BRB No. 99-0674 BLA

OSCAR CHASTEEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
NEW HARLAN BLOCK COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

W. William Prochot (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 appeals the Decision and Order (1998-BLA-588) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits 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 administrative law judge noted that the district director credited claimant with ten years of coal mine employment, and adjudicated this duplicate

claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found that the recent evidence submitted with the instant claim was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1)-(4). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the recent evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), and thus erred in failing to find a material change in conditions established pursuant to 20 C.F.R. §725.309(d). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[2]

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).

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-

[1] Claimant filed his first claim for black lung benefits on March 30, 1992, which was denied by the district director on September 14, 1992. Director's Exhibit 43. Claimant filed the instant claim on August 20, 1996. Decision and Order at 3; Director's Exhibit 1.

[2] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties 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. Claimant initially contends that the administrative law judge erred in finding that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge selectively analyzed the evidence, improperly relied on the superior qualifications of the readers that did not interpret the x-rays as positive and improperly gave greater weight to the numerical superiority of the x-ray readings that were not positive. We disagree. In his consideration of the x-ray evidence, the administrative law judge noted that there were twenty-four negative x-ray readings and only three positive x-ray readings submitted with the most recent claim and that all of the negative x-ray readings were by B readers, six of whom were also board-certified radiologists. Decision and Order at 5-6. The administrative law judge thus reasonably found that the preponderance of the x-ray evidence was negative and rationally accorded greater weight to the preponderance of the x-ray interpretations by the readers with superior qualifications in concluding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6. Inasmuch as the administrative law judge weighed all of the x-ray evidence and reasonably concluded that it was insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

We further reject claimant's contention that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to Section 718.202(a)(4). The administrative law judge acted within his discretion as trier-of-fact in determining that the probative value of the opinions of Drs. Bushey, Myers, Baker and Vaezy diagnosing coal workers' pneumoconiosis was undermined since the physicians relied in part upon their own positive x-ray readings which the administrative law judge determined were erroneous based on the substantial number of contrary readings by better qualified physicians. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 10. Moreover, while acknowledging that Dr. Baker's opinion was entitled to added weight based on his credentials as a pulmonary specialist, the administrative law judge ultimately discounted the opinion because Dr. Baker substantially understated claimant's smoking history. Similarly, the administrative law judge gave less weight to Dr. Bushey' s opinion because the physician did not specify the extent of claimant's smoking

history. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 10. In addition, the administrative law judge acted within his discretion in according greater weight to contrary opinions of Drs. Broudy and Dahhan, buttressed by the opinion of Dr. Vuskovich, based on their superior qualifications as pulmonary specialists, Dr. Dahhan's status as claimant's treating physician, and Dr. Broudy's comprehensive review of the medical record. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 10. Inasmuch as the administrative law judge rationally concluded that the medical opinion evidence did not establish the existence of pneumoconiosis and his conclusion is supported by substantial evidence, we affirm his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) . *Clark*, *supra*; *Perry*, *supra*; *Lucostic*, *supra*; *Oggero*; *supra*.

With respect to Section 718.204(c), the administrative law judge also rationally determined that the recently submitted pulmonary function study and blood gas study evidence, along with the medical opinion evidence of record, was insufficient to establish total disability. In considering whether total disability was established by the recently submitted medical opinions of record under Section 718.204(c)(4), the administrative law judge permissibly accorded diminished weight to the opinion of Dr. Baker since he found that the underlying documentation did not support the physician's conclusions, *i.e.*, the pulmonary function studies was invalid and the blood gas study was non-qualifying. *Clark*, *supra*; *Lucostic*, *supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 12. Moreover, the administrative law judge permissibly gave greater weight to the opinions of Drs. Myers, Vuskovich, Broudy, Dahhan and Fino, that claimant has no significant pulmonary impairment and is capable of doing his usual coal mine employment from a respiratory standpoint, since he found their opinions were supported by the objective evidence and since Drs. Broudy, Dahhan and Fino were also pulmonary specialists. *Clark*, *supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel*, *supra*; Decision and Order at 12-13. We reject claimant's argument that the administrative law judge failed to consider that he is totally disabled for comparable and gainful work because of his age, work experience and education since the newly submitted medical opinions do not establish the existence of a totally disabling respiratory impairment under Section 718.204(c).[3] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18

[3] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual

(1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1995). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray*, *supra*, 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). The administrative law judge's finding that the weight of the newly submitted medical opinions of record were insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4) is supported by substantial evidence and thus is affirmed. Furthermore, since the administrative law judge 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). As claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), essential elements of entitlement, the administrative law judge correctly found that claimant failed to establish a material change in conditions since the prior denial pursuant to Section 725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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coal mine employment . See also 20 C.F.R. §718.204(b)(1), (b)(2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge