BRB No. 02-0728 BLA

CHARLES PUKAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SCHUYLKILL CONTRACTING COMPANY, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
TRAVELERS 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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Charles Pukas, Pottsville, Pennsylvania, *pro se*.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2001-BLA-01117) of Administrative Law Judge Robert D. Kaplan denying modification and 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).[1] This case has been before the Board previously.[2] In its most recent decision, the Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to conduct a new hearing on claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000).[3] *Pukas v. Schuylkill Contracting Co*., 22 BLR 1-69 (2000).

On remand, the administrative law judge conducted a hearing and noted the proper standard for evaluating a request for modification. Decision and Order at 5-6. The administrative law judge found that claimant had twenty-three and one-half years of qualifying coal mine employment. Based on the date of filing, the administrative law judge considered entitlement in this living miner's claim pursuant to 20 C.F.R. Parts 718 and 727. Decision and Order at 2, 6-13; Director's Exhibit 35; Hearing Transcript at 9. The administrative law judge initially reviewed the prior denial of benefits, then considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish invocation of the interim presumption or the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§727.203(a)(2000), 718.202(a) or 718.204(b). Consequently, the administrative law judge found that because claimant had failed to establish either a mistake in fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000), his request for modification must be denied. Decision and Order at 6-14. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge because it is supported by substantial evidence. 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

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[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The procedural history of this case has previously been set forth in detail in the Board's prior decisions in *Pukas v. Schuylkill Contracting Co*., BRB No. 95-1041 BLA (Nov. 30, 1995)(unpublished); *Pukas v. Schuylkill Contracting Co.*, BRB No. 96-1413 BLA (July 29, 1997)(unpublished); *Pukas v. Schuylkill Contracting Co*., 22 BLR 1-69 (2000).

[3] The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

(1994); *McFall v. 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).

After considering 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 it contains no reversible error. The United States Court of Appeals for the Third Circuit held in *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), that when ruling on a petition for modification, the administrative law judge must determine whether the record demonstrates a change in conditions since the prior decision or a mistake of fact in the prior decision, even where no specific allegation of either has been made.[4] Furthermore, in determining whether claimant has established a basis for modification pursuant to Section 725.310 (2000), the administrative law judge must 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 reviewed the relevant evidence of record in the prior decision to determine if a mistake of fact was established and he properly concluded that the finding of no entitlement by Administrative Law Judge Ralph A. Romano was correct. Decision and Order at 3-4, 14; *Keating*, *supra*; *Nataloni, supra.* Considering the newly submitted evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) (2000). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

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

The administrative law judge properly weighed the newly submitted x-ray evidence of record, noting that all of the interpretations were by B-readers and Board-certified radiologists. *See Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Keating, supra*; Decision and Order at 7. The administrative law judge noted that although four of the seven x-ray readings were positive for the existence of pneumoconiosis, x-rays taken before and after the positive readings were interpreted by a similarly qualified radiologist as negative. Decision and Order at 7. The administrative law judge thus rationally found that the x-ray evidence was in equipoise and that claimant failed to carry his burden of proof to establish the existence of pneumoconiosis. *See Mullins, supra*; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); Decision and Order at 7-8; Director's Exhibits 182, 185; Employer's Exhibits 1, 2. We therefore affirm the administrative law judge's finding that the newly submitted evidence of record was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000) as it is supported by substantial evidence.[5] *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Edmiston, supra*; *Clark, supra*; *McMath, supra*; Decision and Order at 7-8.

Furthermore, the administrative law judge properly found that the newly submitted, valid pulmonary function study and blood gas study evidence of record was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2)-(3) (2000) and therefore insufficient to establish modification. *Mullins, supra*; *Keating, supra*; Decision and Order at 8-10; Director's Exhibits 182, 184, 186; Employer's Exhibit 3. The administrative law judge properly noted that the pulmonary function studies conducted by Dr. Dittman on December 29, 1998 and July 7, 2000 were valid. Decision and Order at 9; Director's Exhibits 184, 186. The administrative law judge found that the December 29, 1998 study produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. The July 7, 2000 study produced non-qualifying values. *Id*.

The administrative law judge rationally determined that the September 8, 1999 pulmonary function study was entitled to no weight as it was invalidated by Dr. Levinson, who provided a detailed commentary and possessed superior credentials. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Dillon v. Director,*

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[5] The administrative law judge properly found that the record does not contain any autopsy or biopsy evidence. *See* 20 C.F.R. §727.203(a)(1) (2000); Decision and Order at 7.

OWCP, 11 BLR 1-113 (1988); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Kuchwara, supra*; Decision and Order at 8-9; Director's Exhibits 182, 183, 187. The administrative law judge, within his discretion as fact-finder, further permissibly determined that the December 7, 2001 pulmonary function study was invalid as the administering physician, Dr. Dittman, questioned the reliability of the study because claimant's effort was inconsistent and less than optimal. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Winchester, supra*; *Lucostic, supra*; *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); Decision and Order at 9; Employer's Exhibit 3. In considering this evidence, the administrative law judge rationally accorded greatest weight to the July 2000 study, which produced non-qualifying values, because it was the most recent valid study and, therefore, was a more reliable indicator of claimant's current lung function. *See Lucostic, supra*; *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); Decision and Order at 9; Director's Exhibits 182, 184, 186; Employer's Exhibit 3. The administrative law judge correctly found that none of the newly submitted blood gas studies of record produced qualifying results. Decision and Order at 9-10; Director's Exhibits 184, 186; Employer's Exhibit 3. Consequently, we affirm the administrative law judge's finding that the newly submitted pulmonary function study and blood gas study evidence of record is insufficient to establish invocation pursuant to Section 727.203(a)(2)-(3) (2000).

With respect to Section 727.203(a)(4) (2000), the administrative law judge considered the newly submitted medical opinion evidence of record, *i.e.,* the opinions of Drs. Kraynak and Dittman, and permissibly found that the medical opinions were insufficient to establish invocation of the interim presumption. Decision and Order at 10-11; Director's Exhibits 182-184, 186, 188; Employer's Exhibit 3. While Dr. Kraynak opined that claimant suffers from total respiratory disability due to pneumoconiosis, Director's Exhibits 182, 183, Dr. Dittman opined that claimant does not have pneumoconiosis or any disabling or non-disabling pulmonary disease. Director's Exhibits 186, 188; Employer's Exhibit 3. The administrative law judge properly considered Dr. Kraynak's status as a treating physician, but noted that the doctor relied on an invalid pulmonary function study and stated that claimant was getting progressively worse, without explaining the bases for his conclusion. *See Evosevich v. Consolidation Coal* Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Collins, supra*; *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); Decision and Order at 10-11. Thus, the administrative law judge rationally accorded determinative weight to the opinion of Dr. Dittman over the contrary opinion of Dr. Kraynak because his opinion was more thorough and complete, with detailed discussions of various laboratory tests, claimant's other medical conditions, findings on physical examination and claimant's subjective complaints. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.,* 8

BLR 1-262 (1985); *Wetzel, supra*; *Lucostic, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 10-11. The administrative law judge also reasonably considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Dillon, supra*; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel, supra*; *Lucostic, supra*; *Fuller, supra*; Decision and Order at 10-11; Director's Exhibits 182, 183, 186, 188; Employer's Exhibit 3. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4) (2000) and therefore insufficient to establish modification pursuant to Section 725.310 (2000).[6] *Keating, supra*; *Kuchwara, supra*.

The administrative law judge also properly considered this claim, filed prior to March 31, 1980, under the permanent criteria of 20 C.F.R. Part 718, following a denial of benefits pursuant to 20 C.F.R. Part 727. *See Caprini v. Director, OWCP*, 824 F.3d 283, 10 BLR 2-180 (3d Cir. 1987). 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, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[6] We note that as this claim was properly adjudicated under 20 C.F.R. Part 727 (2000), the presumption at 20 C.F.R. §410.490 (2000) is inapplicable. *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991); *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991).

The administrative law judge weighed all of the newly submitted x-ray evidence of record and properly found that this evidence was insufficient to establish the existence of pneumoconiosis. *Mullins*, *supra*; *Keating, supra*; *Clark*, *supra*; Decision and Order at 7-8, 12. Further, the administrative law judge also properly noted that the record contained no autopsy or biopsy evidence. Decision and Order at 7, 12. Moreover, the administrative law judge permissibly concluded that the opinion of Dr. Dittman, that claimant did not suffer from pneumoconiosis, was entitled to the greatest weight as his opinion is more thorough and complete with detailed discussions of the laboratory tests, claimant's other medical conditions, findings on physical examination and claimant's subjective complaints.[7] *See Mancia, supra*; *Evosevich, supra*; *Collins, supra*; *Trumbo, supra*; Decision and Order at 10-11.

The administrative law judge, after weighing this evidence together, rationally concluded that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Trent, supra*; *Perry, supra*; Decision and Order at 12. The administrative law judge is empowered to weigh the medical evidence 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, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law. Decision and Order at 7, 11-12; *Williams, supra*; *Trent, supra*;

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[7] Although the administrative law judge did not specifically address the existence of pneumoconiosis pursuant to 20 C.F.R. §718.203(a)(3), remand of this case is not required. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because the administrative law judge permissibly found the valid pulmonary function studies and the blood gas study evidence were insufficient to establish total disability, the record does not contain evidence of cor pulmonale with right sided congestive heart failure and the administrative law judge reasonably determined that the opinion of Dr. Dittman, that claimant is not totally disabled, outweighed the contrary opinion of record. Hence, claimant failed to establish a totally disabling respiratory or pulmonary impairment. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985); Decision and Order at 12-13. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Perry, supra. Because claimant has failed to establish entitlement to modification of the prior decision pursuant to Section 725.310 (2000), we affirm the denial of benefits. *Keating*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge