BRB No. 07-0368 BLA

O.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/24/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (06-BLA-0020) of Administrative Law Judge Donald W. Mosser rendered 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 involves a request for modification and has a lengthy procedural history. Claimant originally filed a claim for black lung benefits with the Social Security Administration (SSA) on July 23, 1970. Director's Exhibit 99 n.1. SSA denied this claim on October 15, 1975. *Id.* Claimant then filed a second claim for benefits with the Department of Labor (DOL) on December 9, 1975. Director's Exhibit 1. On April 4, 1978, while his second claim was still pending at DOL, claimant elected SSA review of his first claim under the 1977 Amendments to the Act. Director's Exhibit 99 n.1. SSA again denied the claim and forwarded it to DOL for

further review. *Id.* The district director merged the SSA claim with the DOL claim and denied benefits. Claimant requested a hearing, which was held on March 20, 1985 before Administrative Law Judge Jeffrey Tureck. In a Decision and Order dated April 9, 1986, Judge Tureck determined that claimant could establish only six and three-quarter years of coal mine employment. Because claimant's total coal mine employment was less than ten years, Judge Tureck noted that claimant was ineligible to invoke the interim presumption under 20 C.F.R. Part 727. Reviewing the claim under 20 C.F.R. Part 410, Subpart D, Judge Tureck denied benefits, finding that the evidence failed to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment arising out of coal mine employment. He also examined the claim pursuant to 20 C.F.R. §410.490, but determined that claimant was not entitled to the presumption contained therein. Director's Exhibit 35. Claimant appealed, and the Board affirmed the denial of benefits. *[O.M.] v. Director, OWCP,* BRB No. 86-1115 BLA (Nov. 30, 1988) (unpub.), *recon. denied* (Mar. 30, 1988) (unpub.); Director's Exhibits 49, 51. The Board's decision was also affirmed by the United States Court of Appeals for the Sixth Circuit. *[O.M.] v. Director, OWCP*, 893 F.2d 1335 (1990) (table); Director's Exhibit 52.

Claimant filed a request for modification on November 28, 1990, which was denied by the district director. Director's Exhibits 53, 57. At claimant's request, a formal hearing was held on May 13, 1992, before Administrative Law Judge Richard D. Mills. In a Decision and Order dated June 24, 1992, Judge Mills awarded benefits, finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis by application of the true doubt rule, and therefore, that claimant was entitled to invocation of the Section 410.490 presumption of total disability due to pneumoconiosis. He further found that the presumption had not been rebutted. Director's Exhibit 66. On August 21, 1992, Judge Mills denied a motion for reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director). Director's Exhibit 70. However, pursuant to the Director's appeal, the Board vacated the award of benefits and remanded the case for further consideration of the qualifications of the x-ray readers. *[O.M.] v. Director, OWCP*, BRB No. 92-2713 BLA (May 26, 1994) (unpub.); Director's Exhibit 80.

On remand, Judge Mills determined that the x-ray evidence was negative for pneumoconiosis based on the preponderance of the credible negative readings by the more qualified physicians and, thus, denied benefits in a Decision and Order dated November 18, 1994. He further denied claimant's motion for reconsideration. Director's Exhibits 81, 83. In conjunction with claimant's appeal, the Board affirmed Judge Mills' denial of benefits under Section 410.490, but remanded the case for him to consider claimant's entitlement pursuant to 20 C.F.R. Part 718. *[O.M.] v. Director, OWCP*, BRB No. 95-0926 BLA (June 27, 1995) (unpub.); Director's Exhibit 90. On remand, Judge Mills denied benefits because he found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and his denial of benefits was

affirmed on appeal. *[OM.] v. Director, OWCP*, BRB No. 96-0911 BLA (Oct. 9, 1996) (unpub.); Director's Exhibit 99.

Claimant filed a second request for modification on September 11, 1997, which was finally denied by Administrative Law Judge Joseph E. Kane on January 22, 1999. Director's Exhibit 110. Judge Kane specifically found that there was no mistake in fact in the prior denial of benefits by Judge Mills, and that the newly submitted evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (1999).

Thereafter, claimant filed a third modification request on September 22, 1999, which was denied by Administrative Law Judge Daniel J. Roketenetz on June 27, 2001. Director's Exhibits 113, 122. Claimant appealed and the Board vacated the denial of benefits and remanded the case to the district director in order for the DOL to satisfy its obligation to provide claimant with a complete pulmonary evaluation. *[O.M.] v. Director, OWCP*, BRB No. 01-0848 BLA (June 28, 2002) (unpub.); Director's Exhibit 114.

On remand, claimant underwent a new pulmonary evaluation with Dr. Baker, and after receipt of his report, the district director denied the claim. Director's Exhibit 128. Claimant requested a hearing, and the case was referred to Administrative Law Judge Rudolf Jansen for a hearing. However, by Order dated October 18, 2004, Judge Jansen remanded the case to the district director because it was determined that Dr. Baker's opinion did not satisfy the Board's remand directive to provide claimant with a complete, credible pulmonary evaluation on the issue of the existence of pneumoconiosis. Director's Exhibit 130 at 39. During the second remand, the district director obtained a supplemental report from Dr. Baker dated October 24, 2004. The case was returned to Judge Jansen, but he continued to find Dr. Baker's opinion deficient and issued another Order of Remand on January 7, 2005. *Id.* at 20, 28.

During the third remand of the case, claimant underwent a new pulmonary evaluation with Dr. Dahhan on January 26, 2005. Director's Exhibit 130 at 6. Following the district director's denial of benefits, claimant requested a hearing, which was held on September 5, 2006. *Id.* at 3. In a Decision and Order – Denial of Benefits (Decision and Order) dated December 12, 2006, which is the subject of this appeal, Administrative Law Judge Donald W. Mosser (the administrative law judge) credited claimant with six and three-quarters years of coal mine employment, as stipulated to by the parties, and considered whether claimant established a basis for modification pursuant to the regulations contained in 20 C.F.R. Part 410, Subpart D and 20 C.F.R. Part 718. The administrative law judge considered the newly submitted evidence, in conjunction with the previous evidence of record, to determine whether claimant established either the existence of pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§410.414(a), (c), 718.202(a), 718.204(b)(2). The

administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414(a) and total disability pursuant to 20 C.F.R. §410.414(c). In addition, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge thus concluded that the record established neither a change in conditions nor a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). [1] Accordingly, the administrative law judge denied modification and benefits.

On appeal, claimant contends that the administrative law judge erred in evaluating the x-ray evidence and medical opinion evidence for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that he erred in failing to find that claimant was totally disabled by a respiratory or pulmonary impairment based on the medical opinion evidence pursuant to 20 C.F.R. §718.203(b)(2)(iv). The Director responds, urging affirmance of the administrative law judge's denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000). In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an 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 at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Sixth Circuit has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in fact, inasmuch as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

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[1] The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, which were pending on January 19, 2001. 20 C.F.R. §725.2(c).

In considering claimant's modification request, the administrative law judge stated that he had performed a *de novo* review of all of the evidence of record, although he summarized in his Decision and Order only the medical evidence developed since claimant filed his request for modification in 1997. Decision and Order at 4. The administrative law judge further indicated that since the earlier evidence was over ten years old, he chose to assign controlling weight to the newly submitted evidence on the relevant issue of entitlement. Decision and Order at 4 n.2.

The administrative law judge first considered whether the newly submitted evidence of record was sufficient to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D, and then he considered whether claimant was entitled to benefits pursuant to 20 C.F.R. Part 718. Decision and Order at 4; *see Muncy v. Wolfe Creek Collieries Coal Company, Inc.*, 3 BLR 1-627 (1981). As claimant does not raise a specific challenge to the administrative law judge's findings pursuant to Part 410 in this appeal, they are affirmed. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

Under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled as a result of his pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

With respect to the issue of the existence of pneumoconiosis, the administrative law judge indicated in his Decision and Order that there were a total of nine readings of four x-rays dated June 24, 1997, October 13, 1999, August 19, 2002 and July 26, 2005. Decision and Order at 5. Of these nine readings, there were six negative and three positive readings for pneumoconiosis. Director's Exhibits 100, 102, 103, 114, 116, 128, 130-7, 130-8. As noted by the administrative law judge, all of the positive readings were made by Dr. Baker, a B reader, while all of the negative readings were made by dually qualified physicians. Decision and Order at 7. Relying on the preponderance of the negative readings by the dually qualified physicians, the administrative law judge determined that the x-ray evidence failed to establish the existence of pneumoconiosis. *Id*.

Claimant contends that the administrative law judge selectively analyzed the evidence, that he improperly relied on the superior qualifications of the physicians who rendered negative readings, and that he improperly relied on the numerical superiority of the negative readings to find that claimant failed to establish the existence of pneumoconiosis. Claimant's Brief at 3. We disagree. The administrative law judge properly performed both a qualitative and quantitative analysis of the x-ray evidence, and rationally accorded greater weight to the negative readings by the dually qualified

physicians over the negative readings by Dr. Baker, who was not dually qualified. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, we affirm his finding that the x-ray evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[2]

As there was no biopsy evidence of pneumoconiosis, the administrative law judge determined that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 8. Furthermore, since claimant was not eligible for any of the presumptions referenced in 20 C.F.R. §718.202(a)(3), the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis under that subsection.[3] *Id.*

With respect to Section 718.202(a)(4), we reject claimant's contention that the administrative law judge erred in failing to find that he established the existence of pneumoconiosis based on the medical opinion of Dr. Baker. As noted by the administrative law judge, Dr. Baker diagnosed coal workers' pneumoconiosis and chronic bronchitis due to coal dust exposure, and cited in support of his opinion his own positive x-ray readings, along with claimant's symptoms of shortness of breath and wheezing, and claimant's history of coal dust exposure. Director's Exhibits 128. In contrast, Dr. Dahhan opined that claimant had no cardio-pulmonary disease, citing claimant's negative chest x-rays, the normal pulmonary function studies, normal arterial blood gas studies, and a normal EKG. Director's Exhibit 131. In weighing these conflicting medical opinions, the administrative law judge permissibly assigned greater weight to Dr. Dahhan's diagnosis that claimant did not suffer from pneumoconiosis or any respiratory condition, as he found that Dr. Dahhan's opinion was better explained and better supported by the objective evidence of record. *See Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19

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[2] The administrative law judge correctly charted the x-ray evidence to show that there are nine readings of four x-rays. However, in his analysis of the x-ray evidence, he misstates that "three" x-rays were read a total of "ten" times. Decision and Order at 5, 7. We consider this error to be harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), since the administrative law judge relied on the qualifications of the readers, as opposed to a numerical count of the positive versus negative x-rays, to find that the x-ray evidence was negative for pneumoconiosis.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (3). *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

(1987); Decision and Order at 8-9. Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Additionally, we reject claimant's contention that the administrative law judge erred in finding that he was not totally disabled.[4] Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that neither Dr. Baker nor Dr. Dahhan opined that claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order at 10. Claimant asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5-6, citing *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's work included loading coal. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the opinion of Dr. Baker (who did diagnose a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 6

Claimant's argument is without merit. In his August 19, 2002 DOL examination report and supplemental report dated October 24, 2004, Dr. Baker diagnosed that claimant suffered a mild respiratory impairment (Class II impairment with the FEV1 between 60 % and 79% of predicted, based on Table 5-12, Page 107, Chapter Five, *Guides to the Evaluation of Permanent Impairment*, Fifth Edition). Director's Exhibits 128, 131. Dr. Baker, however, specifically opined that claimant retained the respiratory

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[4] The administrative law judge determined that claimant was unable to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i) or (ii) as none of the pulmonary function or arterial blood gas study evidence was qualifying for total disability. Decision and Order at 8. He also noted that there no evidence of record that claimant suffered from cor pulmonale with right-sided congestive heart failure, by which claimant could establish total disability under 20 C.F.R. §718.204(b)(2)(iii). *Id.* Because these findings are unchallenged, they are affirmed. *Skrack,* 6 BLR at 1-711.

capacity to perform the work of a coal miner. Director's Exhibits 128, 130. Similarly, Dr. Dahhan opined in his July 26, 2005 DOL examination report that claimant had no respiratory impairment, and that claimant could perform his usual coal mine work. Director's Exhibit 130 at 6. Because the administrative law judge properly determined that "none of the physicians found that the claimant suffers from a totally disabling respiratory condition related to coal mine employment[,]" Decision and Order at 10, it was unnecessary for him to compare the exertional requirements of claimant's usual coal mine employment as a coal loader to the medical opinions. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Therefore, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence at Section 718.204(b)(2)(iv).[5]

Lastly, although claimant "proposes" that the DOL failed to provide him with a credible pulmonary examination, he does not explain the basis for his proposition, raise any specific error by the administrative law judge, or otherwise demonstrate how he has been prejudiced. Claimant's Brief at 7. Unless a party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis for review. *Sarf v. Director, OWCP*, 10 BLR 1-119, 120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983).

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent,* 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR at 1-1 (1986) (*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *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 claimant does not have pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Because claimant failed to establish the existence of pneumoconiosis and total disability, requisite elements of entitlement under 20 C.F.R. Part 718, benefits are precluded. *Worrell*, 27 F.3d 227, 18 BLR 2-291. Since the new evidence failed to establish a change in conditions, and the administrative law judge

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[5] We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White v. New White Coal Co.,* 23 BLR 1-1, 1-7 n.8 (2004).

determined that there was no mistake in fact with respect to the prior denial of benefits, we affirm his finding that claimant failed to establish a basis for modification pursuant to Section 725.310 (1999). We therefore affirm the denial of benefits.[6]

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[6] The Director, Office of Workers' Compensation Programs (the Director), notes that since claimant worked less than ten years of coal mine employment, and he filed his claim prior to March 31, 1980, this case is subject to adjudication under 20 C.F.R. §410.490. Director's Brief at 11-12; *see Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992) (*en banc*) (Smith, J., concurring; McGranery, J., concurring and dissenting). We agree with the Director that, based on the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, which we have affirmed, claimant is precluded from invoking the Section 410.490 presumption of total disability due to pneumoconiosis. Consequently claimant is unable to establish his entitlement to benefits under that regulation.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge