BRB No. 00-0116 BLA

JOHN CANTRELL (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MORGAN COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-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 Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Michael R. Dowling, Ashland, Kentucky, for claimant.

Amy E. Wilmot (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (98-BLA-0353) of

[1] The claimant's widow notified the Board on November 6, 1999, that claimant died on October 4, 1999. She is pursuing his claim.

Administrative Law Judge Donald W. Mosser 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). The administrative law judge found that claimant established eight years of coal mine employment, and based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge initially found that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(c), but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Director's Exhibit 46. Accordingly, benefits were denied.[2] Pursuant to claimant's request for modification, the administrative law judge reviewed his prior Decision and Order and the newly submitted evidence and determined that claimant failed to establish that a mistake in a determination of fact had been made or that claimant established a change in conditions, *i.e.*, an element of entitlement previously adjudicated against him pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied again. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

On appeal, claimant contends that the administrative law judge erred in failing to award benefits.[3] Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are

[2] Claimant appealed this decision to the Board, but because he subsequently filed a Motion for Modification, the Board, by Order dated July 17, 1997, dismissed claimant's appeal and remanded the case to the district director for modification proceedings.

[3] We affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact and his finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

rational and 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).

Initially, claimant contends that the administrative law judge erred in finding only eight years of coal mine employment, contending that he has established at least ten years. At the hearing, claimant alleged twenty years of coal mine employment, while Social Security records show 6.25 years.[4] Hearing Transcript at 29; Director's Exhibit 3. Employer conceded eight years.[5] In his initial Decision and Order, the administrative law judge found that employer conceded "a little bit more coal mine employment as self-employment" over the Social Security records, and found that the miner's testimony supported additional coal mine employment, "probably amounting to between 1.5 and 2 years." Initial Decision and Order at 4. The administrative law judge, therefore, credited claimant with a total of eight years of coal mine employment. Initial Decision and Order at 4. As claimant failed to submit additional credible evidence regarding length of coal mine employment on modification, the administrative law judge reviewed the record, determined that claimant is a "poor historian," and reaffirmed his finding of eight years of coal mine employment. Decision and Order on modification at 4; Hearing Transcript at 29. Accordingly, as the administrative law's finding of eight years of coal mine employment is based on a reasonable method of calculation and is supported by substantial evidence, it is affirmed. *See Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Hall v. Director, OWCP*, 7 BLR 1-696 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984).

[4] The administrative law judge found that the Director conceded 6.25 years of coal mine employment; however, at the hearing, the Director actually conceded 6.27 years, and at least a year for Morgan. Hearing Transcript at 20; Director's Exhibit 39. This error is harmless; however, as the administrative law judge actually found more than 6.27 years. *Skrack, supra*.

[5] In its post-hearing brief submitted after the initial Decision and Order, and in it's current brief before the Board, employer argues that claimant established eight years of coal mine employment. Director's Exhibit 42 at 5; Employer's Brief at 5.

Claimant next contends that the administrative law judge erred in rejecting the opinion of Dr. O'Dell, his treating physician. We disagree. Dr. O'Dell diagnosed coal workers' pneumoconiosis, and stated that claimant suffers from a chronic lung disease related, in part, to the inhalation of coal dust. Claimant's Exhibits 4, 5, 6. Drs. Branscomb and Fino, on the other hand, found no coal workers' pneumoconiosis and no evidence of occupational disease. Employer's Exhibits 1, 2, 3, 4. In weighing the medical opinions, the administrative law judge found that although Dr. O'Dell diagnosed the existence of

pneumoconiosis, he "testified at his deposition that he had only made a 'historical diagnosis' of the condition based on what claimant had told him and on a previous physician's report." Decision and Order on modification at 9; Claimant's Exhibit 6 at 14.

Contrary to claimant's contention, the administrative law judge is not required to automatically award greater weight to the opinion of a treating physician. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tedesco v. Director, OWCP*, 18 BLR 1-104 (1994). Moreover, in the instant case, the administrative law judge permissibly credited the contrary opinions of Drs. Branscomb and Fino based on their superior qualifications, and the fact that their opinions were consistent with the objective evidence of record. *Church v. Eastern Associated Coal* Co., 20 BLR 1-8 (1996); *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We, therefore, affirm the administrative law judge's weighing of the medical opinions at Section 718.202(a)(4) as rational and supported by substantial evidence, and affirm his finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a). *See Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J. concurring.).

Next, the administrative law judge noted that in his previous Decision and Order, he had found that claimant established total disability at Section 718.204(c), but failed to establish total disability due to pneumoconiosis at Section 718.204(b). Pursuant to claimant's request for modification, the administrative law judge properly found that as the newly submitted evidence failed to establish the presence of pneumoconiosis, claimant could not establish that pneumoconiosis contributed at least, in part, to his disability. *See* 20 C.F.R. §718.201; *Peabody Coal Co. v. Smith*, 127, F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203(6th Cir. 1997). Therefore, after reviewing all the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge properly found that claimant failed to establish any element of entitlement previously found against him, and had not, therefore, established a change in conditions and basis for modification pursuant to *Nataloni, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge