BRB Nos. 99-0974 BLA
and 97-0880 BLA

ELDON K. NEWPORT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SAM DAUGHERTY/DAUGHERTY TRUCKING COMPANY	)	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 on Remand Denying Modification and the Decision and Order on Remand Denying Second Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Eldon K. Newport, Caryville, Tennessee, *pro se*.

Herbert B. Williams (Stokes, Rutherford, Williams, Sharp & Davies, PLLC.), Knoxville, Tennessee, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order on Remand Denying Modification of February 28, 1997 (95-BLA-2158) and the Decision and Order on Remand Denying Second Modification of June 9, 1999 (98-BLA-0347) of Administrative Law Judge Jeffrey Tureck denying benefits on requests for modification with respect to 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). Claimant originally filed a claim for black lung benefits on October 12, 1990. In his Decision and Order dated

June 1, 1994, Administrative Law Judge E. Earl Thomas credited claimant with twenty-eight years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Benefits were accordingly denied.

Claimant filed a motion for modification on June 7, 1994. In a Decision and Order issued February 21, 1996, Administrative Law Judge Tureck (the administrative law judge) reviewed the evidence submitted by claimant in support of his request for modification of Judge Thomas's Decision and Order denying benefits issued on June 1, 1994 and determined that the newly submitted evidence was insufficient to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, modification and benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Newport v. Sam Daugherty*, BRB No. 96-0830 BLA (Nov. 26, 1996)(unpub.), the Board vacated the administrative law judge's findings regarding Dr. Robinette's x-ray readings and medical opinion pursuant to 20 C.F.R. §718.202(a)(1) and (4) and remanded the case to the administrative law judge for further consideration thereunder. In a Decision and Order on Remand Denying Modification dated February 28, 1997, the administrative law judge reconsidered the evidence in accordance with the Board's remand instructions and again found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and thus that claimant had failed to establish either a mistake in a determination of fact or a change in conditions. Accordingly, modification and benefits were denied.

Claimant appealed the denial of benefits to the Board, but also submitted additional evidence and requested modification while the case was pending at the Board. By Order dated June 10, 1997, the Board dismissed the appeal and remanded the case to the district director for modification proceedings.[1] Director's Exhibit 137. The district director denied

[1] By its Order dated June 10, 1997, the Board advised claimant that it was dismissing claimant's appeal without prejudice in BRB No. 97-0880 BLA as claimant had requested modification of the administrative law judge's Decision and Order while the appeal was pending before the Board. The Board advised claimant that should the administrative law judge deny modification, the appeal could be reinstated upon claimant's request. Since claimant is proceeding without the assistance of counsel in the instant case, we hereby accept claimant's appeal of the administrative law judge's Decision and Order denying modification as a request to reinstate the original appeal in BRB No. 97-0880 BLA as well as a request to review the administrative law judge's denial of second modification and consolidate the appeals.

modification and the case was forwarded to the Office of Administrative Law Judges. In his June 9, 1999 Decision and Order on Remand Denying Second Modification, the administrative law judge found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge thus found that since the previous denial, the evidence was insufficient to establish a change in conditions. The administrative law judge also considered the evidence that he had considered in the previous denial and concluded that there was no mistake in a determination of fact therein. Thus, the administrative law judge concluded that claimant was not entitled to modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated 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 Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with 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 of claimant to establish any one 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 Decisions and Orders, the arguments raised on appeal and the evidence of record, we conclude that the Decisions and Orders of the administrative law judge are supported by substantial evidence and that there are no reversible errors contained therein. With respect to the reinstated appeal of the administrative law judge's Decision and Order on Remand Denying Modification dated February 28, 1997, the administrative law judge complied with the Board's remand instructions by reconsidering the x-ray readings of Dr. Robinette and the qualifications of the respective x-ray readers. The administrative law judge rationally accorded greater weight to the preponderance of x-ray interpretations by the readers with superior qualifications. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by

substantial evidence.

In weighing the medical opinions of record, the administrative law judge also complied with the Board's instructions on remand by reconsidering the medical opinion of Dr. Robinette. The administrative law judge also rationally concluded that claimant did not establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Perry*, *supra*. In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion of Dr. Robinette was not credible as he relied solely on his own positive x-ray reading in diagnosing the existence of pneumoconiosis, which was contrary to the weight of the x-ray evidence. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, *supra*; *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). As the administrative law judge weighed all of the medical opinions in the record before him and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) is affirmed as it is supported by substantial evidence. *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). Consequently, as the administrative law judge properly determined that the evidence of record did not support a finding of pneumoconiosis, we affirm the denial of claimant's first petition for modification and the denial of benefits as the administrative law judge's findings are supported by substantial evidence and in accordance with law.

With respect to the administrative law judge's consideration of claimant's second modification request, he properly found that the newly submitted evidence 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 correctly found that all of the new x-ray evidence was either negative for the existence of pneumoconiosis or unreadable. Decision and Order at 3; Director's Exhibit 141; Employer's Exhibits 2-3. The administrative law judge therefore rationally found that claimant failed to establish the existence of pneumoconiosis by x-ray evidence. *See* 20 C.F.R. §718.202(a)(1); *Edmiston*, *supra*; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Additionally, as the record contains no biopsy or autopsy evidence and as the presumptions found at 20 C.F.R. §§718.304, 718.305 and 718.306 are inapplicable,[2]

[2] The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305 applies to

claimant cannot establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3). *See* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Finally, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis by the newly submitted medical opinion evidence as there are no credible medical opinions diagnosing the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry, supra*. The administrative law judge reasonably concluded that the reports of Dr. Sullivan, claimant's treating physician, were insufficient to support a finding of the existence of pneumoconiosis as the administrative law judge found that Dr. Sullivan stated his conclusions in equivocal terms and did not provide an adequate explanation for his diagnosis of pneumoconiosis. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1988); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order at 2. Finally, the administrative law judge stated correctly that none of the newly submitted CT scan interpretations diagnosed pneumoconiosis. 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. *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*. Finally, the administrative law judge properly reviewed his prior denial and rationally concluded that there was no mistake in a determination of fact in that decision. *See Nataloni, supra*; Decision and Order at 3. Consequently, we affirm the denial of benefits in this case, as the administrative law judge rationally determined, after considering all of the evidence of record, that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement. *See Perry, supra*.

Accordingly, the Decisions and Orders of the administrative law judge denying benefits are affirmed.

SO ORDERED.

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claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge