BRB No. 99-1076 BLA

WILLIE R. CORNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	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 Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-BLA-0052) of 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). Claimant filed a claim in September 1994. Director's Exhibit 1. Administrative Law Judge Robert L. Hillyard issued a Decision and Order - Denial of Benefits on March 24, 1997. Director's Exhibit 44. Judge Hillyard credited claimant with twenty-nine years and three months of coal mine employment. Further, Judge Hillyard found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, the administrative law judge found the medical evidence of record insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, Judge Hillyard denied benefits. Claimant appealed, and the Benefits Review Board, in a Decision and Order issued February 4, 1998, affirmed Judge Hillyard's decision to credit claimant with twenty-nine years and three months of coal mine employment. Further, the Board affirmed

Judge Hillyard's findings at 20 C.F.R.§§718.202(a)(2) and (a)(3) and 718.204(c). Accordingly, the Board affirmed Judge Hillyard's denial of benefits. Director's Exhibit 52.

Claimant filed a timely request for modification of the Board's denial on March 19, 1998. Director's Exhibit 53; 20 C.F.R. §725.310. Administrative Law Judge Donald W. Mosser (the administrative law judge) accepted Judge Hillyard's finding of twenty-nine years and three months of coal mine employment as accurate. Further, the administrative law judge found, with respect to Section 718.202(a)(1), that the newly submitted evidence failed to establish pneumoconiosis, and also that the prior finding with respect to pneumoconiosis was not a mistake of fact. Decision and Order at 6-7. With regard to Section 718.202(a)(2), the administrative law judge found that there was no biopsy evidence in the record. With regard to Section 718.202(a)(3), the administrative law judge found that the presumptions described in 20 C.F.R. §§718.304, 718.305 and 718.306 were not applicable. The administrative law judge found, with respect to Section 718.202(a)(4), that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis. The administrative law judge stated that, when viewed in conjunction with the previously submitted evidence, he found that claimant did not establish a change in his condition under Section 718.202(a) or that a mistake of fact was made by the administrative law judge in finding the record did not prove the existence of pneumoconiosis.

In addition, the administrative law judge found that if claimant could establish the existence of pneumoconiosis, claimant established that his pneumoconiosis was caused at least in part by his coal mine employment, pursuant to 20 C.F.R. §718.203(b). Decision and Order at 8. Further, the administrative law judge found that the newly submitted pulmonary function study evidence failed to establish total disability pursuant to Section 718.204(c)(1), and when viewed together with the previous ventilatory studies, the prior finding of no total disability remained unchanged, and that no mistake of fact was established. The administrative law judge found that the one new blood gas study of record failed to yield qualifying values. Thus, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(c)(2) based either on the newly submitted evidence alone or in conjunction with the prior studies of record. The administrative law judge found that total disability was not established under Section 718.204(c)(3) because there was no evidence of pneumoconiosis and cor pulmonale with right sided congestive heart failure. Moreover, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(c)(4). The administrative law judge found that when the newly submitted evidence was considered in conjunction with the record as a whole, the prior finding of no total disability was not a mistake of fact. In conclusion, the administrative law judge stated that claimant had not established a change in condition since the prior denial, nor did claimant establish a mistake in fact. Accordingly, the administrative law judge denied claimant's motion for modification and denied benefits.

Claimant appeals, arguing that the administrative law judge erred in evaluating the x-ray evidence of record, *see* 20 C.F.R. §718.202(a)(1), in evaluating the medical report evidence of record, *see* 20 C.F.R. §718.202(a)(4), and in finding that claimant was not totally disabled, *see* 20 C.F.R. §718.204(c). Employer has filed a response brief supporting affirmance of the administrative law judge's Decision and Order Denying Benefits. The Director, Office of Workers' Compensation

Programs, has submitted a letter stating that he will not respond to the present appeal unless specifically requested to do so by the Board.[1]

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 the 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).

Claimant may establish modification by establishing either a change in conditions since the prior denial or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established pursuant to Section 725.310, an 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 at least one element of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, the fact-finder has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see also Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's

[1] We affirm, as uncontested on appeal, the administrative law judge's finding that claimant established twenty-nine years and three months of coal mine employment. Decision and Order at 3; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We affirm the administrative law judge's finding, pursuant to 20 C.F.R. §718.202(a)(2), that there is no biopsy evidence in the record to consider, as unchallenged on appeal. *Skrack*, *supra*. We also affirm, as unchallenged on appeal, the administrative law judge's finding that the presumptions referred to in 20 C.F.R. §718.202(a)(3) are not applicable. *Skrack*, *supra*. Further, we affirm, as uncontested on appeal, the administrative law judge's finding regarding causation of pneumoconiosis at 20 C.F.R. §718.203(b). Decision and Order at 8; *Skrack*, *supra*.

claim, claimant must establish the existence of 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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With regard to Section 718.202(a)(1), claimant argues initially that the administrative law judge erred in relying almost solely on the qualifications of the physicians providing the x-ray interpretations, while the Board has held that, in weighing the x-ray evidence, the administrative law judge need not defer to a doctor with superior qualifications. Claimant's Brief at 4. This argument has no merit. The administrative law judge stated:

The newly submitted evidence consists of four readings of two separate x-rays. Only Dr. Bushey's reading was read as positive for pneumoconiosis. Significantly, the March 10, 1998 and December 7, 1998 x-rays were each reread by B-readers, two of whom are also Board-certified radiologists. I place great weight on their interpretations.

Decision and Order at 6. The administrative law judge acted properly in crediting the x-ray opinions of the physicians on the basis of their qualifications. *See Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59-60, 19 BLR 2-271, 2-279-281 (6th Cir. 1995); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985).

Next, claimant argues that the administrative law judge erred in placing substantial weight on the numerical superiority of x-ray interpretations. Claimant states that the Board has held that an administrative law judge need not accept as conclusive the numerical superiority of x-ray interpretations. Claimant's Brief at 4. This argument lacks merit inasmuch as the administrative law judge considered more than merely the numerical superiority of the negative readings. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Also, in regard to Section 718.202(a)(1), claimant contends that the administrative law judge may have selectively analyzed the x-ray evidence, and that an administrative law judge must weigh all relevant medical evidence. Claimant's Brief at 4-5. This contention is without merit, since it does not amount to a specific assertion of error on the part of the administrative law judge. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Since claimant raises no further assertions of error at Section 718.202(a)(1), we affirm the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis, and also that in viewing the record as a whole, the prior finding with respect to pneumoconiosis was not a mistake of fact with regard to Section 718.202(a)(1). *See Skrack, supra*.

With regard to Section 718.202(a)(4), the administrative law judge reasonably credited Dr. Broudy's opinion above the opinions of Drs. Bushey and Sullivan. The administrative law judge stated that Dr. Broudy's opinion was the best reasoned and documented of record. Decision and Order at 7. The administrative law judge reasonably stated that Dr. Broudy conducted the most

thorough examination of the three physicians, including accurate smoking and coal mine employment histories. Decision and Order at 7. In addition, as a basis for crediting Dr. Broudy's opinion, the administrative law judge properly stated that Dr. Broudy had the benefit of having examined claimant in 1994 as well as 1998, thus providing him with a four-year span over which to observe any deterioration of health. Decision and Order at 7; Employer's Exhibit 1. We affirm the administrative law judge's finding that Dr. Broudy's opinion is the best reasoned and documented. *See* Director's Exhibits 53, 57; Employer's Exhibit 1; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the administrative law judge properly stated that Dr. Broudy possessed superior qualifications in the area of pulmonary medicine. Decision and Order at 8; *see Staton, supra*. According to the record, Dr. Broudy is Board-certified in internal medicine, including a subspecialty in pulmonary medicine. Employer's Exhibit 1. Dr. Sullivan's qualifications do not appear in the record. Director's Exhibit 57. Dr. Bushey's qualifications do not appear in the record. Director's Exhibit 53. Since we affirm the administrative law judge's crediting of Dr. Broudy's opinion over the opinions of Drs. Bushey and Sullivan, we decline to address claimant's specific arguments pertaining to the administrative law judge's discounting of Drs. Bushey and Sullivan. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Thus, we affirm the administrative law judge's finding that claimant did not establish a change in condition at Section 718.202(a)(4). Moreover, we find no error in the administrative law judge's conclusion that the prior administrative law judge made no mistake of fact in finding the record did not prove the existence of pneumoconiosis. The administrative law judge, within a proper exercise of his discretion, concluded:

When viewed in conjunction with the previously submitted evidence, I find the claimant has not established a change in his condition under Section 718.202(a) or that a mistake of fact was made by the administrative law judge in finding the record did not prove the existence of pneumoconiosis.

Decision and Order at 8. Inasmuch as we affirm this finding, we decline to address any argument by claimant regarding the administrative law judge's findings at Section 718.204(c) as any error in those findings would be harmless. Thus, we further affirm the administrative law judge's denial of modification. *See Trent, supra*; *Perry, supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

REGINA C. McGRANERY
Administrative Appeals Judge