BRB No. 04-0527 BLA

JUNIOR C. STREET	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEWELL SMOKELESS COAL CORPORATION	)	DATE ISSUED: 01/31/2005
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-75) of Administrative Law Judge Edward Terhune Miller denying modification and 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 noted that the instant claim was a request for modification, found thirty-six years of coal mine employment established and, based on the date of filing, considered entitlement in this living miner's

claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 1-3, 8. The administrative law judge, noting the proper standard and that the claim had been denied as claimant failed to establish any element of entitlement, reviewed the prior denial of benefits and then considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish the existence of totally disabling pneumoconiosis due to coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(b) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310. Decision and Order at 7-11. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4) or total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). 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, has filed a letter indicating that he will not participate in this appeal.[2]

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[1]Claimant filed his claim for benefits on June 26, 1986, which was finally denied by the Department of Labor (DOL) on September 28, 1990. Director's Exhibits 1, 56. Claimant appealed the subsequent denial by the Benefits Review Board to the United States Court of Appeals for the Fourth Circuit which vacated and remanded the case for further consideration on March 14, 1991. Director's Exhibit 58. On remand, DOL awarded benefits on July 20, 1993. Director's Exhibit 77. Employer appealed the award of benefits to the Fourth Circuit which affirmed in part, vacated in part and remanded the case for further consideration on December 22, 1994. Director's Exhibits 78, 80. Benefits were finally denied by DOL on February 22, 2000 and claimant appealed to the Benefits Review Board. Director's Exhibits 128, 129. Claimant subsequently requested modification on April 12, 2000 and the Board remanded the case to the district director for further proceedings. Director's Exhibits 132, 133. The district director denied benefits on August 2, 2000 and claimant requested a hearing before an administrative law judge. Director's Exhibits 145, 146. Administrative Law Judge Pamela L. Wood denied benefits on April 22, 2002 as claimant failed to establish any element of entitlement. Director's Exhibit 179A. Claimant again requested modification on May 3, 2002, which was denied by the district director on October 17, 2002. Director's Exhibits 179B, 186. Claimant requested a formal hearing on November 11, 2002 and the case was referred to the Office of Administrative Law Judges in which the parties agreed to cancel the hearing and have a decision based upon the written record. Director's Exhibit 189.

[2]The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The United States Court of Appeals for the Fourth Circuit held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), with respect to modification, that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made, even where no specific allegation has been asserted.[3] Furthermore, in determining whether the requesting party has established modification pursuant to 20 C.F.R. §725.310, the 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 the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge can determine whether a mistake in fact in the prior decision occurred by reviewing wholly new evidence, cumulative evidence, or merely upon further reflection of the evidence initially submitted. *O'Keeffe*, 404 U.S. at 254; *Kovac*, 14 BLR at 1-156.

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 80.

After considering the newly submitted as well as the prior evidence on modification, the administrative law judge, in this case, rationally determined that the evidence of record was insufficient to establish any element of entitlement pursuant to 20 C.F.R. Part 718 and therefore insufficient to establish modification.[4] *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Jessee*, 5 F.3d at 723, 18 BLR at 2-26. The administrative law judge reviewed the relevant evidence of record in the original decision in determining if a mistake in determination of fact was established and properly concluded that the finding of no entitlement by Administrative Law Judge Wood was correct. Decision and Order at 10-11; *Jessee*, 5 F.3d at 723, 18 BLR at 2-26; *Kuchwara*, 7 BLR at 1-167.

Considering the newly submitted evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Kuchwara*, 7 BLR at 1-167. Claimant, setting forth the favorable evidence in the record, argues that the administrative law judge erred in failing to find the x-ray and medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). Claimant's Brief at 4-6, 8. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

The administrative law judge, in the instant case, rationally found that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the preponderance of the newly submitted x-ray readings by physicians with superior qualifications was negative. Director's Exhibit 184; Employer's Exhibits 1, 3, 5, 7; Decision and Order at 8; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent*, 11 BLR 1-26; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

In determining if the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the entirety of the newly submitted medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying

[4]The administrative law judge properly determined that the basis for claimant's prior denial of benefits was because the evidence of record was insufficient to establish any element of entitlement. Decision and Order at 2, 10-11; Director's Exhibit 179A.

documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR at 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 8-9.

The administrative law judge acted within his discretion, as fact-finder, in concluding that the opinion of Dr. Robinette was insufficient to meet claimant's burden of proof as he found the physician's opinion to be entitled to less weight since his diagnosis of pneumoconiosis is based upon his positive x-ray reading, which was reread as negative by Drs. Wheeler, Scott and Scatarige, highly qualified experts.[5] *See Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Worhach*, 17 BLR at 1-105; *Trumbo*, 17 BLR at 1-85; *Clark*, 12 BLR at 1-149; *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Hutchens*, 8 BLR at 1-16; Decision and Order at 8-9; Director's Exhibit 184; Employer's Exhibit 5. The administrative law judge also permissibly found Dr. Kabaria's opinion to be unreliable as the physician relied upon unspecified medical evidence including x-ray interpretations that were not clearly positive for the existence of coal workers' pneumoconiosis and further, as did Dr. Robinette, failed to note claimant's smoking history which was moderate to extensive. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Trumbo*, 17 BLR at 1-85; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR at 1-149; *Anderson*, 12 BLR at 1-111; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-136 (1986); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Hutchens*, 8 BLR at 1-16; Decision and Order at 8-9; Claimant's Exhibit 1.

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Fino and Castle, than to the contrary opinion of Dr. Kabaria, as the physicians offered well reasoned and documented opinions which are supported by the objective medical evidence of record and in light of their superior qualifications.[6] *See Worhach*, 17 BLR at 1-105; *Trumbo*, 17 BLR at 1-85; *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19; *Wetzel*, 8 BLR at 1-139; Decision and Order at 8-9; Claimant's Exhibit 1; Employer's Exhibits 1, 7. Consequently, as claimant makes no other specific challenge to the

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[5]The record, in the instant case, indicates that Dr. Robinette is a B-reader. Director's Exhibit 184. Drs. Wheeler, Scott and Scatarige are B-readers and board-certified radiologists. Employer's Exhibit 5.

[6]Drs. Robinette, Castle and Fino are board-certified in Internal Medicine and Pulmonary Disease and are B-readers. Director's Exhibit 184; Employer's Exhibits 1, 7. Dr Kabaria is board-certified in Internal Medicine. Claimant's Exhibit 1.

administrative law judge's credibility determinations with respect to the newly submitted medical opinions of record, we affirm the administrative law judge's credibility determinations as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR at 1-26*; Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR at 1-67*; Perry*, 9 BLR at 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

With respect to 20 C.F.R §718.204(b)(2), the administrative law judge adequately examined and discussed all of the relevant newly submitted evidence of record as it relates to total disability and permissibly concluded that the evidence fails to carry claimant's burden of proof. Decision and Order at 9-10; *Lafferty*, 12 BLR at 1-190; *Hutchens*, 8 BLR at 1-16. The administrative law judge considered the newly submitted medical opinion evidence of record and rationally concluded that the opinions were insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv) as no physician opined that claimant had a totally disabling respiratory or pulmonary impairment.[7] Decision and Order at 9-10; Director's Exhibits 184, 188; Claimant's Exhibit 1; Employer's Exhibits 1, 7; *Lafferty*, 12 BLR at 1-190; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Gee*, 9 BLR at 1-4; *Perry*, 9 BLR at 1-1.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis or total disability, claimant has not met his burden of proof on all the elements of entitlement.[8] *Clark*, 12 BLR at 1-149; *Trent*, 11 BLR at 1-26;

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[7]Dr. Fino opined that from a functional standpoint, claimant's pulmonary system was normal and that he retained the physiologic capacity from a respiratory standpoint to perform all the requirements of his last job. Employer's Exhibit 7. Dr. Kabaria offered no opinion with respect to total disability. Claimant's Exhibit 1. Dr. Castle opined that claimant was not disabled from any respiratory process and, from a purely pulmonary point of view, claimant retains the respiratory capacity to perform his previous coal mine employment duties. Employer's Exhibit 1. Dr. Robinette opined that claimant developed an occupational pneumoconiosis related to his prior coal dust exposure, but there was no evidence of significant functional impairment. Director's Exhibit 184.

[8]The administrative law judge properly noted that as claimant failed to establish the existence of pneumoconiosis and total disability, the issues of whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) are moot. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G.*

Perry, 9 BLR at 1-1. 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. *See Clark*, 12 BLR at 1-149; *Anderson*, 12 BLR at 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or total disability as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Jessee*, 5 F.3d at 723, 18 BLR at 2-26.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

Moore and Sons, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); Decision and Order at 9-10.