BRB No. 99-1009 BLA

JAMES A. ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WALNUT COAL COMPANY	)	DATE ISSUED:
D/B/A TENNESSEE ENERGY COMPANY	)	
	)	
and	)	
	)	
A. T. MASSEY	)	
	)	
Employers/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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

James A. Roberts, Tracy City, Tennessee, *pro se*.

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

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0022) of Administrative Law Judge Jeffrey Tureck denying benefits on a request for modification of a duplicate 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).[1] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge concluded that the evidence is insufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law

[1]Claimant filed his initial claim on October 7, 1975. Director's Exhibit 31. On January 6, 1982, Administrative Law Judge Stuart A. Levin issued a Decision and Order denying benefits. Although Judge Levin found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4), he further found the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). *Id*. Judge Levin also found that claimant was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on January 31, 1983. Director's Exhibit 1. On October 4, 1988, Administrative Law Judge V.M. McElroy issued a Decision and Order denying benefits based on claimant's failure to establish a material change in conditions. Director's Exhibit 12. Claimant filed a request for modification of the duplicate claim on March 16, 1992. Director's Exhibit 20. On April 6, 1994, Administrative Law Judge E. Earl Thomas issued a Decision and Order awarding benefits. Director's Exhibit 36A. However, the Board vacated Judge Thomas' award of benefits and remanded the case for further consideration of the evidence under the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994). *Roberts v. Walnut Coal Co.*, BRB No. 94-2355 BLA (Nov. 29, 1995)(unpub.). On November 14, 1996, the case was transferred to Administrative Law Judge Clement J. Kichuk, who issued a Decision and Order on Remand denying benefits based on claimant's failure to establish a material change in conditions. Director's Exhibit 50. Judge Kichuk's conclusion that claimant failed to establish a material change in conditions was based on his finding that claimant did not establish the existence of pneumoconiosis and total disability. *Id*. However, inasmuch as the prior claim was denied because claimant failed to establish the existence pneumoconiosis, Judge Kichuk erred in considering whether a material change in conditions was established with respect to the issue of total disability. 20 C.F.R. §725.309. Claimant filed his most recent request for modification on December 13, 1996. Director's Exhibit 51.

judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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, supported by substantial evidence, and in accordance with law. 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 considering whether claimant established a basis for modification of the prior denial of benefits, the administrative law judge should have considered whether the newly submitted evidence on modification is sufficient to establish a material change in conditions at 20 C.F.R. §725.309.[2] Nonetheless, we hold that the

[2]Administrative Law Judge Jeffrey Tureck (the administrative law judge) stated that "this is a case in which the claimant is seeking modification of a denial of modification of the denial of a duplicate claim for black lung benefits." Decision and Order at 3. Further, the administrative law judge, citing 20 C.F.R. §725.309, stated that "[i]t must be kept in mind that the claim giving rise to this proceeding is the 1983 duplicate claim, which is limited to the issue of whether the claimant has had a material change in conditions since Judge Levin denied the claimant's initial claim in January of 1982." *Id*. However, the administrative law judge found that "[s]ince the claim before me is a petition to modify Judge Kichuk's denial of the claim for modification, the actual issue before me is quite limited." *Id*. The administrative law judge stated, "I have to decide whether Judge Kichuk made a mistake in a

administrative law judge's error in this regard is harmless in view of the administrative law judge's proper determination that the newly submitted evidence on modification is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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determination of fact in denying modification or whether the claimant's condition has changed since the record before Judge Kichuk was closed." *Id*.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him in order to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994). The previous claim was denied because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 31. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309, and thus, a change in conditions at 20 C.F.R. §725.310, the newly submitted evidence on modification must support a finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a).[3]

In finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence. Of the twelve newly submitted x-ray interpretations of record, nine readings are negative for pneumoconiosis, Director's Exhibits 60, 63-66; Employer's Exhibits 2, 3, and three readings are positive, Director's Exhibits 54, 62. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians.[4] *See Woodward v. Director, OWCP*, 991

[3]The administrative law judge observed that "[c]laimant first filed for black lung benefits in 1975." Decision and Order at 2. The administrative law judge also observed that "[t]hat claim ultimately was denied on January 6, 1982 by Judge Stuart Levin, who found that the claimant did not have coal workers' pneumoconiosis." *Id*. As previously noted, although Judge Levin found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4), he also found the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). Director's Exhibit 31. Thus, inasmuch as total disability was not an element of entitlement previously adjudicated against claimant, we decline to address the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(4). *See Ross, supra*.

[4]The administrative law judge stated, "[d]ue both to the numerical superiority of the negative readings and the outstanding qualifications of three of the physicians interpreting claimant's x-rays as negative, I give greater weight to the negative readings." Decision and Order at 5.

F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Thus, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Next, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since there is no biopsy or autopsy evidence demonstrating the existence of pneumoconiosis. In addition, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Further, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Drs. Baker, Chandler and Westerfield opined that claimant suffers from pneumoconiosis, Director's Exhibits 54, 55, 62, Drs. Castle and Hansberger opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 63; Employer's Exhibit 1. The administrative law judge properly accorded greater weight to the opinion of Dr. Castle than to the contrary opinion of Dr. Chandler because he found Dr. Castle's opinion to be better reasoned.[5] See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge permissibly discredited the opinions of Drs. Baker and Westerfield because their diagnoses of pneumoconiosis were based in part on a positive interpretation of an x-ray that was subsequently reread as negative by

[5]The administrative law judge stated that Dr. Castle's opinion is "far and away the best explained of any of the doctors' opinions." Decision and Order at 7. The administrative law judge observed that "Dr. Castle's opinion is consistent with the evidence in the record." *Id*. In contrast, the administrative law judge stated that Dr. Chandler's "diagnosis is unexplained." *Id*. at 6.

physicians with superior qualifications.[6] *See Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984). Further, the administrative law judge permissibly discredited the opinions of Drs. Baker and Westerfield because he found them to be based on inaccurate smoking histories,[7] *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988), and because he found them to be based on inaccurate coal mine employment histories,[8] *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Thus,

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[6]Although Drs. Baker and Westerfield are B-readers, they are not Board-certified radiologists. Whereas Dr. Baker read the January 24, 1996 x-ray as positive for pneumoconiosis, Director's Exhibit 54, Drs. Sargent, Scott and Wheeler, who are B-readers and Board-certified radiologists, reread the same x-ray as negative, Director's Exhibit 60; Employer's Exhibits 2, 3. Similarly, whereas Dr. Westerfield read the April 2, 1997 x-ray as positive for pneumoconiosis, Director's Exhibit 62, Drs. Sargent and Cole, who are B-readers and Board-certified radiologists, reread the same x-ray as negative. Director's Exhibits 65, 66.

[7]The administrative law judge observed that, in his 1982 Decision and Order, Judge Levin "found that the claimant smoked a pack of cigarettes a day for 20 years." Decision and Order at 3. The administrative law judge stated that although Dr. Baker's belief that claimant is "a non-smoker played a significant role in Dr. Baker's opinion that claimant's symptoms are related to his coal mine employment..., claimant had a 20 pack year smoking history back in 1982, and Dr. Castle noted that claimant had an elevated carboxyhemoglobin level on March 11, 1997, when he was examined by Dr. Harnsberger (sic) (*see* EX 1), which may mean he was still smoking at that time." *Id*. at 5. Similarly, the administrative law judge stated that the fact that "Dr. Westerfield believed that claimant never smoked regularly was important enough to him that he mentioned it twice in his report." *Id*.

[8]The administrative law judge stated that "the parties stipulated at the hearing before Judge Levin that claimant had at least 10 years of coal mine employment..., and Judge Levin so found." Decision and Order at 3. The administrative law judge observed, "[a]t that time, claimant's counsel conceded that he could not prove that claimant was a miner for 20 years, as the claimant alleged." *Id*. The administrative law judge also stated that Judge Kichuk "found, based primarily on the Social Security records in evidence, that claimant worked as a coal miner for 11 ½ years." *Id*. at 3 n.2. The administrative law judge observed that Dr. Baker's "diagnosis of pneumoconiosis is based on...a history of more than 20 years of underground coal mining." *Id*. at 5. The administrative law judge, however, found that "claimant's coal mine employment was of a much shorter duration than Dr. Baker believed." *Id*. Further, the administrative law judge observed that Dr. Westerfield based his diagnosis of pneumoconiosis on a history "of 20 years of coal mining." *Id*. The

inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

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administrative law judge found that "the exaggerated coal mine employment history played a significant part in his diagnosis of coal workers' pneumoconiosis." *Id*.

Since the newly submitted evidence on modification is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we hold that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Ross, supra*. Consequently, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310.[9] *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Therefore, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[9]The administrative law judge rendered a finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).