BRB Nos. 00-0885 BLA
and 00-0885 BLA-A

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| RALPH HINKLE | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| GOBLES QUALITY CONTROL | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| LIBERTY MUTUAL INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| Cross-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

W. Barry Lewis (Lewis and Lewis Law Offices) Hazard, Kentucky, for employer-carrier.

Timothy S. Williams (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (99-BLA-0737) of Administrative Law Judge Joseph E. Kane 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).[1] Based on the initial filing date of October 6, 1997, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718 (2000).[2] The administrative law judge found that claimant's work as a coal sampler constituted coal mine employment under the Act, and credited claimant with seven years, two weeks, and three days of coal mine employment. The administrative law determined that Gobles Quality Control (Gobles) was the last employer with which claimant had more than one year of coal mine employment, and was, therefore, the responsible operator. In this request for modification, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(1)-(4)(2000), and insufficient to demonstrate the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4)(2000). Thus, the administrative law judge found the newly submitted evidence insufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial application for benefits on October 6, 1997 which the district director denied on January 29, 1998. Director's Exhibits 1, 17. Claimant requested a hearing by letter dated November 6, 1998 and filed with the district director on November 9, 1998. Director's Exhibit 18. The district director treated this letter as a request for modification pursuant to 20 C.F.R. §725.310 and again denied the claim on December 22, 1998. Director's Exhibits 19, 20. Claimant requested a hearing. Director's Exhibit 21.

On appeal, claimant challenges the findings of the administrative law judge on the existence of pneumoconiosis and a totally disabling respiratory impairment. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. On cross-appeal, employer challenges its designation as responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds, in a letter, only to employer's challenge to its designation as responsible operator.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief and stayed for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which the Director and claimant responded.[4] In his response, the Director asserts that the regulations at issue in the law suit do not affect the outcome of this case. Claimant contends that this case is impacted by the regulations at issue and requests that this case be stayed pending the resolution of the lawsuit. Based on our review, we find the Director's arguments persuasive.[5] We, therefore, hold that the disposition of this case is not impacted by the challenged regulations and will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's

[3] We affirm the findings of the administrative law judge on the length of coal mine employment, and at 20 C.F.R. §§718.202(a)(2)-(3)(2000), and 718.204(c)(1)-(3)(2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[5] Contrary to claimant's assertions, the changes to 20 C.F.R. §718.201(a)(2), (c), merely codify existing case law. *Cornett v. Benham Coal Co.*, 227 F.3d 569, BLR 2- (6th Cir. 2000); *Crace v. Kentland Elkhorn Coal Co.*, 109 F.3d 1163 (6th Cir. 1997); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987), and the changes to 20 C.F.R. §718.204(a) do not affect this case. Since the changes at 20 C.F.R. §718.104(d) apply prospectively, this case is not impacted by that new regulation. *See* 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726).

findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 prove 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.[6] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In determining whether claimant established a change in conditions or a mistake in a determination of fact at Section 725.310 (2000), the administrative law judge properly conducted an independent assessment of the newly submitted evidence in conjunction with the previous evidence and the prior finding that claimant failed to show the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to pneumoconiosis under the Act. *See* 20 C.F.R. §725.310(2000); *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); Decision and Order at 13-16. Claimant bears the burden of proving that a change in condition has occurred since the previous denial of modification by the district director. *Id.* In the instant case, claimant failed to demonstrate either the existence of pneumoconiosis or the presence of a totally disabling respiratory impairment in his initial application for benefits. *See* Director's Exhibit 17. Thus, pursuant to Section 725.310 (2000), claimant must establish the existence of pneumoconiosis or a totally disabling respiratory impairment to show a change in conditions. Claimant may also establish modification based on a mistake in a determination of fact in the prior decision. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

[6] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In the instant case, the administrative law judge properly reviewed the medical evidence related to medical examinations, testing and diagnosis submitted after January 29, 1998, the date of the district director's denial of claimant's initial application for benefits. *See* Decision and Order at 8-12; *Nataloni*, *supra*; *Kovac*, *supra*. In reviewing this evidence, the administrative law judge properly found that all of the newly submitted x-ray interpretations were negative for pneumoconiosis, and that all these interpretations, except one, were by physicians with superior radiological qualifications.[7] *See* Claimant's Exhibit 1; Employer's Exhibits 1-4, 7, 8, 10, 11; Decision and Order at 8, 13. Thus, the administrative law judge properly found this evidence insufficient to demonstrate a change in conditions or a mistake in a determination of fact. In so doing, the administrative law judge correctly noted that these negative x-ray interpretations supported the district director's finding that the x-rays were negative for pneumoconiosis. *See* 20 C.F.R. §§725.310 (2000), 718.202(a)(1)(2000); *Nataloni*, *supra*; *Kovac*, *supra*; Decision and Order at 13.

The administrative law judge also correctly determined that since the record contained no biopsy or autopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2)(2000) and that claimant, a living miner, was not entitled to the presumptions at Section 718.202 (a)(3)(2000) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306. Thus, the administrative law judge properly concluded that claimant did not establish a change in conditions or a mistake in a determination of fact pursuant to these regulations. *See* 20 C.F.R. §725.310 (2000).

[7] The majority of physicians interpreting the new x-rays were Board-certified Radiologists and B-readers or B-readers.

In determining whether claimant had met his burden of proving the existence of pneumoconiosis at Section 718.202(a)(4)(2000), the administrative law judge correctly concluded that Drs. Dahhan and Broudy, who examined claimant, and Dr. Fino, who reviewed claimant's medical records, did not diagnose the existence of clinical coal workers' pneumoconiosis or a respiratory impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment while Dr. Sundaram, who treated claimant, diagnosed the existence of coal workers' pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(4), 718.201 (2000); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, BLR 2- (6th Cir. 2000); Director's Exhibit 15; Claimant's Exhibit 1; Employer's Exhibits 1, 5, 10, 11. Contrary to claimant's assertion, the administrative law judge did not decline to credit Dr. Sundaram's report, but rather, acted within his discretion, when he found that Dr. Sundaram's status as treating physician, a factor which is to be considered in evaluating his report, was not sufficient to accord his report greater weight over the reports of the better qualified physicians, Drs. Fino, Dahhan and Broudy.[8] *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1996), *modif'd on recon*. 20 BLR 1-64 (1996); *Tedesco v. Director, OWCP*, 18 BLR 1-104 (1994). Moreover, the administrative law judge permissibly found the reports of Drs. Dahhan, Broudy and Fino better supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Consequently, the administrative law judge considered the new medical opinions in conjunction with the previous medical opinion evidence and properly found that claimant failed to meet his burden of proving the existence of pneumoconiosis by medical opinion evidence, and that, therefore, claimant had not established a change in conditions or a mistake in a determination of fact. Decision and Order at 15-16; *see* 20 C.F.R. §§718.202(a)(4), 718.201, 725.310; Director's Exhibit 15; Claimant's Exhibit 1; Employer's Exhibits 1, 5, 11, 10.

As the record contains insufficient affirmative evidence supportive of claimant's burden of proof on an essential element of entitlement, we affirm the finding of the administrative law judge that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4)(2000). 20 C.F.R. §718.202(a)(1)-(4). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, affirm the administrative law judge's denial of modification as it is supported by substantial evidence.[9]

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[8] The record indicates that Drs. Dahhan, Broudy and Fino are Board-certified in internal medicine and pulmonary diseases. Employer's Exhibits 1, 10, 11. The record does not contain the qualifications of Dr. Sundaram.

[9] In light of our decision to affirm the denial of benefits, we need not address claimant's argument regarding total disability and the issues raised in employer's cross-appeal regarding its designation as the responsible operator. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge