*, No. 92-3960 (6th Cir. Mar. 18, 1993) (unpub.); Director's Exhibit 59.

[1] Claimant is Carmel Akers, who filed his application for benefits on June 10, 1988. Director's Exhibit 1.

Claimant, thereafter, requested modification pursuant to 20 C.F.R. §725.310 and filed supportive medical evidence. Administrative Law Judge Frederick D. Neusner found that claimant failed to establish modification under Section 725.310 and, accordingly, denied benefits on July 14, 1995. Director's Exhibits 91. On July 15, 1996, claimant filed a duplicate application for benefits, which was treated as a request for modification because it was filed within one year of the prior denial. *See* 30 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), 20 C.F.R. §725.310; Director's Exhibit 94. Administrative Law Judge Neusner adjudicated this petition for modification and denied benefits in a Decision and Order issued on August 13, 1997. Director's Exhibit 126.[2] Consequently, on September 23, 1997, claimant filed another petition for modification with the district director accompanied by new medical evidence. Director's Exhibit 130.

Pursuant to a formal hearing held on September 23, 1998, Administrative Law Judge Robert L. Hillyard (administrative law judge) credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-nine years and eight months, *see* [1998] Hearing Transcript at 12-13. Next, the administrative law judge dismissed Raccoon Elkhorn Coal Company as a party and determined that Corbin Coal Company was the properly designated responsible operator because claimant had spent his last cumulative one-year period of employment with Corbin Coal Company. Addressing the merits of the claim, the administrative law judge found that because the evidence submitted since the prior denial failed to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), claimant failed to establish a change in conditions under Section 725.310. The administrative law judge also determined that, after a review of the record in its entirety, no mistake in a determination of fact had been made in the previous decision under Section 725.310. Accordingly, the administrative law judge denied benefits.

[2] In addition, Administrative Law Judge Neusner denied claimant's Motion to Vacate his August 1997 Decision and Order on September 5, 1997. Director's Exhibit 129.

On appeal, claimant argues that the administrative law judge erred by not according greater weight to the opinions of his treating physicians. Raccoon Coal Company responds, urging affirmance of the administrative law judge's denial of benefits.[3] Corbin Coal

[3] Raccoon Coal Company additionally argues that the administrative law judge did not have jurisdiction to consider claimant's fourth petition for modification based on a mistake in a determination of fact. Specifically, employer cites *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997), and contends that once a claimant's request for modification has been denied, an administrative law judge is barred from considering the issue of a mistake in a determination of fact in subsequent petitions for modification on the grounds of *res judicata.* We disagree. Employer's reliance on *Abner* is misplaced. The holding in *Abner* involves whether the filing of successive motions for reconsideration, *see* 20 C.F.R. §802.206(b)(2), and not petitions for modification, *see* 20 C.F.R. §725.310, tolls the time limitation on the filing of an appeal. Moreover, Section 22 of the Longshore Act, 33 U.S.C. §922, as incorporated into the Black Lung Act by 30 U.S.C. §932(a), was implemented by Congress to displace traditional notions of *res judicata* and collateral estoppel. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256, 92 S.Ct. 405, 407 (1971); *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27, 1-32 (1996), *aff'g on recon*,

Company has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not participate in this appeal.[4]

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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred by not according greater weight to the opinions of Drs. Mann and Sundaram because, as claimant's treating physicians, their opinions are entitled to significant weight. We disagree. Although the Sixth Circuit court has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians, *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993), deference to the treating physician's opinion is not required where, as in the instant case, the treating physicians' opinions contain deficiencies, *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). The administrative law judge permissibly found that Dr. Sundaram's opinion failed to establish either the existence of pneumoconiosis or total disability because Dr. Sundaram's x-ray dated August 29, 1997 was reread as negative by physicians with superior radiological expertise, his pulmonary function study taken on August 27, 1997 was invalidated by Drs. Fino, Burki,

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21 BLR 1-79 (1998) (McGranery, J., dissenting). We, therefore, reject Raccoon Coal Company's argument.

[4] We affirm the administrative law judge's findings regarding length of coal mine employment, responsible operator, and pursuant to Sections 718.202(a)(1)-(3) and 718.204(c)(1)-(3) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4-5,11, 12.

and Branscomb, and his physical examination findings were the same in his previous reports, and therefore, not supportive of a change in claimant's condition. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 12; Director's Exhibits 68, 86, 108, 130; Employer's Exhibit 4. Likewise, the administrative law judge rationally found the opinion of Dr. Mann entitled to less weight because Dr. Mann did not indicate the values of the 1991 pulmonary function study on which he relied and his opinion that claimant's functional ability has decreased since 1991 failed to demonstrate that claimant's condition has worsened since August 19, 1997, the date of the last denial. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-295-296 (6th Cir. 1994); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-14-15 (1994) (*en banc*); Decision and Order at 11, 12; Claimant's Exhibits 1, 2. The administrative law judge, within a proper exercise of his discretion, found that the opinions of Drs. Fino, Branscomb, and Dahhan, who all opined that there was no evidence of pneumoconiosis or a totally disabling respiratory impairment, were entitled to determinative weight because their opinions were well reasoned, better explained, and supported by the objective medical evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Employer's Exhibits 1, 3, 5, 6. Furthermore, the administrative law judge reviewed all of the previously and newly submitted evidence of record and, properly found that the medical evidence of record failed to establish either the existence of pneumoconiosis or total disability, and hence, failed to demonstrate a mistake in a determination of fact pursuant to Section 725.310. *See Worrell, supra; Kingery, supra; Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); Decision and Order at 13. Inasmuch as claimant has not otherwise challenged the administrative law judge's analysis of the evidentiary record or his findings of fact, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of establishing modification under Section 725.310 inasmuch as this determination is rational, contains no reversible error, and is supported by substantial evidence.

Accordingly, the Decision and Order Denying Modification Request of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge