BRB No. 01-0828 BLA

ALICE WOOTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DON WOOTON MINING COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

David S. Panzer (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-BLA-0476) of Administrative Law Judge Joseph E. Kane denying benefits on a request for modification in 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] Claimant originally filed her claim for black lung benefits on September 2, 1995. Director's Exhibit 1. In a Decision and Order dated December 30, 1997, Administrative Law Judge Daniel J. Roketenetz credited claimant with four and one-half years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a) and 718.203 (2000), but insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied and claimant appealed.

[1]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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In a Decision and Order dated January 12, 1999, the Board affirmed the denial of benefits. *Wooton v. Director, OWCP*, BRB No. 98-0558 BLA (Jan. 12, 1999) (unpub.); Director's Exhibit 39. On June 9, 1999, within one year of the previous denial, claimant submitted new medical evidence and requested modification. Director's Exhibit 40. The district director denied claimant's request for modification and claimant requested a formal hearing. Judge Kane (the administrative law judge) adjudicated the merits of this case pursuant to the criteria of 20 C.F.R. Part 718 and found that, based on the newly submitted evidence and the evidence submitted in connection with the denied claim, claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[2] The administrative law judge further found that total disability was not established pursuant to 20 C.F.R. §718.204(b).[3] The administrative law judge thus found that since the previous denial, the newly submitted evidence, in conjunction with the previously submitted evidence, was insufficient to establish a change in conditions or a mistake in a determination of fact which would establish entitlement and thus warrant modification pursuant to 20 C.F.R. §725.310 (2000).[4] Accordingly, benefits and claimant's request for modification were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted x-ray and medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4), and thus erred in failing to find a change in conditions established pursuant to Section 725.310 (2000).[5] Claimant also contends that the administrative law judge erred in failing to find that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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[2]The administrative law judge found that a mistake in a determination of fact was made by Judge Roketenetz with regards to the evidence establishing the existence of pneumoconiosis in the prior denial.

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) (2001).

[4]The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 2000 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

[5]The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 the 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of claimant to establish any one of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties 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 administrative law judge properly considered this claim under the regulations set forth in Section 725.310 (2000) since this case involves a modification request of a claim that was previously denied. 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 occurred even where no specific allegation of either has been made by claimant.[6] 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. *Hess v. Director, OWCP*, 21 BLR 1-141 (1998); *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).

Claimant initially contends that the administrative law judge erred in finding that the newly submitted x-ray evidence, in conjunction with the previously submitted x-ray

[6]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*).

evidence, failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge selectively analyzed the evidence, improperly relied on the superior qualifications of the readers that did not interpret the x-rays as positive and improperly gave greater weight to the numerical superiority of the x-ray readings that were not positive. We disagree.

In his consideration of the x-ray evidence, the administrative law judge listed the newly submitted x-ray interpretations, which consisted of fifteen negative interpretations by B readers and/or Board-certified radiologists. Decision and Order at 4-5; Director's Exhibits 51-52; Employer's Exhibits 2, 4-5. The administrative law judge found that the the record contained a total of seventeen x-ray readings of five x-rays and that there was only one positive x-ray reading, which was by a B reader. Decision and Order at 8. The administrative law judge thus reasonably found that the preponderance of the x-ray evidence was negative and rationally accorded greater weight to the preponderance of the x-ray interpretations by the readers with superior qualifications in concluding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 8. Inasmuch as the administrative law judge weighed all of the x-ray evidence and reasonably concluded that it was insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

We further reject claimant's contention that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to Section 718.202(a)(4). The administrative law judge acted within his discretion as trier-of-fact in determining that Dr. Baker's opinion diagnosing coal workers' pneumoconiosis was based on his own positive x-ray reading. Decision and Order at 8. Moreover, the administrative law judge noted that Dr. Baker's qualifications were not in the record and acted within his discretion in according increased weight to the contrary opinion of Dr. Broudy, who examined claimant, buttressed by the opinion of Dr. Fino, based on their superior qualifications as Board-certified pulmonologists. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 8.

In addition, contrary to claimant's assertion that the administrative law judge ignored Dr. Becknell's status as claimant's treating physician, the administrative law judge acknowledged Dr. Becknell's statement that claimant suffered from possible chronic obstructive airways disease, but found that the diagnosis failed to establish the existence of pneumoconiosis since he did not relate the respiratory condition to coal mine employment. *See Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987); Decision and Order at 6; Director's Exhibit 48. Inasmuch as the

administrative law judge rationally concluded that the medical opinion evidence did not establish the existence of pneumoconiosis and his conclusion is supported by substantial evidence, we affirm his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Perry, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 8-9; Director's Exhibits 54-55; Employer's Exhibits 1, 5.

With respect to Section 718.204(b), 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). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge properly concluded that the newly submitted evidence was insufficient to establish total disability as no physician of record opined that claimant was suffering from a totally disabling respiratory or pulmonary impairment. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988), *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry, supra*; Decision and Order at 8-9. Contrary to claimant's contention, opinions finding no significant or compensable impairment need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, we reject claimant's argument that the administrative law judge failed to consider that she is totally disabled for comparable and gainful work because of her age, work experience and education since the newly submitted medical opinions do not establish the existence of a totally disabling respiratory impairment under Section 718.204(b). *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1995). 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) and were thus insufficient to establish a basis for modification pursuant to Section 725.310 (2000). *Nataloni, supra*; *Wojtowicz, supra*; *Kovac, supra*; *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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). 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) and was therefore insufficient to provide a basis for

modification.[7] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Worrell, supra*. 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*.

[7]The administrative law judge properly determined that claimant's prior claim was denied because the evidence of record was insufficient to establish that she suffered from a totally disabling respiratory impairment total disability. Decision and Order at 3, 7; Director's Exhibit 32.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge