BRB No. 98-1190 BLA

GARY D. NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
LEECO, INCORPORATED/ TRANSCO ENERGY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:_____
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Paul E. Jones (Baird, Baird, Baird, & Jones), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (97-BLA-1807) of Administrative Law

[1]Claimant is Gary D. Napier, the miner, who filed his claim for benefits on January 10, 1994. Director's Exhibit 1. This claim was denied on March 27, 1996 by Administrative Law Judge Donald W. Mosser because claimant failed to establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 37. Thereafter, claimant filed a request for modification on November 4, 1996. Director's Exhibit 38.

Judge Donald W. Mosser 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 judge credited the miner with fourteen and one-half years of coal mine employment. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Decision and Order at 7-9. Additionally, the administrative law judge found that claimant failed to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310(a). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4). Claimant's Brief at 4-7. Claimant also asserts that the administrative law judge erred in failing to find that claimant has established total respiratory disability at Section 718.204(c)(4). Claimant's Brief at 7-9. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs, has declined to 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 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).

[2]We affirm the administrative law judge's findings regarding length of coal mine employment, mistake in fact, and pursuant to Section 718.202(a)(2)-(3) and Section 718.204(c)(1)-(3) as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the x-rays submitted on modification, noting that the only positive reading was rendered by a physician who is neither a B-reader[3] nor Board-certified radiologist and the negative readings were all rendered by physicians with superior qualifications. Decision and Order at 7. The administrative law judge also noted that he found that the previously submitted x-ray evidence was negative for pneumoconiosis. *Id.* Therefore, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis by x-ray. *Id.*

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 4-5. Contrary to claimant's assertion, it was permissible for the administrative law judge to consider the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Because the administrative law judge also considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit inasmuch as he considered all the relevant x-ray evidence pursuant to Section 718.202(a)(1). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Inasmuch as the administrative law judge properly concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we affirm his finding. *See Director*,

[3]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

OWCP v. Greenwich Collieries [Ondecko], 114 S.Ct. 2251, 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); *Staton, supra.*

In considering the medical opinions submitted on modification pursuant to Section 718.202(a)(4), the administrative law judge noted that Dr. Bushey found the existence of pneumoconiosis whereas Drs. Broudy and Fino did not. With regard to Dr. Bushey's opinion, contrary to claimant's contention, it was permissible for the administrative law judge to discredit this physician's finding of pneumoconiosis as it was based solely on an x-ray reading, Director's Exhibit 38. Decision and Order at 8; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993)(medical opinion that purports to be based on clinical findings beyond x-ray may be found to be based solely on x-ray reading); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *cf. Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996). Additionally, the administrative law judge reasonably accorded greater weight to Dr. Broudy's opinion because of his superior qualifications,[4] *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and because he found his opinion to be well-documented, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and supported by Dr. Fino's opinion. Decision and Order at 8. The administrative law judge also previously found that the prior medical opinion evidence did not establish the existence of pneumoconiosis. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by medical opinion. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge erred in failing to consider the exertional requirements of his usual coal mine employment when weighing the medical opinion evidence. Claimant's Brief at 7-9. In considering the new medical opinion evidence, the administrative law judge found this evidence insufficient to support a finding of total respiratory disability inasmuch as Drs. Broudy and Fino found no respiratory impairment and Dr. Bushey did not render an opinion regarding claimant's respiratory capacity, Director's Exhibits 33, 46; Employer's Exhibit 2. Decision and Order at 9. Additionally, the administrative law judge noted that he found the previously submitted medical opinion evidence failed to establish a totally disabling respiratory impairment. *Id.*

Contrary to claimant's contention, because Drs. Broudy and Fino found no respiratory

[4]Dr. Broudy is a B-reader and is Board-certified in internal medicine and pulmonary disease whereas Dr. Bushey's qualifications do not appear to be in the record. Employer's Exhibit 1.

impairment, it was not necessary for the administrative law judge to compare the physicians' findings with the exertional requirements of claimant's usual coal mine employment. *See Parsons v. Director, OWCP*, 6 BLR 1-272 (1983)(with Miller, J., dissenting)*; Parino v. Old Ben Coal Co.*, 6 BLR 1-104 (1983); *see also Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*) *aff'd on recon.*, 9 BLR 1-104 (1986). Therefore, we affirm the administrative law judge's finding that total disability could not be demonstrated pursuant to Section 718.204(c)(4). *See Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Maddaleni, supra; Kuchwara, supra*.

The administrative law judge concluded that claimant failed to establish a change in conditions since the prior denial pursuant to Section 725.310(a). Decision and Order at 9. Inasmuch as the administrative law judge properly found that claimant failed to establish a change in conditions based on a review of the entire record, *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *Kovac v. BCNR Mining Corp.*, 15 BLR 1-156 (1990), *aff'd on recon.* 16 BLR 1-71 (1992), we affirm the administrative law judge's denial of modification pursuant to Section 725.310(a).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge