BRB No. 97-1388 BLA

JOSEPH SMERKO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C.L.S. COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LACKAWANNA CASUALTY 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 upon Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

James E. Pocius (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order upon Modification (96-BLA-01746)

[1]Claimant is Joseph Smerko, the miner, whose initial claim for benefits was filed on December 21, 1983 and denied on January 29, 1988. Director's Exhibit 100. Claimant filed the present claim on December 19, 1989. Director's Exhibit 1. In his first Decision and Order, the administrative law judge found that claimant

of Administrative Law Judge Ainsworth H. Brown 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

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established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and a material change in conditions pursuant to 20 C.F.R. §725.309(d), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 718.204(c)(1)-(3), vacated the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.204(c)(4), and remanded the claim for the administrative law judge to reconsider the evidence pursuant to Sections 718.202(a)(1) and 718.204(c)(4). *Smerko v. C.L.S. Coal Co.*, BRB No. 91-1940 BLA (Jan. 31, 1994)(unpub.). On remand, the administrative law judge again found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), but failed to establish total respiratory disability pursuant to Section 718.204(c)(4). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.204(c)(4), and the denial of benefits. *Smerko v. C.L.S. Coal Co.*, BRB Nos. 94-3810 BLA and 94-3810 BLA-A (Sep. 26, 1995)(unpub.). Claimant filed a petition for modification contending that there was a change in claimant's condition on February 5, 1996. Director's Exhibit 77.

judge found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), and thus failed to establish modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his weighing of the newly submitted pulmonary function study and medical opinion evidence pursuant to Section 718.204(c)(1), (4). Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance.

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 this 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order upon Modification, the arguments raised on appeal and the evidence or record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Pursuant to Section 725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying* 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The instant claim was initially denied because claimant failed to establish total respiratory disability. Director's Exhibit 76.

Claimant initially contends that the administrative law judge erred in rejecting Dr. Kraynak's qualifying pulmonary function studies of November 1, 1995 and October 28, 1996. Claimant's Brief at 2-4. Dr. Sahillioglu invalidated the November 1, 1995 study because there was less than optimal effort and the study was improperly performed. Director's Exhibit 78. Dr. Sahillioglu further explained that there was no patient weight recorded, no demonstration of inspiratory effort, hesitancy on FVC, and variable breaths on MVV. Dr. Sahillioglu also opined that the "restrictive defect need be verified by TLC." Director's Exhibit 78.

Dr. Levinson invalidated the October 28, 1996 pulmonary function study because the patient effort was judged unacceptable and because there was excessive variability of the FEV1 results on the two largest attempts. Employer's Exhibit 6. Dr. Kaplan invalidated the October 28, 1996 study because there was excessive variation between the individual forced expiratory curves, indicating inconsistent effort, and because there was inconsistent effort on MVV. Employer's Exhibit 6. Dr. Dittman, in a deposition, opined that the November 1, 1995 and October 28, 1996 studies are invalid. Employer's Exhibit 7 at pp. 14-15.

The administrative law judge rationally credited the invalidation reports of Drs. Sahillioglu, Kaplan, and Levinson on the basis of their superior qualifications.[2] Decision and Order at 2-3; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1).

Claimant further contends that the administrative law judge erred in his weighing of the medical opinions of Drs. Kraynak and Dittman pursuant to Section 718.204(c)(4). Claimant's Brief at 3. Dr. Kraynak, in a deposition dated March 7, 1997, stated that he has treated claimant since 1991 and opined that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 2. Dr. Dittman, in a deposition dated January 17, 1997, stated that he had examined claimant on four different occasions, the latest being May 1, 1996, and opined that claimant's objective test results suggest that there is no evidence of an obstructive or a restrictive abnormality and that claimant has no impairment due to pneumoconiosis. Employer's Exhibit 7 at pp. 12, 15.

[2]Dr. Kraynak is Board-eligible in family medicine. Director's Exhibit 77. Dr. Sahillioglu is Board-eligible in internal medicine and pulmonary diseases. Director's Exhibit 79. Drs. Kaplan, Levinson and Dittman are Board-certified in internal medicine. Employer's Exhibits 2, 6.

The administrative law judge acted within his discretion in finding Dr. Dittman's opinion entitled to greater weight on the basis of his superior credentials and because his opinion is better supported by the objective data.[3] Decision and Order at 2-3; *Director, OWCP v. Siwiec,* 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Lafferty, supra; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath, supra; Dillon, supra; Martinez, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Wetzel, supra; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge is empowered to weigh the 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.* Thus, we affirm the administrative law judge's findings that claimant failed to establish total respiratory disability pursuant to Section 718.204(c) and modification pursuant to Section 725.310 as they are supported by substantial evidence and in accordance with law.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[3]Claimant also contends that the administrative law judge erred in relying on Dr. Dittman's opinion pursuant to 20 C.F.R. §718.204(c)(4) because he did not diagnose pneumoconiosis. Claimant's Brief at 5. We reject this contention because the physician's failure to diagnose pneumoconiosis would affect the credibility of his findings regarding the causation of claimant's respiratory impairment but not his opinion as to whether or not claimant has total respiratory disability.

REGINA C. McGRANERY
Administrative Appeals Judge