BRB No. 98-1492 BLA

LEO THACKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HELLIER FUEL COMPANY	)	DATE ISSUED: 7/29/99
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Leo Thacker, Raccoon, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-909) of Administrative Law Judge J. Michael O'Neill denying 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 found that the instant case was a request for modification and, based on the date of filing, adjudicated the

claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 2-4. The administrative law judge, noting the proper modification standard, concluded that the newly submitted and prior evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(c) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant generally contends that the evidence is sufficient to establish entitlement to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and consistent with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 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)(*en banc*).

[1]Claimant filed his initial claim for benefits on April 26, 1993, which was finally denied by the Department of Labor on June 15, 1995 as the evidence failed to establish the existence of pneumoconiosis or that claimant was totally disabled. Director's Exhibit 58. The Benefits Review Board affirmed this denial on August 26, 1996. Director's Exhibit 58. Claimant filed a modification request on September 6, 1996. Director's Exhibit 74.

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, issued *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), holding 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 of either has been made by claimant. Furthermore, 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); *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, in the instant case, rationally determined that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(c) and therefore insufficient to establish modification.[2] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Worrell*, *supra*.

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). *Piccin*, *supra*. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the fact that the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 76, 78, 81, 83, 87; Employer's Exhibits 1, 2; Decision and Order at 5; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) as there is no biopsy of record, this is a living miner's claim filed after January

[2]The administrative law judge properly determined that claimant's prior claim was denied because the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability. Decision and Order at 2, 7; Director's Exhibit 58.

1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 4; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

The administrative law judge also properly considered the entirety of the newly submitted medical opinion evidence of record pursuant to Section 718.202(a)(4) and permissibly accorded greater weight to the opinion of Dr. Fino, finding no pneumoconiosis, than to the contrary opinion of Dr. Wells, in light of Dr. Fino's superior qualifications and as his opinion is documented, well reasoned and consistent with the objective evidence of record. *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Perry, supra*; *King v. Consolidation Coal Co*., 8 BLR 1-262 (1985)*; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 6-7; Director's Exhibits 76, 87.

With respect to 20 C.F.R. §718.204(c), the administrative law judge rationally found the newly submitted evidence insufficient to establish total disability. *Piccin, supra*. Considering the newly submitted evidence to determine if a change in conditions was established under Section 718.204(c)(1), the administrative law judge permissibly determined that inasmuch as all of the newly submitted pulmonary function study evidence was invalidated based upon claimant's suboptimal effort, the pulmonary function studies were not probative evidence of a respiratory disability. Decision and Order at 7; Director's Exhibits 76, 82, 87; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). The administrative law judge also properly found that the blood gas study evidence of record was non-qualifying and thus total disability was not established pursuant to Section 718.204(c)(2).[3] *See* Decision and Order at 7; Director's Exhibits 11, 35, 36, 44, 46, 50, 51, 87. The administrative law judge further properly found that total disability was not established pursuant to Section 718.204(c)(3) as there is no evidence of cor pulmonale with right sided congestive heart failure in the record. See Decision and Order at 7. Moreover, the administrative law judge considered the newly submitted medical opinion evidence of record and properly found that the opinions were insufficient to establish claimant's burden of proof as no physician opined that claimant was totally disabled.[4] Decision and Order at 7; Director's Exhibits 76, 87; *Budash v. Bethlehem*

[3]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).

[4]Although Dr. Wells opined that claimant should not be exposed further to coal mine dust, this opinion is insufficient to establish total disability. *See Zimmerman v.Director,*

Mines Corp., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record 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 v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge rationally found that the newly submitted 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.[5] *Nataloni, supra*; *Wojtowicz, supra*; *Kovac, supra*; *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Finally, we note that the administrative law judge properly considered the previously submitted evidence and rationally concluded that there was no mistake in fact in the original denial of benefits. Decision and Order at 5-7; *Worrell, supra*; *Nataloni*, *supra*. Therefore, the administrative law judge's denial of claimant's petition for modification is supported by substantial evidence and is in accordance with law. *Worrell, supra*. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Worrell*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

OWCP, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988).

[5]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)(1)-(4), 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).

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge