BRB No. 00-0184 BLA

CONDOR LOCKHARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG BOTTOM COAL COMPANY	)	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 - Denial of Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Condor Lockhard, Turkey Creek, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Request for Modification (99-BLA-0017) of Administrative Law Judge Robert L. Hillyard on a duplicate 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 instant case involves claimant's fourth claim for benefits which was filed on October 5, 1994.[1]

[1] Claimant filed his initial claim for benefits on April 29, 1981, which was denied August 20, 1981. Director's Exhibit 35. Claimant filed a second claim on September 21, 1988, which was denied on March 3, 1989. Director's Exhibit 36. Claimant filed a third claim on December 12, 1990, which was denied on June 4, 1991, as claimant failed to

Administrative Law Judge Pamela Lakes Wood found that claimant failed to establish a material change in conditions pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) since the denial of the prior claim, Director's Exhibits 1, 48, and, accordingly, denied benefits on March 31, 1998. Claimant did not appeal this denial. On May 5, 1998, claimant filed a timely request for modification. Pursuant to claimant's request for modification, after considering the evidence of record and Judge Wood's previous findings, Administrative Law Judge Robert L. Hillyard (the administrative law judge) determined that claimant established twelve years of qualifying coal mine employment. Decision and Order at 4. The administrative law judge further found that claimant failed to establish a change in conditions or a mistake in a determination of fact because the evidence did not establish the presence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), or total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge found that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 and denied benefits. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, is not participating 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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).

Initially, we note that the administrative law judge properly found that as none of the newly submitted x-ray readings of record were positive for the existence of pneumoconiosis, they are insufficient to establish the presence of pneumoconiosis at Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1). In addition, the administrative law judge properly determined that claimant cannot establish the existence of pneumoconiosis at Section 718.202(a)(2) and (3), as the record contains no biopsy or autopsy evidence, and because the presumptions contained at Sections 718.304, 718.305, and 718.306 are unavailable to claimant. 20 C.F.R. §718.202(a)(2), (3).

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establish the presence of pneumoconiosis arising from coal mine employment, or total disability due to pneumoconiosis. Director's Exhibit 37.

The evidence of record also contains the newly submitted medical opinions of five physicians. Of the five, Drs. Dahhan, Fino, Jarboe and Broudy found that claimant did not have coal workers' pneumoconiosis. Employer's Exhibits 3, 5, 6, 9; Director's Exhibit 73. Dr. Hussain, in a hospital discharge summary, stated that claimant had evidence of chronic obstructive pulmonary disease, but failed to relate this respiratory condition to claimant's coal mine employment. Director's Exhibit 51. Thus, the administrative law judge properly found that Dr. Hussain's opinion was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See* 20 C.F.R. §718.201; *Handy v. Director, OWCP*, 16 BLR 1-73 (1990). We therefore affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). 20 C.F.R. §781.202(a)(4).

The administrative law judge next considered the newly submitted evidence of record at Section 718.204(c), and properly found that none of the new pulmonary function studies or blood gas studies established total disability. 20 C.F.R. §718.204(c)(1), (2); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); Director's Exhibits 51, 73.[2] Further, as none of the physicians' opinions of record termed claimant totally disabled, the administrative law judge properly determined that they were insufficient to establish total disability at Section 718.204(c)(4). *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd* 9 BLR 1-104 (1986). Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Dahhan, Fino, Jarboe and Broudy, all of whom found that claimant retained the respiratory capacity to perform his usual coal mine employment, as their opinions were well-reasoned and well-documented, and they had better qualifications than Dr. Hussain.[3] *See Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996). We, therefore, affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987).

As claimant failed to establish any element of entitlement previously adjudicated against him, the administrative law judge properly found that claimant failed to establish a

[2] Because the record contains no evidence of cor pulmonale with right sided congestive heart failure, claimant cannot establish total disability at Section 718.204(c)(3). 20 C.F.R. §718.204(c)(3).

[3] Although Dr. Hussain is claimant's treating physician, the administrative law judge is not required to accord greater weight to his opinion on that basis alone. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

mistake in determination of fact or a change in conditions, and therefore failed to establish modification pursuant to Section 725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Accordingly, the Decision and Order - Denial of Request for Modification 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