BRB No. 99-0981 BLA

ROY E. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED:
	)	
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 on Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Roy E. Ratliff, Vansant, Virginia, *pro se*.

. Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen Chartered), Washington D.C., for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Modification (99-BLA-00122) of Administrative Law Judge Daniel F. Sutton denying benefits 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). This case is before the Board for the fourth time.[1]

[1] Claimant filed his initial application for benefits on June 16, 1986 which the district director denied on October 17, 1986. *See* Director's Exhibits 1, 19. Following a hearing on the merits, Administrative Law Judge Nicholas J. Laezza credited claimant with twenty-two years of coal mine employment, and found the evidence of record sufficient to establish the

existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but insufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c); denying benefits in a Decision and Order dated October 24, 1988. *See* Director's Exhibit 36. On May 3, 1989, claimant filed a request for modification which the district director denied on May 5, 1989. *See* Directors' Exhibits 38, 41. Following a second hearing, Administrative Law Judge Clement J. Kichuk issued a Decision and Order on the modification request, dated March 21, 1991, where he found the new evidence sufficient to show a change in conditions pursuant to 20 C.F.R. §725.310 by establishing the existence of pneumoconiosis and total disability at Sections 718.202 and 718.204. Turning to the merits, Judge Kichuk found employer to be the responsible operator, determined that claimant had three dependents, credited claimant with twenty-two years and one month of coal mine employment, found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1) and 718.203(b), and sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(c), (b). Benefits were accordingly awarded. *See* Director's Exhibit 94. Pursuant to employer's appeal, the Board affirmed the findings of Judge Kichuk on length of coal mine employment and at Section 718.203(b) as unchallenged. The Board, however, vacated the findings of Judge Kichuk at Sections 718.202(a)(1), 718.204(c)(1), (4) and remanded this case for further consideration. The Board also directed Judge Kichuk to make findings at 20 C.F.R. §§718.202(a)(2)-(4), 718.204(b) on remand. *See Ratliff v. Dominion Coal Corp.*, BRB No. 91-1093 BLA Aug.20, 1992 (unpub.); Director's Exhibit 110.

On remand, Judge Kichuk found the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), but insufficient to demonstrate a totally disabling respiratory impairment at Section 718.204(c), as well as insufficient to establish a change in conditions at Section 725.310, and denied benefits in a Decision and Order dated January 11, 1993. *See* Director's Exhibit 114. Pursuant to an appeal by claimant, the Board held that Judge Kichuk had erred in addressing the claim on the merits before first reconsidering whether claimant had established modification pursuant to Section 725.310. The Board therefore directed the administrative law judge to determine first whether the evidence established a change in condition, and then, if reached, to reconsider the findings at Sections 718.203 and 718.204, in light of the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). *See Ratliff v. Dominion Coal Corp.*, BRB No. 93-0921 BLA July 25, 1994 (unpub.); Director's Exhibit 124. The Board reaffirmed its decision on reconsideration by Order dated April 11, 1995. *Id.*

In the June 13, 1996, Decision and Order on Remand, Judge Kichuk found the newly submitted evidence failed to establish total disability and was therefore insufficient to establish a basis for modification. Consequently, claimant's motion for modification on the basis of a change in conditions was denied. Furthermore, Judge Kichuk stated that even assuming that claimant had established modification, the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4) and insufficient to demonstrate a totally disabling respiratory impairment due to pneumoconiosis at Section 718.204(c), (b), and denied benefits. Director's Exhibit 129. Pursuant to claimant's appeal dated June 21, 1996, Director's Exhibit 130, the Board affirmed Judge Kichuk's finding that total disability and modification were not established at Sections 718.204(c), 725.310 and his denial of benefits. *See Ratliff v. Dominion Coal Corp.*, BRB No. 96-1252 BLA, May 23, 1997 (unpub.); Director's Exhibit 139.

Pursuant to claimant's second request for modification, Director's Exhibits 140, 153, Administrative Law Judge Daniel F. Sutton issued a Decision and Order on the record denying benefits after claimant requested that a hearing be waived. Claimant appeals that denial herein.

Pursuant to claimant's second request for modification, Administrative Law Judge Daniel F. Sutton (the administrative law judge) found that the newly submitted evidence considered in conjunction with the previously submitted evidence established the presence of a totally disabling respiratory impairment, an element of entitlement previously found against claimant, and that claimant had therefore established a change in conditions pursuant to 20 C.F.R. §725.310. Applying the regulations at 20 C.F.R. Part 718, however, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge at Section 718.202(a). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *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 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Having found modification established based on claimant's showing of a totally disabling respiratory impairment, the administrative law judge turned to the merits of the claim. In finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge found that the x-rays dated January 29, 1996 and April 11, 1997 were read as showing no pneumoconiosis by Drs. Wheeler, Scott and Dahhan.

[2] As employer does not challenge the finding of the administrative law judge that claimant established a change in conditions pursuant to 20 C.F.R. §§725.310, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director's Exhibit 152; Employer's Exhibit 3. The administrative law judge found that the x-ray dated April 17, 1998 was read as negative readings by Drs. Fino, Wheeler and Scott, and positive by Drs. Sargent, Alexander and Forehand, although the administrative law judge stated that, in his notes accompanying the x-ray reading, Dr. Sargent "concluded that the etiology of the Claimant's condition was 'unknown' and that the abnormalities were 'not consistent with pneumoconiosis." Decision and Order at 10. The administrative law judge found that the June 2, 1998 x-ray was read as positive by Dr. Alexander, and negative by Drs. Wheeler, Scott, Fino and Dahhan. *See* Director's Exhibits 145, 146, 150, 152, 155; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3, 5.

In summarizing the evidence, the administrative law judge concluded that the negative readings of the January 29, 1996 and April 11, 1997 x-rays were by B-readers, two of whom were also Board-certified radiologists, and that their negative readings were uncontradicted, while the readings of the April 17, 1998 and June 2, 1998 x-rays were both positive and negative, by dually qualified readers. Thus, the administrative law judge concluded that, in light of the preponderance of earlier negative readings by dually qualified readers, and the more recent readings by dually qualified readers, which were both positive and negative, the x-ray evidence was "essentially in equipoise" and did not establish the existence of pneumoconiosis. This was proper. Decision and Order at 10; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 151, 12 BLR 2-313 (4th Cir. 1992). Accordingly, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) is affirmed.

Likewise, the administrative law judge also correctly determined that since the record contained no biopsy or autopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), and that claimant, a living miner, was not entitled to the presumptions at Section 718.202 (a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306. We, therefore, affirm the findings of the administrative law judge at Section 718.202(a)(1)-(3) as it is supported by substantial evidence.

Turning to Section 718.202(a)(4), the administrative law judge considered all the medical opinion evidence and found that the preponderance of the evidence did not establish the existence of pneumoconiosis. Contrary to claimant's arguments, in evaluating the medical opinion evidence, the administrative law judge properly credited Dr. Fino's opinion of the absence of pneumoconiosis because it was well reasoned and supported by claimant's history as well as the objective medical evidence and corroborated by Dr. Dahhan's finding that the miner did not have pneumoconiosis. Employer's Exhibit 7; *see Carson v.*

Westmoreland Coal Co., 19 BLR 1-16 (1994), *aff'd on recon*, 20 BLR 1-64 (1996); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Moreover, contrary to claimant's argument, there is no evidence of record to support a finding that Dr. Fino's opinion was hostile to the Act, *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *see Kelley v. Ziegler Coal Co.*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997), Employer's Exhibit 7 at 27, or equivocal, Employer's Exhibit 7. Likewise, the administrative law judge permissibly gave diminished weight to the opinion of Dr. Forehand "because he relied in part on an x-ray interpretation which [was] contrary to the weight of the most reliable and probative new x-ray evidence, and because, unlike Dr. Fino, he neither considered, "[c]laimant's extensive medical record nor the reversal in his condition as observed by Dr. Dahhan in 1990." Decision and Order 12-13; *Carson*, *supra*; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Wetzel*, *supra*; *Lucostic*, *supra*; *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Further, contrary to claimant's argument, the administrative law judge was not required to give dispositive weight to the opinion of claimant's treating physician when he found other opinions more credible. *See Compton*, *supra*; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 18 BLR 2-123 (4th Cir. 1993).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge