BRB No. 98-1349 BLA

JAMES GREEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HURLEY COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
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 J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1109) of Administrative Law Judge J. Michael O'Neill denying benefits on a request for modification in 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 has been before the Board previously. In the original Decision and Order, Administrative Law Judge Rudolf L. Jansen credited claimant with thirteen years and nine months of coal mine employment and adjudicated the merits of the claim pursuant to 20 C.F.R. Part 718. 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) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appealed the denial of benefits to the Board and in *Green v. Hurley Coal Company, Inc.*, BRB No. 90-0226 BLA

(March 22, 1992)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 52. On August 13, 1992, within one year of the denial, claimant requested modification. Director's Exhibit 53. The district director denied modification, claimant requested a formal hearing and the case was referred to the Office of Administrative Law Judges. On referral to the Office of Administrative Law Judges, the case was reassigned to Administrative Law Judge O'Neill, who held a formal hearing and found that the recently submitted evidence, in conjunction with the previously submitted evidence, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge further found no mistake in a determination of fact in the prior denial. The administrative law judge thus found that the evidence did not warrant modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in failing to apply the standard articulated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), in finding the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4) and in finding that total disability was not established pursuant to 20 C.F.R. §718.204(c)(2), (4).[1] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

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 the 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the

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

arguments of the parties and the evidence of 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. Contrary to claimant's contention, the standard articulated by the United States Court of Appeals for the Sixth Circuit in *Ross, supra*, applies to adjudication of duplicate claims under Section 725.309. The administrative law judge properly considered this claim under the regulations set forth in Section 725.310 instead of Section 725.309 since this case involves a modification request and is not a duplicate claim. In determining whether claimant has established a change in conditions pursuant to Section 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).

The administrative law judge properly found that the newly submitted evidence as well as the evidence submitted in connection with the original file failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a). The administrative law judge rationally concluded that the preponderance of the x-ray evidence was negative for the existence of pneumoconiosis. Decision and Order at 7-9, 14-15. The administrative law judge also permissibly relied upon the qualifications of the readers in his consideration of the x-ray evidence and rationally found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *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); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 14-15. Inasmuch as the administrative law judge weighed all of the x-ray interpretations, in light of the qualifications of the readers, and reasonably concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

In addition, the administrative law judge properly considered the entirety of the medical opinion evidence of record and acted within his discretion in concluding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinions of Drs. Anderson, Sullivan, Clarke and Baker, who diagnosed the existence of pneumoconiosis, were outweighed by the opinions of Drs. Williams, O'Neill, Broudy, Jackson and Dahhan, because a majority of the physicians overall as well as a majority of the most qualified physicians found no pneumoconiosis. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139

(1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 17. Moreover, the administrative law judge could rationally reject Dr. Martin's opinion since Dr. Martin failed to explain the rationale for his diagnosis. *Clark*, *supra*; Decision and Order at 16. Inasmuch as the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Clark, supra*; *Perry, supra*; *Lucostic, supra*; *Oggero*; *supra*. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus failed to establish a change in conditions pursuant to Section 725.310, as it is supported by substantial evidence.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant probative evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence as well as the other evidence of record failed to establish total disability pursuant to Section 718.204(c). *Piccin, supra*. Contrary to claimant's assertion, the administrative law judge permissibly credited the preponderance of the non-qualifying blood gas study evidence as more probative of claimant's pulmonary condition than the single qualifying blood gas study in finding that total disability was not established pursuant to Section 718.204(c)(2).[2] *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); Decision and Order at 10, 18. Consequently, we affirm the administrative law judge's findings that the blood gas study evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(2).

[2] 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, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge permissibly found that the opinions of Drs. Clarke and Baker failed to establish total disability by a preponderance of the evidence in light of the non-qualifying objective studies and the medical opinions of Drs. Williams, Broudy, Jackson and Dahhan that claimant was not totally disabled from a respiratory standpoint. Decision and Order at 17-18. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel*, *supra*; Decision and Order at 17-18. 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*, *supra*; *Anderson*, *supra*. Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) and were thus insufficient to establish a change in conditions pursuant to Section 725.310.[3] *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Clark*, *supra*; *Lucostic*, *supra*. Furthermore, the administrative law judge properly reviewed the entire record and concluded that there was no mistake in a determination of fact in the prior denial. Therefore, we affirm the administrative law judge's finding that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 as it is supported by substantial evidence and is in accordance with law.

[3] As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge