BRB No. 01-0312 BLA

BRAFFARD ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLAYMON & ABRAM ADKINS COAL	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Bonnie Hoskins (Stoll, Keenon & Park LLP), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-0390) of Administrative Law Judge Joseph E. Kane rendered 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 found twenty-six years and

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the

ten months of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Considering the newly submitted evidence, in conjunction with the previously submitted evidence in this request for modification, the administrative law judge concluded that the evidence failed to establish the existence of pneumoconiosis and total disability, elements previously adjudicated against claimant, and therefore found that neither a mistake in a determination of fact nor a change in conditions had been shown. The administrative law judge, therefore, found that claimant failed to establish a basis for modification. Accordingly, benefits were denied.

On appeal, claimant contends that the evidence is sufficient to establish a change in conditions, *i.e.*, the existence of pneumoconiosis and total disability, and therefore a basis for modification. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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 this 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).

---

preliminary injunction. *National Mining Association v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

[2] Claimant filed his claim for benefits on November 4, 1988. This claim was denied by the district director on May 26, 1998, for failure to establish the existence of pneumoconiosis and total disability. Director's Exhibits 1, 17. Claimant filed a request for modification on May 5, 1999, which was denied by the district director on June 17, 1999 and October 6, 1999. Director's Exhibits 18, 19, 32, 35. The case was subsequently forwarded to the Office of Administrative Law Judges on January 14, 2000, pursuant to claimant's request for a hearing on modification.

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 to establish any 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*).

In determining whether modification has been established 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); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held, in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been made.

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge rationally found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)(2000) since the earliest x-ray, dated October 27, 1993, and the most recent x-ray, dated November 13, 1999, were read solely as negative for the existence of pneumoconiosis, while only one x-ray, the March 23, 1999 x-ray, was read solely as positive. The administrative law judge further found that the February 9, 1998 x-ray was read as positive by physicians with no special qualifications and as negative by two dually qualified physicians, and that while the May 12, 1999 x-ray was read as positive by one dually qualified physician, it was found unreadable by two dually qualified physicians. Director's Exhibits 11, 14-16, 31, 39, 41, 44; Employer's Exhibit 1. Thus, contrary to claimant's contention, we conclude that the administrative law judge rationally found the x-ray evidence insufficient to establish the existence of pneumoconiosis based on the preponderance of negative readings by physicians with superior qualifications. Decision and Order at 12; *Staton v. Norfolk & Western Ry. 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); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom.*

Greenwich Collieries v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The administrative law judge also considered all of the medical opinion evidence of record and permissibly found it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000).[3] The administrative law judge permissibly accorded greater weight to the opinions of Drs. Fino, Castle and Renn, finding no pneumoconiosis, than to the contrary opinions of Drs. Sundaram and Fritzhand, because he found the former better supported by the objective evidence of record. The administrative law judge also permissibly accorded less weight to Dr. Sundaram's opinion because he failed to consider claimant's cardiac problem, which was noted by Drs. Fritzhand, Dahhan and Renn, and because he failed to explain how his finding of shortness of breath was evidence of pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 147 n.2 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1994). Further, contrary to claimant's contention, Dr. Renn was aware of claimant's coal mining history. Director's Exhibit 46. Nor, contrary to claimant's contention, was Dr. Renn's opinion entitled to less weight because he saw and examined claimant for employer. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 36 (1991)(*en banc*). Moreover, the administrative law judge was not required to accord greater weight to the opinion of Dr. Sundaram merely because he was claimant's treating physician. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Accordingly, we affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis and therefore a basis for modification on that ground.

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 Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark, supra*.

[3] The medical opinions of record consist of the reports of Drs. Wright, Dahhan, Castle and Renn, finding no pneumoconiosis, Director's Exhibits 12, 43, 45, 46, the report of Dr. Sundaram diagnosing pneumoconiosis due to prolonged exposure to coal dust, Director's Exhibit 11, and the report of Dr. Fritzhand diagnosing pneumoconiosis, Director's Exhibits 30, 31.

Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis. Furthermore, because the administrative law judge has considered all the evidence relevant to the existence of pneumoconiosis and found that it has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument on total disability. *See Trent, supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge