BRB No. 97-0666 BLA

MELVIN MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Barry H. Joyner (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Modification (96-BLA-0391) of

[1] Claimant is Melvin Miller, the miner, who has filed previous applications for benefits on August 19, 1971, August 5, 1976, and March 14, 1983, which were ultimately denied. Director's Exhibits 1, 17, A-1, A13, B-8. Claimant filed the present claim for benefits on January 25, 1989. Director's Exhibit B-1. The administrative law judge found that the parties had previously agreed that claimant has pneumoconiosis, but that claimant failed to establish total respiratory disability and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. Director's Exhibit B-12. Claimant appealed the denial of benefits, but requested withdrawal of the appeal on June 27, 1995. Director's Exhibit B-15. The Board dismissed the appeal on

Administrative Law Judge J. Michael O'Neill 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). The administrative law judge found that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 and that claimant failed to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in substituting his medical opinion for that of a qualified physician, in failing to fully discuss all of the evidence of record, and in crediting the opinions of Drs. Cander and Fritzhand. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's Decision and Order.

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 applicable law, they are binding upon this Board and may not be disturbed. 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).

Pursuant to 20 C.F.R. §725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that once a request for modification is filed, no matter the grounds stated, if any, the administrative law judge has the authority, if not duty, to reconsider all the evidence for any mistake of fact or change in conditions. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

June 30, 1995 and claimant filed a petition for modification on August 25, 1995. Director's Exhibits B-16, B-17.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence or record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Claimant contends that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to Section 718.204(c)(4). The evidence submitted in support of claimant's petition for modification consists of the opinions of Drs. Hessl and Cohen, who diagnosed total respiratory disability, Dr. Cander, who opined that claimant has no evidence of significant lung function abnormality or gas exchange abnormality caused by pneumoconiosis, and Dr. Long, who opined that claimant has no respiratory impairment. Director's Exhibits B-18, B-19, B-24; Claimant's Exhibit 2. The administrative law judge rationally found Dr. Cander's opinion entitled to greater weight than the opinions of Drs. Hessl and Cohen because his opinion is supported by the objective data of record.[2] Decision and Order at 4-5; Director's Exhibit B-24; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *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); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Claimant also contends that the administrative law judge erred in substituting his opinion for that of the physicians when he stated that simple pneumoconiosis generally does not cause respiratory impairment. Claimant's Brief at 6-7. Claimant's argument has merit but the administrative law judge's statement does not constitute reversible error in this instance because the administrative law judge permissibly assigned greater weight to Dr. Cander's opinion which found no respiratory impairment. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[2] All of the arterial blood gas studies and pulmonary function studies of record yielded non-qualifying results. Director's Exhibits B-2, B-8, B-18. A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Claimant further contends that the administrative law judge erred in crediting the opinions Drs. Cander and Fritzhand because neither physician considered the exertional demands of claimant's last coal mine employment. Claimant's Brief at 10-12. We reject this contention, however, because the administrative law judge assigned greatest weight to Dr. Cander's opinion that claimant has no evidence of lung function abnormality and such an opinion would not support a finding of disability regardless of the exertional requirements of claimant's coal mine employment. Decision and Order at 4-5; Director's Exhibit B-29. The administrative law judge is empowered to weigh the 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. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's findings that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204, and, thus, failed to establish a change in conditions or a mistake in a determination of fact , and the denial of benefits, as they are supported by substantial evidence and in accordance with law.

Accordingly, the administrative law judge's Decision and Order on Modification denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge