BRB No. 97-0897 BLA

EUGENE COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	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 Modification of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen Chartered), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (97-BLA-0353) of Administrative Law Judge John C. Holmes 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). This case is before the Board for the fourth time. Initially, the administrative law judge credited claimant[1] with twelve and one-half years of coal mine employment and found that claimant had failed to establish invocation of the interim presumption at 20 C.F.R. §727.203, or entitlement under 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. This denial was affirmed by the Board in 1988. *Collett v. Shamrock Coal Co., Inc.,* BRB No. 87-505 BLA (Sept. 30, 1988)(unpub). Subsequently,

[1] Claimant is the miner, Eugene Collett, who filed his initial application for benefits on May 7, 1979, Director's Exhibit 1.

claimant filed a petition for modification on September 6, 1989, which was denied by the administrative law judge on December 11, 1991 due to claimant's failure to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204, although claimant was able to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). This denial was appealed to the Board who vacated and remanded the case for the administrative law judge to consider the claim pursuant to the regulations contained at 20 C.F.R. Part 727, and to reconsider the evidence relevant to 20 C.F.R. §718.204(b), (c). *Collett v. Shamrock Coal Co., Inc.*, BRB No. 92-0837 BLA (June 29, 1993)(unpub).

On remand, the administrative law judge again denied benefits, finding the evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. Part 727, or to establish total disability pursuant to Section 718.204(c). This determination was affirmed by the Board. *Collett v. Shamrock Coal Co., Inc.*, BRB No. 94-0631 BLA (June 29, 1995)(unpub). Claimant filed the present petition for modification on March 1, 1996. Director's Exhibit 117. The administrative law judge found the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3), (4) and insufficient to establish a mistake of fact or change in condition as the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). In the instant appeal, claimant argues that the administrative law judge erred in finding that claimant's newly submitted medical reports failed to establish a material change in condition pursuant to 20 C.F.R. §725.310, and total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 718. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has declined to participate in this appeal.[2]

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

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra*.

[2] The administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(3), (4) and that there was no mistake of fact in the prior decision are unchallenged on appeal and therefore are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order Denying Modification, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge thoroughly considered all the newly submitted evidence which includes eight x-ray readings, only one of which was positive, two non-qualifying arterial blood gas studies,[3] two pulmonary function studies which produced qualifying values, but were considered invalid, and several medical reports. Dr. Baker diagnosed coal workers' pneumoconiosis, but failed to address the issue of total disability or causation. Director's Exhibit 117. Dr. Kennedy, claimant's treating physician, diagnosed heart disease, obesity, and chronic obstructive pulmonary disease, but failed to diagnose pneumoconiosis, or attribute claimant's condition to his coal mine employment. Director's Exhibit 123; Employer's Exhibit 2. Dr. Dahhan found a totally disabling respiratory impairment solely due to smoking, and Dr. Castle also attributed claimant's condition to smoking, but stated that claimant could continue to perform his usual coal mine work from a respiratory standpoint. Director's Exhibit 125; Employer's Exhibit 1. Pursuant to Section 718.204(b), (c), the administrative law judge rationally found the preponderance of the medical reports of record insufficient to establish that claimant suffers from a totally disabling respiratory impairment due to pneumoconiosis. *Adams v. Director, OWCP*, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*. Moreover, it was unnecessary for the administrative law judge to consider the exertional requirements of claimant's former coal mine employment since none of the medical reports of record phrased claimant's disability in terms of exertional or physical limitations. *See generally Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc).*

The administrative law judge is empowered to weigh the medical evidence and 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 inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). Consequently, we affirm the administrative law judge's findings pursuant to Sections 718.204(b), (c) and 725.310, as they are supported by substantial evidence and are in accordance with law. *See Grant, supra; Trent, supra; Perry, supra*.

[3] 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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Accordingly, the Decision and Order Denying Modification of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge