BRB No. 01-0796 BLA

HASSELL HAMILTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PACE ENERGIES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE 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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Hassell Hamilton, Pikeville, Kentucky, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (2000-BLA-0151) of Administrative Law Judge Joseph E. Kane denying modification and benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

[1]Susie Davis, a benefits counselor with the Kentucky Black Lung Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision. The Board acknowledged the instant appeal on July 18, 2001, stating that the case would be reviewed under the general standard of review.

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] The administrative law judge noted that the instant claim was a request for modification and that the parties had stipulated to nineteen years of qualifying coal mine employment. Decision and Order at 3-5. The administrative law judge, based on the date of filing, considered entitlement in this living miner's claim pursuant to 20 C.F.R. Part 718.[3] Decision and Order at 4. The administrative law judge, noting the proper standard and that the claim had been denied as claimant failed to establish any element of entitlement, initially reviewed the prior denial of benefits and then considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b) (2001) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 4-7. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer has not responded in the instant appeal. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v.*

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[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

[3]Claimant filed his original claim for benefits on August 7, 1997, which was denied by Administrative Law Judge Daniel J. Roketenetz on June 28, 1999. Director's Exhibits 1, 38. Claimant requested modification, the subject of the instant appeal, on July 27, 1999, which was denied by the district director on September 8, 1999. Director's Exhibits 39, 40. The case was referred to the Office of Administrative Law Judges for a formal hearing on September 8, 1999. Director's Exhibit 40.

Jewell Ridge Coal Co., 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The United States Court of Appeals for the Sixth Circuit held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), with respect to modification, that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been made by claimant.[4] Furthermore, in determining whether claimant has established a change in conditions pursuant to Section 725.310 (2000), 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 newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(b) (2001) and therefore insufficient to establish modification.[5] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Worrell, supra*.

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

[5]The administrative law judge properly determined that claimant's prior claim was

Considering the newly submitted and prior evidence to determine if a basis for modification 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) (2001). *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) (2001) based on the fact that the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 12, 24-27, 33-35; Decision and Order at 5; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) (2001) as there is no biopsy of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306 (2001); Decision and Order at 5-6; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

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denied because the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability. Decision and Order at 5, 7; Director's Exhibit 38.

The administrative law judge also properly considered the entirety of the newly submitted and prior medical opinion evidence of record pursuant to Section 718.202(a)(4) (2001) and permissibly accorded greater weight to the opinion of Dr. Jarboe, who examined claimant and opined that he does not suffer from pneumoconiosis, than to the contrary opinions of Drs. Casey and Myers, in light of Dr. Jarboe's superior qualifications and as his opinion is bolstered by the opinion of Dr. Zaldivar, who is also highly qualified, and by Dr. Fritzhand, who examined claimant. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 6; Director's Exhibits 10, 25, 35; Employer's Exhibit 1. The administrative law judge properly declined to accord determinative weight to the opinion of Dr. Casey, in spite of her status as claimant's treating physician, as her qualifications were not in the record and her opinion was suspect.[6] *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Back v. Director, OWCP*, 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Piccin, supra*; Decision and Order at 6; Director's Exhibits 29-30. We therefore affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis.

With respect to 20 C.F.R. §718.204(b) (2001), the administrative law judge rationally found the newly submitted and prior evidence insufficient to establish total disability. *Piccin, supra*. Considering the evidence to determine if a basis for modification was established under Section 718.204(b)(2)(i), (ii) (2001) the administrative law judge properly found that the pulmonary function and blood gas study evidence of record was non-qualifying and thus total disability was not established thereunder.[7] *See Winchester v. Director, OWCP*, 9 BLR

[6]We note that a treating physician may be accorded deference in the weighing of medical reports but such deference is not accorded as a matter of course. The United States Court of Appeals for the Sixth Circuit has held that "...opinions of treating physicians are entitled to greater weight than those of non-treating physicians." *Tussey v. Island Creek Coal Co.*, 982 F. 2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, in setting this standard the Sixth Circuit did not overrule its earlier admonition that there is no "mechanical rule insulating a treating doctor's opinion from attack...[it] is still subject to attack when thrown in contest with other and contrary respectable opinions." *Halsey v. Richardson*, 441 F.2d 1230, 1236 (6th Cir. 1971).

[7]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

1-177 (1986); Decision and Order at 6-7; Director's Exhibits 9, 11, 25, 35. The administrative law judge further properly found that total disability was not established pursuant to Section 718.204(b)(2)(iii) (2001) as there is no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* Decision and Order at 7.

Moreover, the administrative law judge considered the newly submitted and prior medical opinion evidence of record and rationally concluded that the opinions were insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv) (2001). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*. The administrative law judge permissibly determined that the opinion of Dr. Casey, who opined that claimant was totally disabled, was insufficient to establish total disability in light of the preponderance of medical opinions stating that claimant was not totally disabled, as Dr. Jarboe's opinion was entitled to greater weight in light of his superior credentials and was bolstered by the opinions of Drs. Fritzhand, Meyers and Zaldivar. Decision and Order at 7; Director's Exhibits 10, 25, 29-30, 35; Employer's Exhibit 1; *Worhach, supra*; *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *Wetzel, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record 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 v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge rationally found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(b)(2)(iv) (2001) and were thus insufficient to establish a basis for modification pursuant to Section 725.310 (2000).[8] *Nataloni, supra*; *Wojtowicz, supra*; *Kovac, supra*; *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Therefore, the administrative law judge's denial of claimant's petition for modification is supported by substantial evidence and is in accordance with law. *Worrell, supra*. Inasmuch as claimant has failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000), we affirm the denial of benefits. *Worrell, supra*.

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

[8]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) (2001), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d) (2001); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge