BRB No. 99-0650 BLA

FRANK BRUNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	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 - Denying Request for Modification of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Harold Rader (Law Offices of Neville Smith), Manchester, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Request for Modification (98-BLA-272) of Administrative Law Judge Rudolf L. Jansen 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). Initially, Administrative Law Judge Bernard J. Gilday, Jr., found that the parties stipulated to at least twelve years of coal mine employment, and based on the filing date of November 3,1986, applied the regulations found at 20 C.F.R. Part 718. Director's Exhibits 22-350, 22-24. Judge Gilday found that claimant established the existence of pneumoconiosis, based on the true doubt rule, at 20 C.F.R. §718.202(a)(4), but found that total disability was not established at 20 C.F.R. §718.204(c). Accordingly, benefits were

denied on August 1, 1989. Claimant appealed, and in *Bruner v. Shamrock Coal Co., Inc.*, BRB No. 89-2741 BLA (Jan. 29, 1991)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 22-1. Claimant filed a duplicate claim on February 14, 1994. Director's Exhibit 1. Administrative Law Judge Rudolf L. Jansen (the administrative law judge), found that a material change in condition was established as claimant established that he was totally disabled, an element he had previously failed to establish. Despite the fact that pneumoconiosis had been established in the earlier claim, however, the administrative law judge conducted a *de novo* review of all the evidence because the true doubt rule, relied on to find the existence of pneumoconiosis in the earlier decision, was no longer valid. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Director's Exhibit 36. Benefits were again denied on February 16, 1996. Claimant appealed, and in *Bruner v. Shamrock Coal Co., Inc.*, BRB No. 96-0703 BLA (Nov. 20, 1996)(unpub.), the Board affirmed the denial. Director's Exhibit 44. On July 2, 1997, claimant filed a request for modification, and submitted additional medical evidence. Director's Exhibit 45. Reviewing all the evidence of record pursuant to 20 C.F.R. §725.310, *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993) and *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *aff'd on recon.*, 16 BLR 1-71 (1992), the administrative law judge found that the evidence failed to establish a mistake in determination of fact, or a change in condition, and denied claimant's request for modification. *See Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Claimant appeals, contending that the administrative law judge erred in failing to find that the newly submitted evidence establishes the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4), and total disability at Section 718.204(c). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

Claimant contends that the administrative law judge erred by according greater weight to the better qualified readers, by improperly relying on the numerical weight of the negative readings, and by selectively analyzing the x-ray evidence. We disagree. The newly submitted evidence contains eight x-ray readings. Only one, by Dr. Bushey, is positive. Director's Exhibit 45. All remaining readings state that the film is either negative for pneumoconiosis, is unreadable, or shows only chronic obstructive pulmonary disease. The administrative law judge properly found that Dr. Bushey is not a B-reader or a Board certified radiologist, whereas five of the other readings were made by better-qualified

readers. Contrary to claimant's argument, the administrative law judge could properly accord greater weight to the readings of the better qualified readers. *See Staton v. Norfolk & Western Railway Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995). *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Further, claimant fails to specifically state how the administrative law judge selectively analyzed the evidence, leaving this Board without a proper foundation to review this contention. *See Barnes v. Director, OWCP*, 19 BLR 1-71 (1995). As the administrative law judge committed no error in his weighing of the new x-ray evidence and considered it in conjunction with earlier x-ray evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by x-ray evidence at Section 718.202(a)(1) and modification pursuant to Section 725.310.[1]

Claimant next contends that the administrative law judge erred in failing to find pneumoconiosis established at Section 718.202(a)(4), arguing that the administrative law judge erred by discrediting Dr. Bushey's opinion, for relying largely on his own x-ray interpretation, by not finding Dr. Bushey's opinion reasoned, and by crediting the medical opinion of Dr. Fino, who did not examine claimant. The newly submitted evidence consists of two medical opinions. Dr. Bushey diagnosed pneumoconiosis, Director's Exhibit 48, whereas Dr. Fino found no evidence of a coal mine dust related disease. Employer's Exhibit 1. Additionally, the evidence contains hospital reports which are silent regarding the existence of pneumoconiosis, mentioning only chronic obstructive pulmonary disease with asthmatic bronchitis. Director's Exhibit 55.

Contrary to claimant's assertion, the administrative law judge was not required to find Dr. Bushey's opinion reasoned, and is not required to discredit nonexamining physicians. The administrative law judge stated only that Dr. Bushey relied, in part, on an x-ray reread by more qualified readers as unreadable. However, that was not the only reason the administrative law judge gave for not crediting Dr. Bushey. The administrative law judge permissibly assigned "most probative weight" to the opinion of Dr. Fino, as he found it well

[1] We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Similarly, the administrative law judge's finding of no total disability at 20 C.F.R. §718.204(c)(1)-(3) is affirmable as unchallenged on appeal. *Id*.

reasoned and documented, and because Dr. Fino's credentials in pulmonary disease are superior to those of Dr. Bushey. Decision and Order at 7; *see Peabody v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). As the administrative law judge properly weighed the two newly submitted medical opinions and considered them in conjunction with earlier submitted evidence, we affirm the administrative law judge's accordance of greater weight to Dr. Fino's opinion, and affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) and modification at 725.310.

Claimant next contends that the administrative law judge erred in his weighing of the medical opinions at Section 718.204(c)(4). None of the medical opinions term claimant totally disabled or make sufficient physical assessment from which the administrative law judge can infer total disability, therefore, we affirm the administrative law judge's weighing of the medical reports at Section 718.204(c)(4), and his finding that claimant has not established total disability. 20 C.F.R. §718.204(c); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).[2]

[2] In his Decision and Order - Denying Request for Modification, in addition to finding that claimant failed to establish the existence of pneumoconiosis, the administrative law judge also found that claimant failed to establish total disability. Although the administrative law judge's finding concerning total disability is affirmable, since the administrative law judge never made a determination on the merits regarding total disability in his previous decision, it was not an element before the administrative law judge on modification.

Accordingly, the Decision and Order - Denying Request for Modification of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge