

BRB No. 98-0273 BLA

PETE BRAY	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
LEECO, INCORPORATED	)	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 on Remand of Daniel J. Roketenetz,  
Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp, Inverness, Florida, for claimant.

Timothy J. Walker (Reece & Jensen), London, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-BLA-327) of Administrative Law Judge Daniel J. Roketenetz 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 involves a request for modification and is before the Board for the second time.<sup>1</sup> On remand, the

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<sup>1</sup> Claimant filed his claim for benefits on January 12, 1987. On August 24, 1989, an administrative law judge found that claimant established eight and three-quarter years of coal mine employment but failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Benefits were denied. On November 21, 1989, claimant filed a second claim, which was treated as a request for modification. The administrative law judge considered the new evidence and determined that claimant failed to establish modification pursuant to 20 C.F.R. §725.310. Claimant appealed to the Board, which determined that the administrative law

administrative law judge credited claimant with ten and one-half years of coal mine employment, and considered the newly submitted evidence in conjunction with the previously submitted evidence to find that it failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge therefore concluded that claimant did not establish a basis for modification in that he did not establish a mistake in fact or change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge's findings are erroneous and that the administrative law judge also should have considered lay testimony contained in the record. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.<sup>2</sup>

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).

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

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judge failed to consider the entire record, focusing only on the newly submitted evidence, and therefore vacated the administrative law judge's findings and remanded for further consideration of the evidence. *Bray v. Leeco, Inc.*, BRB No. 92-1095 BLA (Jan. 31, 1994)(unpub.). Employer requested reconsideration. The Board granted employer's motion for reconsideration, held that employer had raised no new arguments, and therefore denied the relief requested. *Bray v. Leeco, Inc.*, BRB No. 92-1095 (Sep. 7, 1995)(unpub.)(*en banc*).

<sup>2</sup> The administrative law judge's findings regarding the length of coal mine employment and pursuant to 20 C.F.R. §718.202(a)(2) and (3) are unchallenged on appeal, and are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 of these 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 on Remand, 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 there is no reversible error contained therein. In the instant case, claimant makes general allegations of error that the administrative law judge was presented with equally probative, conflicting x-ray evidence for which he failed to provide an adequate rationale for resolving against claimant. Claimant's Brief at 14. Claimant contends that the administrative law judge may not resolve the evidence by relying on the diagnoses rendered by the majority of physicians. Claimant also contends that the medical opinions which diagnosed pneumoconiosis are "better" and establish that claimant should be entitled to benefits. Claimant's Brief at 15. Claimant further contends that the administrative law judge did not discuss lay testimony in the record and concludes by stating that the administrative law judge's finding that claimant is not totally disabled is erroneous.<sup>3</sup> Claimant's arguments are without merit. The administrative law judge found that the preponderance of the x-ray evidence initially submitted was negative for pneumoconiosis. He also found that among the x-rays submitted on modification, the majority of readings by dually qualified physicians who were board-certified radiologists and B-readers were negative. With regard to the positive readings in the record, the administrative law judge found that these interpretations were made by physicians without special qualifications, did not specifically diagnose pneumoconiosis, or did not address their findings according to the ILO classification system. Decision and Order at 19. Based on the both the quality and quantity of the negative interpretations, the administrative law judge rationally determined that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent, supra*; *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984).

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<sup>3</sup> The administrative law judge did not reach the issue of disability as he found that claimant did not establish pneumoconiosis.

At Section 718.202(a)(4), the administrative law judge permissibly accorded less weight to the opinions of Drs. Baker and Bushey, that claimant suffered from pneumoconiosis, as their opinions were dated and based in large part on their positive x-ray interpretations which were read as negative by more qualified readers. *See Worhach, supra; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); Decision and Order at 20. In addition, the administrative law judge properly gave less weight to Dr. Waits' opinion because it was brief, conclusory, unsupported by the objective evidence and equivocal, Dr. Mandviwala's opinion because he noted an inflated coal mine employment history and didn't discuss the etiology of claimant's chronic obstructive pulmonary disease, and the hospital records as they were unclear whether references to pneumoconiosis and chronic obstructive pulmonary disease were comments claimant himself made or were medical determinations. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). The administrative law judge then permissibly accorded the greatest weight to Dr. Broudy's well-documented and well-reasoned 1996 opinion, that claimant does not have pneumoconiosis, in light of his qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984). The administrative law judge also found that this opinion was supported by the opinions of Drs. Jarboe and Myers, who are also highly qualified, and by Dr. Broudy's own deposition testimony. As the administrative law judge permissibly weighed the medical opinions, we affirm his conclusion that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).<sup>4</sup> 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). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish a change in conditions. Furthermore, the administrative law judge properly reviewed the entire record and permissibly concluded that there was no mistake in fact in the prior denial. Inasmuch as the administrative law judge's findings are supported by substantial evidence and are rational, we affirm his conclusion that claimant failed to establish a basis for

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<sup>4</sup> Claimant's contention regarding the lay testimony is without merit inasmuch as lay testimony alone cannot establish the existence of pneumoconiosis at 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

modification pursuant to Section 725.310. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Accordingly, the administrative law judge Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge