BRB No. 04-0199 BLA

CHARLES BEN HOOPS, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 07/29/2004
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-Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order-Denying Benefits (02-BLA-5422) of Administrative Law Judge Gerald M. Tierney in a claim filed pursuant to the provisions

[1] Claimant filed his claim for benefits on October 20, 1998. Director's Exhibit 1. Administrative Law Judge Robert J. Lesnick denied claimant's claim for benefits on June 22, 2000. Director's Exhibit 65. On July 24, 2001, the Benefits Review Board affirmed Judge Lesnick's Decision and Order. *Hoops v. Elk Run Coal Co.*, BRB Nos. 00-0968

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).[2] The administrative law judge credited claimant with at least seventeen years of coal mine employment and found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the element previously adjudicated against claimant. Decision and Order at 2. The administrative law judge further found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] *Id.* Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to properly consider the evidence in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) pursuant to 20 C.F.R. §718.202(a). Claimant further argues that the administrative law judge erred in denying this claim based on the negative x-ray readings of the employer and in finding Dr. Rasmussen's opinion insufficient to establish that claimant's totally disabling respiratory impairment arose from his coal mine employment. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 by 30

BLA and 00-0968 BLA-A (July 24, 2001) (unpublished); Director's Exhibit 82. Claimant requested modification and submitted new evidence on August 25, 2001. Director's Exhibits 83, 84. The district director denied claimant's request for modification, and upon claimant's request the case was transferred to the Office of Administrative Law Judges on August 20, 2002 to be set for a hearing. Director's Exhibits 96.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge did not consider all the methods "for establishing the presence of pneumoconiosis because of his pre-determination to accept the opinion of the employer's physicians that the claimant did not suffer from the disease." Claimant's Brief at 7. Claimant further argues that the administrative law judge "chose to discredit Dr. Rasmussen's report not because it was unreasoned or not based on the evidence but because it conflicted with the determination of the employer's physicians" who did not diagnose pneumoconiosis, "even when they were forced to admit that there were markings of fibrosis on the claimant's chest x-rays." *Id* at 7, 8. Claimant alleges that this is in conflict with *Compton.* Claimant asserts that because Dr. Rasmussen considered all the evidence in concluding that claimant's totally disabling respiratory impairment arose out of coal mine employment "it was error for the ALJ and the Board" to discredit his opinion "simply because Dr. Rasmussen disagreed with the employer's opinions." Claimant's Brief at 8.

We reject claimant's arguments. The administrative law judge found that Judge Lesnick denied benefits on the ground that claimant failed to establish the existence of pneumoconiosis. Decision and Order-Denying Benefits at 2. The administrative law judge further found that to support his request for modification of the prior denial, claimant only submitted Dr. Pathak's 1/1 reading of claimant's August 9, 2001 x-ray. *Id.* The administrative law judge reasonably found that the interpretation, identifying pneumoconiosis, by Dr. Pathak, a B reader, was outweighed by the contrary interpretations by Drs. Navani, Binns, Wheeler, Scott and Scatarige, who are better qualified as both Board-certified radiologists and B readers. Decision and Order-Denying Benefits at 3; *Adkins v. Director, OWCP*, 958, F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); Director's Exhibits 83, 91-93; Employer's Exhibits 2-4. Therefore, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis and, thus, a change in conditions pursuant to Section 725.310.

We also reject claimant's argument that in the prior Decision and Order, the Board erred in accepting the administrative law judge's finding that Dr. Rassmussen's opinion was insufficient to establish the existence of pneumoconiosis in light of *Compton.* The Board affirmed the administrative law judge's finding that claimant's affirmative evidence diagnosing pneumoconiosis was insufficient to carry his burden of proof pursuant to Section 718.202(a)(1)-(4). *Hoops v. Elk Run Coal Co.* BRB Nos. 00-0968 BLA and 00-0968-A BLA (July 24, 2001). Therefore, claimant's assertions regarding the applicability of *Compton* are misplaced. We, therefore, affirm as supported by substantial evidence, the administrative law judge's finding that after a review of the entire record, Judge Lesnick's finding that the evidence is insufficient to establish the

existence of pneumoconiosis by the preponderance of the evidence warrants no modification. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see also 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)*;* Decision and Order-Denying Benefits at 3.

Accordingly, the administrative law judge's Decision and Order-Denying 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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REGINA C. McGRANERY
Administrative Appeals Judge