BRB Nos. 90-0331 BLA
and 97-1003 BLA

BOBBY F. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRIPLE S COAL COMPANY, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John. S. Patton, Administrative Law Judge, United States Department of Labor, and the Decision and Order Denying Benefits of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Bobby F. Smith, Big Rock, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, has filed two appeals, an initial appeal from the Decision and Order Denying Benefits of Administrative Law Judge John S. Patton (88-BLA-1628), (1989 Decision and Order), and a second appeal of the Decision and Order Denying Benefits of Administrative Law Judge Edith Barnett (92-BLA-1684), (1997 Decision and 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). These appeals have been consolidated before the Board. Judge Patton credited claimant with at least thirty years of coal mine employment and

adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. He found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and found the evidence insufficient to establish that claimant is totally and permanently disabled by pneumoconiosis. Accordingly, Judge Patton denied benefits. 1989 Decision and Order.

Claimant appealed this denial to the Benefits Review Board on January 4, 1990, Director's Exhibit 54. On February 5, 1991, claimant filed a petition for modification, Director's Exhibit 66, and on April 4, 1991, the Board dismissed claimant's appeal, based on his petition for modification, Director's Exhibit 67. The parties were advised that the administrative law judge's decision on modification could be appealed and that the existing appeal could be reinstated, and the case was remanded to the district director. Director's Exhibit 67.

Claimant's petition for modification was denied by the claims examiner, Director's Exhibit 68, and the district director on April 13, 1992, Director's Exhibit 84. Claimant requested a formal hearing. Director's Exhibit 87.

In her 1997 Decision and Order, Judge Barnett reviewed the procedural history of the claim and described the evidence submitted subsequent to claimant's request for modification. Judge Barnett noted the methods of establishing modification and found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Barnett found that "[c]laimant has not proven a change in conditions with respect to disability." 1997 Decision and Order at 8. Judge Barnett concluded:

> I find no change in conditions with respect to claimant's respiratory condition, Claimant is not totally disabled by pneumoconiosis. Thus, the weight of the new evidence is insufficient to establish all of the elements of entitlement which defeated entitlement in the prior decision.

1997 Decision and Order at 9. Judge Barnett also determined that modification was not established based on a mistake in a determination of fact.

In claimant's Notice of Appeal, he requested reinstatement of his earlier appeal. Therefore, the Board, by Order dated May 22, 1997 reinstated claimant's appeal of BRB No. 90-0331 BLA and consolidated that appeal with claimant's current appeal, BRB No. 97-1003 BLA.

Employer responds to claimant's *pro se* appeal, urging that the Board affirm the findings of Judges Patton and Barnett that claimant does not suffer from a totally disabling respiratory impairment pursuant to Section 718.204(c). Employer urges affirmance of Judge Patton's finding of no pneumoconiosis pursuant to Section 718.202(a), and contends that Judge Barnett erred in finding the newly submitted

evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and sufficient to establish a change in conditions pursuant to Section 725.310. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a brief in this appeal.

In an appeal by a claimant filed 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

Initially, we review Judge Patton's 1989 Decision and Order. In finding the evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge noted twenty-three readings of four chest x-rays, and noted the qualifications of the physicians reading the x-rays. Judge Patton found that only one of these interpretations was positive for the existence of pneumoconiosis, and noted that this reading was provided by a physician who is not a Board-certified radiologist. We affirm Judge Patton's finding inasmuch as he considered all of the x-ray evidence and properly considered the qualifications of the physicians who interpreted the x-rays, *see Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Dixon v. Director, OWCP*, 8 BLR 1-150 (1985), and properly relied upon the preponderance of the negative interpretations. *See 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); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

We also affirm Judge Patton's finding that the evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)and (a)(3). The record before Judge Patton did not contain any biopsy evidence or evidence of complicated pneumoconiosis, and the living miner's claim was filed in 1987. 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304, 718.305(e), 718.306.

In finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), Judge Patton found that Dr. Abernathy's diagnosis of pneumoconiosis was not a "strong reasoned medical opinion establishing the existence of pneumoconiosis." 1989 Decision and Order at 8. Judge Patton found that Dr. Robinette's opinion did not constitute a diagnosis of pneumoconiosis, and that Drs. Dahhan and Tuteur opined that claimant does not suffer from pneumoconiosis. Accordingly, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis.

As Judge Patton properly found, the opinions of Drs. Dahhan and Tuteur did not

diagnose pneumoconiosis. We affirm Judge Patton's finding that Dr. Robinette's opinion does not constitute a diagnosis of pneumoconiosis. *See* 20 C.F.R. §718.201. *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988). Further, we affirm Judge Patton's determination that Dr. Abernathy's opinion is not a well reasoned opinion sufficient to establish the existence of pneumoconiosis. The administrative law judge, as the trier-of-fact, is charged with determining whether a medical opinion is well-reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), and the Board may not re-weigh the evidence, *see Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Accordingly, we affirm Judge Patton's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). In view of our affirmance of Judge Patton's finding that the evidence before him does not establish the existence of pneumoconiosis, one of the essential elements of entitlement, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), we affirm this denial of benefits.

We now turn to the 1997 Decision and Order. Judge Barnett described the procedural history of this case and reviewed the newly submitted evidence. She described the standard for establishing modification and found the new x-ray evidence sufficient to establish both the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and a change in conditions. She also determined that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Barnett then considered the newly submitted evidence pursuant to Section 718.204(c), and found that claimant has not established a change in conditions with respect to total disability. She stated:

> The weight of the new evidence is insufficient to establish all of the elements of entitlement which defeated entitlement in the prior decision. Nor does my review of the evidence indicate any basis for finding a mistake of fact.

1997 Decision and Order at 9.

Employer asserts that Judge Barnett erred by failing to consider the entirety of Dr. Castle's opinion and by failing to adequately explain her weighing of the x-ray evidence.

We affirm Judge Barnett's finding that the evidence establishes the existence of pneumoconiosis. Judge Barnett properly considered the qualifications of the physicians whose x-ray interpretations are contained in the record, *see Roberts, supra*; *Dixon, supra*, and permissibly relied upon the most recent x-ray evidence in this case where the evidence indicates the progressive nature of the disease, *see Adkins, supra*. Further, we reject employer's assertion that Judge Barnett erred by failing to consider the entirety of Dr. Castle's opinion. Contrary to employer's assertion, Dr. Castle's

opinion, that the radiographic evidence is consistent with simple coal workers' pneumoconiosis, supports Judge Barnett's finding of pneumoconiosis. *See* Employer's Exhibit 7.

Accordingly, we affirm Judge Barnett's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). This finding is sufficient, in and of itself, to establish a change in conditions pursuant to 20 C.F.R. §725.310. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Consequently, we reverse Judge Barnett's finding that claimant has not established modification based on a change in conditions, and hold that modification based on a change in conditions has been established.

After finding a basis for modification established pursuant to Section 725.310, Judge Barnett should have considered all of the evidence of record to determine whether it establishes entitlement to benefits. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Inasmuch as the entirety of the evidence of record has not been considered by Judge Barnett, we remand this case to the Office of Administrative Law Judges to determine whether the elements of entitlement have been established.

Accordingly, Judge Patton's Decision and Order Denying Benefits is affirmed and the Decision and Order Denying Benefits of Edith Barnett is affirmed in part, reversed in part, and this case is remanded to the Office of Administrative Law Judges for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge