BRB No. 98-0465 BLA

TIVIS OSBORNE	)	
	)	
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 of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Tivis Osborne, Cedar Bluff, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order (97-BLA-1033) of Administrative Law Judge Daniel F. Sutton denying modification

[1] Claimant is Tivis Osborne who filed his claim for benefits on July 9, 1981. Director's Exhibit 1.

[2] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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). The administrative law judge, applying the regulations at 20 C.F.R. Part 718, found the evidence insufficient to establish a change in conditions and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a), citing *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Decision and Order at 4, 7-11. Accordingly, modification was denied.

On appeal, claimant generally contends that the administrative law judge erred in denying modification. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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 the Act, 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates*, Inc., 380 U.S. 359 (1965).

Administrative Law Judge Richard K. Malamphy awarded benefits on the miner's claim, and employer appealed this award to the Board. Director's Exhibits 82, 83. On appeal, the Board vacated Judge Malamphy's findings regarding the existence of pneumoconiosis and total respiratory disability and remanded this case for him to reconsider these issues. Director's Exhibits 86. On remand, Judge Malamphy denied benefits by finding that claimant failed to establish the existence of pneumoconiosis, and, therefore, did not address the issue of disability. Director's Exhibit 88. Claimant appealed, and the Board affirmed Judge Malamphy's denial on February 25, 1994. Director's Exhibits 89, 97. Thereafter, claimant filed a motion for reconsideration which the Board denied on June 9, 1995. Director's Exhibit 100. On May 20, 1996, claimant filed a request for modification, the district director denied modification, and claimant appealed to the Office of Administrative Appeals Judges. Director's Exhibits 101, 115, 119.

In accordance with *Jessee, supra*, the administrative law judge considered the evidence to determine whether claimant established the existence of pneumoconiosis, the issue which defeated entitlement to benefits in the prior decision. Decision and Order at 4, 7-12. The administrative law judge permissibly adopted Judge Malamphy's finding of eleven years and three months of coal mine

employment, noting that claimant had not submitted any new evidence regarding this issue. Decision and Order at 6; *see Jessee, supra; Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994)(*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the new x-ray evidence and noted that it contains one positive reading of a March 29, 1990 x-ray, rendered by Dr. Robinette, a B-reader,[3] and several negative readings by physicians, who are either B-readers and/or board-certified radiologists. Decision and Order at 7-8. The administrative law judge permissibly found the new x-ray evidence insufficient to establish the existence of pneumoconiosis by relying on the numerous negative x-ray readings rendered by the physicians with radiological qualifications, *see Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992)*; Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985)*; see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Therefore, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions based on the x-ray evidence. We affirm the administrative law judge's finding that the record contains no new biopsy evidence, *see* 20 C.F.R. §718.202(a)(2), and the presumptions found at Sections 718.304, 718.305, and 718.306 are inapplicable to this living miner's claim with less than fifteen years of coal mine employment established, *see Kubachka v. Windsor Power House Coal Corp.*, 11 BLR 1-171 (1988), in which there is no evidence of complicated pneumoconiosis, *see generally Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Decision and Order at 8; *see* 20 C.F.R. §718.202(a)(3).

[3] 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. of Va. 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).

In considering the newly submitted medical opinions,[4] the administrative law judge noted that Dr. Robinette, the miner's treating physician, found the existence of pneumoconiosis whereas Drs. Castle and Fino did not. Decision and Order at 9-11. The administrative law judge stated that "[w]hile Dr. Robinette has the advantage of having treated the Claimant over a period of years,...I am not persuaded that his diagnosis of coal workers' pneumoconiosis is supported by a reasoned medical opinion." Decision and Order at 11. In this regard, the administrative law judge found that "Dr. Robinette's office notes contain minimal clinical findings on physical examination with the exception of his reliance on a positive x-ray interpretation." *Id.* Therefore, the administrative law judge permissibly found the opinions of Drs. Castle and Fino "to be better documented, supported and reasoned and, consequently, more reliable than Dr. Robinette's diagnosis." *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); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985)*; see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). We affirm the administrative law judge's finding that claimant failed to establish a change in conditions at Section 718.202(a)(4) inasmuch as he permissibly weighed the new medical opinion evidence and his findings are supported by the record.

In considering whether there was a mistake in fact, the administrative law judge reviewed the new evidence in conjunction with the evidence before Judge Malamphy and concluded that claimant has not established any mistake in a determination of fact in the prior finding by Judge Malamphy that claimant does not have pneumoconiosis. Decision and Order at 7-11. Therefore, based on the totality of the administrative law judge's findings, *see Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983), we affirm the administrative law judge's denial of modification pursuant to Section 725.310(a) inasmuch as he rationally determined that claimant

[4] Pursuant to employer's objection, the administrative law judge permissibly found Dr. Robinette's April 9, 1990 opinion and the March 29, 1990 chest x-ray was previously submitted and fully considered by Judge Malamphy, Director's Exhibits 82, 88. *See Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

failed to establish a mistake in fact or a change in conditions, *see* discussion, *supra; Jessee, supra; Kingery, supra; Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *Kovac v. BCNR Mining Corp.*, 15 BLR 1-156 (1990), *aff'd on recon.* 16 BLR 1-71 (1992).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge