BRB No. 07-0505 BLA

J.J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COVENANT COAL CORPORATION	)	DATE ISSUED: 03/27/2008
	)	
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-Denying Benefits of Administrative Law Judge William S. Colwell, United States Department of Labor.

Joseph Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits on modification (2005-BLA-6009) of Administrative Law Judge William S. Colwell (the administrative law judge) 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] The administrative law judge credited claimant with at least fourteen years of qualifying coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b), and that claimant failed, therefore, to establish a change in conditions sufficient to modify the denial of his claim pursuant to 20 C.F.R. §725.310.[2] The administrative law judge further found, on review of the evidence of record and the prior decision, that a mistake in a determination of fact had not been made pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied on modification.

On appeal, claimant contends that he has established a change in conditions because the newly submitted x-ray evidence establishes the existence of pneumoconiosis at Section 718.202(a)(1), and the newly submitted medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4).[3] Claimant also contends that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer has filed a response brief urging affirmance of the administrative law judge's Decision and Order denying benefits on modification. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

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[1] This claim was filed on July 28, 2003. Director's Exhibit 4.

[2] The claim was previously denied because claimant failed to establish any element of entitlement. *See* Decision and Order at 3.

[3] The administrative law judge found that pneumoconiosis could not be established at Section 718.202(a)(2) and (3). That finding is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] We affirm as unchallenged on appeal the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge specifically found that a mistake in a determination of fact on the issues of pneumoconiosis and total disability was not made, after reviewing the evidence of record and the prior decision. Decision and Order at 10.

and in accordance with applicable law.[5] 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In considering whether a claimant has established a change in conditions and thus established grounds for modification pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one of the elements of entitlement previously adjudicated against claimant. *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).

After consideration of the parties' arguments on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge accurately reviewed the newly submitted x-ray evidence. The administrative law judge properly found that it was insufficient to establish pneumoconiosis because, of the two new x-rays submitted, each was interpreted as negative by one reader and positive by another equally qualified reader.[6] *See* 20 C.F.R. §718.202(a); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09, 22 BLR 2-162, 2-169-70 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

[6] The newly submitted x-ray evidence consisted of a June 6, 2004 film read by Dr. Patel as positive for pneumoconiosis, and as negative by Dr. Scatarige. A January 27, 2005 film read was read as positive by Dr. DePonte, and negative by Dr. Wheeler. Director's Exhibits 29, 40; Employer's Exhibit 13; Claimant's Exhibit 1. Drs. Patel, Scatarige, DePonte and Wheeler are B readers and Board-certified radiologists. *Id*.

1992); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 517 U.S. 267, 18 BLR 2A-1 (1994). As the administrative law judge's finding at Section 718.202(a)(1) is supported by substantial evidence, it is affirmed.

Additionally, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) by new medical opinion evidence because he found that the opinion of Dr. Rasmussen, diagnosing pneumoconiosis, was outweighed by the contrary opinion of Dr. Hippensteel.[7] Decision and Order at 4-6, 8-9. In so finding, the administrative law judge properly found that, despite Dr. Rasmussen's years of experience with coal dust related diseases, Dr. Hippensteel's qualifications as a Board-certified pulmonologist entitled his opinion to greater weight.[8] Decision and Order at 8; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Further, contrary to claimant's contention, the absence of a post-exercise blood gas study does not render Dr. Hippensteel's opinion on lung disease unreasoned.[9] Decision and Order at 6. *See* 20 C.F.R. §718.105(b); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997). The administrative law judge also permissibly found that Dr. Hippensteel's opinion was more persuasive than Dr. Rasmussen's because Dr. Hippensteel's findings were better explained.[10] Decision and Order at 8; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335;

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[7] Dr. Rasmussen diagnosed pneumoconiosis. He also cited claimant's cigarette smoking as a causative factor in claimant's lung disease, but concluded that claimant' significant history of coal dust exposure was a major contributing factor. Director's Exhibit 29.

Dr. Hippensteel found that claimant exhibited no evidence of coal workers' pneumoconiosis and that claimant did not have any coal mine dust related disease. Director's Exhibit 40.

[8] The administrative law judge noted that Dr. Rasmussen was not Board-certified in the subspecialty of pulmonary disease, while Dr. Hippensteel was. Decision and Order at 8.

[9] The administrative law judge noted that Dr. Hippensteel explained that he did not require claimant to perform a post-exercise blood gas study because of claimant's severely elevated blood pressure. Decision and Order at 8; Director's Exhibit 40.

[10] The administrative law judge noted that Dr. Hippensteel observed that Dr. Rasmussen's blood gas studies were only slightly above normal limits and that Dr. Rasmussen failed to address claimant's elevated carboxyhemoglobin level. The

Akers, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. Thus, the administrative law judge rationally found that the new medical opinion evidence failed to establish pneumoconiosis at Section 718.202(a)(4). *Clark*, 12 BLR at 1-155. Further, in considering all of the new x-ray and medical opinion evidence together the administrative law judge properly found that claimant failed to meet his burden of establishing the existence of pneumoconiosis at Section 718.202(a)(1)-(4). *Compton*, 211 F.3d at 208-09, 22 BLR at 2-169-70; *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Anderson*, 12 BLR at 1-112. The administrative law judge, therefore, properly found that claimant failed to establish a change in conditions by establishing pneumoconiosis. *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158. As claimant has not established a change in conditions or a mistake in determination of fact on the issue of pneumoconiosis, an essential element of entitlement under Part 718, an award of benefits on modification is precluded.

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administrative law judge also noted that Dr. Hippensteel's more recent pulmonary function study was non-qualifying. The administrative law judge further noted Dr. Hippensteel's citation to the variability and reversibility in claimant's lung function as being consistent with smoking, not pneumoconiosis. Decision and Order at 8; Director's Exhibit 40.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits on modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge