BRB No. 99-0115 BLA

WILLIAM HANEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROCKWOOD ENERGY AND MINERAL 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Charles F. Gilchrest, Sharon, Pennsylvania, for claimant.

William J. Walls (Marshall, Dennehey, Warner, Coleman and Goggin), Pittsburgh, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1997-BLA-1776) of Administrative Law Judge Michael P. Lesniak denying modification and 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 has been before the Board previously. Claimant filed his first claim for black lung benefits on September 12, 1980, which was denied, and he filed his second claim for benefits on June 20, 1991, which was also denied. Decision and Order at 2; Director's Exhibits 56-57. The instant claim was filed on November 17, 1993, and in a Decision and Order dated June 5, 1996, Administrative Law Judge Thomas M. Burke, based on a stipulation by the parties, credited claimant with fifteen years and nine months of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R.

Part 718. Director's Exhibit 78. Administrative Law Judge Burke found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and thus that a material change in conditions since the previous denial was established pursuant to 20 C.F.R. §725.309(d), *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), but further found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Benefits were accordingly denied and claimant appealed to the Board, but also submitted additional evidence and requested modification. By Order dated October 30, 1996, the Board dismissed the appeal and remanded the case to the district director for modification proceedings. Director's Exhibit 86. The district director denied modification and the case was forwarded to the Office of Administrative Law Judges. In his Decision and Order dated September 24, 1998, Administrative Law Judge Lesniak found that the newly submitted evidence of record, in conjunction with the evidence submitted in the prior proceedings, was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus found that since the previous denial, the evidence was insufficient to establish a change in conditions. The administrative law judge also considered all of the evidence previously considered by Administrative Law Judge Burke in the previous denial of benefits and concluded that there was no mistake in a determination of fact therein. Thus, the administrative law judge concluded that claimant was not entitled to modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[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*

[1] Inasmuch as the administrative law judge's length of coal mine employment finding as well as his finding that claimant suffers from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) are not challenged on appeal, we affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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)(*en banc*).

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge permissibly determined that the more recent pulmonary function studies were more probative of claimant's pulmonary condition than the older studies. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984). Claimant's contention that the August 4, 1997, qualifying pulmonary function study was sufficient to establish total disability is without merit. The administrative law judge permissibly found that the pulmonary function study evidence was insufficient to establish total disability by a preponderance of the evidence pursuant to Section 718.204(c)(1) after correctly noting that the pulmonary function study results varied considerably and that the validity of the August 4, 1997, study had been questioned.[2] Decision and Order at 3, 7-8; Claimant's Exhibit 1. Consequently, we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(c)(1).[3]

[2] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

[3] Inasmuch as the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(2)-(3) are not challenged on appeal, we affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Moreover, in determining whether total disability was demonstrated pursuant to Section 718.204(c)(4), the administrative law judge permissibly accorded less weight to the medical opinion of Dr. Fazioli, that claimant was totally disabled due to pneumoconiosis, since the administrative law judge found his opinion unsupported by objective evidence and his conclusion inadequately explained. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); Decision and Order at 8; Director's Exhibit 85; Claimant's Exhibit 1. Furthermore, the administrative law judge reasonably gave determinative weight to the medical opinion of Dr. Fino, that claimant did not have a totally disabling respiratory impairment, because he explained how he relied on the objective studies to reach his conclusion and his opinion was better supported by the objective evidence of record. *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Moreover, the administrative law judge did consider Dr. Fazioli's status as a treating physician, but reasonably gave his opinion less weight. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). In addition, the administrative law judge was not required to reject Dr. Fino's opinion of no total disability on the basis that he did not diagnose pneumoconiosis since a diagnoses of pneumoconiosis or bronchitis does not go to the issue of impairment. *Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J., concurring and dissenting). 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). Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence, in conjunction with all of the other evidence of record, is insufficient to establish total respiratory disability pursuant to Section 718.204(c), and thus, insufficient to establish a change in conditions. Furthermore, the administrative law judge properly reviewed the entire record and concluded that there was no mistake in fact in the prior denial. Therefore, we affirm the administrative law judge's finding that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 as it is supported by substantial evidence and is in accordance with law. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Accordingly, the Decision and Order of the administrative law judge denying modification and benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge