BRB No. 99-0802 BLA

ALLEN MAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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 Request for Modification (98-BLA-0583) 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). In his Decision and Order,

[1] Claimant is Allen May, who filed his first application for benefits on January 20, 1987. Director's Exhibit 28. This claim was finally denied by Rudolf J. Jansen in a Decision and Order issued on November 23, 1988. Director's Exhibit 28. Claimant did not pursue this denial. Thereafter, claimant filed a duplicate application for benefits on February 17, 1994, which is presently pending. Director's Exhibit 1.

Administrative Law Judge Richard E. Huddleston initially adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 and credited claimant with thirty-three and one-half years of qualifying coal mine employment. Next, Administrative Law Judge Huddleston found that, because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(c), he failed to demonstrate a material change in conditions under 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Director's Exhibit 57. Claimant appealed and the Board affirmed the denial of benefits. *May v. Kentland-Elkhorn Coal Corp.*, BRB No. 96-1630 BLA (Jun. 9, 1997)(unpub.); Director's Exhibit 68.

Subsequently, claimant requested modification pursuant to 20 C.F.R. §725.310 on June 16, 1997 and filed supportive medical evidence. Director's Exhibit 70. Pursuant to a formal hearing held on September 23, 1998, Administrative Law Judge Robert L. Hillyard (administrative law judge) credited claimant with thirty-three and one-half years of qualifying coal mine employment. Next, the administrative law judge found that because the evidence submitted since the prior denial failed to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), elements previously adjudicated against claimant, claimant failed to establish a change in conditions under Section 725.310. The administrative law judge also determined that, after a review of the record in its entirety, no mistake in a determination of fact had been made in the previous decision pursuant to Section 725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred by not according greater weight to the opinions of his treating physicians pursuant to Sections 718.202(a)(4) and 718.204(c)(4). The Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance of the administrative law judge's denial of benefits.[2]

[2] By Order dated June 24, 1999, the Board granted employer's Motion to Reform the Caption and to Dismiss Kentland Elkhorn Coal Corporation, the previously named responsible operator, as a party in the captioned case. *May v. Director, OWCP*, BRB No. 99-

0802 BLA (Jun. 24, 1999)(unpub. Order). The Director does not contest the dismissal of Kentland Elkhorn Coal Corporation. Director's Brief at 3 n.2. Likewise, we affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a)(1)-(3) and 718.204(c)(1)-(3) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10-11.

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 the 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).

Claimant argues that the administrative law judge erred by not according greater weight to the opinions of Drs. Wright and Sundaram because, as claimant's treating physicians, their opinions are entitled to significant weight. We disagree. Although the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians, *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993), deference to the treating physician's opinion is not required where, as in the instant case, the treating physicians' opinions contain deficiencies, *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). The administrative law judge permissibly found that the opinions of Drs. Sundaram and Wright failed to establish either the existence of pneumoconiosis or total disability inasmuch as both physicians failed to support their opinions with credible objective evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146, 1-149 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 10. Specifically, the administrative law judge properly accorded less weight to the opinions of Drs. Sundaram and Wright because the x-ray films on which they relied were reread as negative by physicians with superior radiological expertise and the pulmonary function studies they administered yielded non-qualifying values. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 11; Director's Exhibits 45, 70, 75, 79; Claimant's Exhibits 1, 2, 4, 5. In addition, the administrative law judge rationally discredited the opinions of Drs. Sundaram and Wright because both physicians failed to adequately explain their conclusions that claimant's lung disease was due to coal mine employment. *See Clark, supra; Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 11. The administrative law judge, within a proper exercise of his discretion, found that the opinions of Drs. Broudy, Fino, and Branscomb, who all opined that there was no evidence of pneumoconiosis or a totally disabling respiratory impairment, were entitled to determinative weight because these physicians have superior pulmonary expertise than Drs. Sundaram and Wright and their reports were based on multiple examinations[3] and reviews of all of the

[3] The administrative law judge credited Dr. Broudy's opinion because it was based on four separate physical examinations between 1988 and 1998, contrary to claimant's argument that he examined claimant on one occasion. Decision and Order at 10; Director's Exhibit 50; Employer's Exhibits 2, 11.

medical evidence of record to the dates of their respective reports. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). Furthermore, the administrative law judge properly found that the medical evidence of record failed to establish either the existence of pneumoconiosis or total disability, and hence, failed to demonstrate a mistake in a determination of fact pursuant to Section 725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-295-296 (6th Cir. 1994); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-14-15 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); Decision and Order at 11.

Inasmuch as claimant has not otherwise challenged the administrative law judge's analysis of the evidentiary record or his findings of fact, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of establishing modification pursuant to Section 725.310 inasmuch as this determination is rational, contains no reversible error, and is supported by substantial evidence.

Accordingly, the Decision and Order - Denying 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