BRB No. 99-1024 BLA

| | | |
|---|---|---|
| DALLAS WOOTEN | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PEABODY COAL 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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

H. John Taylor, Rand, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love, PLLC), Fairmont, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0247) of Administrative Law Judge Gerald M. Tierney denying modification and 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). Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718,[1] the administrative law judge

[1]Claimant filed his claim for benefits on November 13, 1987, which was finally denied by Administrative Law Judge Robert L. Hillyard on June 23, 1992, as claimant failed to establish the existence of pneumoconiosis. Director's Exhibits 1, 82. Claimant filed a modification request on June 23, 1993. Director's Exhibits 90, 122.

concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310. Decision and Order at 3-6. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). 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.[2]

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 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)(*en banc*).

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

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 Fourth Circuit issued *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), holding that the administrative law judge must determine whether a change in conditions or a mistake of fact has occurred even where no specific allegation of either has been made by claimant.[3] Furthermore, in determining whether claimant has established modification 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 evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and therefore insufficient to establish modification. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge reviewed the relevant evidence of record in the original decision in determining if a mistake in determination of fact was established and properly concluded that Administrative Law Judge Hillyard's finding that the presence of pneumoconiosis was not established was correct. Decision and Order at 6; *Jessee*, *supra*.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

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 was negative. Director's Exhibits 90, 108; Employer's Exhibits 1-4; Decision and Order at 5; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). Contrary to claimant's contention, the administrative law judge fully considered Dr. Deardorff's positive x-ray interpretation and the physician's comment that the reading was consistent with asbestosis. Decision and Order at 5. The administrative law judge, who properly noted that all the x-ray interpretations were performed by B readers and Board-certified radiologists, acted within his discretion as fact-finder when he concluded that Dr. Deardorff's findings were not borne out by the preponderance of the other readings. Decision and Order at 3-5; Director's Exhibits 90, 108; Employer's Exhibits 1-4; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston, supra*; *Clark, supra*. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.[4]

Further, the administrative law judge considered the entirety of the newly submitted medical opinion evidence of record and properly found that the three newly submitted opinions by Drs. Zaldivar, Renn and Tuteur, that claimant did not suffer from any pulmonary condition arising from or aggravated by his coal mine dust exposure, were insufficient to establish claimant's burden of proof at Section 718.202(a)(4). Decision and Order at 6; Director's Exhibits 39, 108; Employer's Exhibits 1, 5-9; *Trent, supra*; *Perry, supra*. Claimant contends that the administrative law judge erred in accepting the opinions of Drs. Renn and Zaldivar although they had not reviewed the x-ray interpretation of Dr. Deardorff which indicated the existence of pneumoconiosis and asbestosis. Claimant's Brief at 2-4. We do not find merit in claimant's arguments. Claimant's contentions constitute a request that the

[4]Claimant correctly asserts that asbestosis which arises from the miner's coal mine employment does constitute pneumoconiosis within the meaning of the regulations. *See* 20 C.F.R. §§725.101, 718.201; *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992).

Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp Coal Company*, 12 BLR 1-111 (1988). In the instant case, the administrative law judge noted that Drs. Renn, Tuteur and Zaldivar were Board-certified pulmonary specialists and that neither physician diagnosed pneumoconiosis or asbestosis. Decision and Order at 6. The administrative law judge permissibly concluded that the opinions of Drs. Renn and Zaldivar, that claimant's respiratory or pulmonary condition has no causal nexus with his coal mine dust exposure or asbestos exposure during his coal mine employment, were most persuasive as they fully discussed claimant's histories, symptoms, findings on physical examination, chest x-ray and pulmonary function and arterial blood gas testing. Decision and Order at 6; Director's Exhibit 108; Employer's Exhibits 1, 5-9; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-703 (1985); *Piccin, supra*.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the newly submitted medical opinion evidence does not establish the existence of pneumoconiosis or asbestosis arising out of coal mine employment, claimant has not met his burden of proof on all the elements of entitlement.[5] *Clark, supra*; *Trent, supra*; *Perry, supra*. 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*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law.[6] Inasmuch as claimant has failed to

[5]The administrative law judge properly determined that the x-ray interpretation of Dr. Deardorff, the only evidence submitted with claimant's modification request, did not constitute a well reasoned and documented medical report pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 5; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

[6]Remand to the administrative law judge for reconsideration of the newly submitted evidence under Section 718.202(a)(1)-(4) in accordance with the Fourth Circuit's recent decision in *Island Creek Coal Co. v. Compton,* 211 F.3d 203, BLR

establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Jessee*, *supra*.

(4th Cir. 2000), is not necessary, as the administrative law judge properly determined that the existence of pneumoconiosis was not established under any of the relevant subsections. In *Compton*, the Fourth Circuit recognized that Section 718.202(a)(1)-(4) provides alternative methods for establishing the existence of pneumoconiosis, but held that in determining whether the evidence is sufficient to support a finding of pneumoconiosis, all relevant evidence must be weighed together.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge