BRB No. 98-1620 BLA

ALEXANDER S. FILOHOSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
READING ANTHRACITE COMPANY	)	
	)	
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 Upon Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

John D. Maddox (Arter & Hadden LLP), 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 Upon Modification (97-BLA-0831) of Administrative Law Judge Ainsworth H. Brown 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 his claim on September 5, 1990.[1] In an initial Decision and Order dated April 23, 1992, the administrative law judge found the

[1]Claimant filed his original claim for benefits on June 6, 1986. Director's Exhibit 39. On February 8, 1988, while his claim was pending before the Office of Administrative Law Judges, claimant requested that his claim be withdrawn because he was at that time working for employer. *Id*. Administrative Law Judge Frank D. Marden dismissed the claim in an Order of Dismissal dated March 11, 1988. *Id*. The record reflects that claimant took no further action in pursuit of benefits until filing a claim on September 5, 1990. Director's Exhibit 1.

evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). The administrative law judge also found the evidence insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4), however, and, accordingly, denied benefits. Claimant appealed. The Board vacated the administrative law judge's finding that claimant failed to establish total disability under Section 718.204(c). *Filohoski v. Reading Anthracite Co.*, BRB No. 92-1660 BLA (Feb. 25, 1994)(unpublished). The Board also vacated the administrative law judge's finding that the existence of pneumoconiosis was established under Section 718.202(a)(1) because the administrative law judge had applied the true doubt rule, which, subsequent to the administrative law judge's decision, was invalidated by the United States Court of Appeals for the Third Circuit in *Greenwich Collieries v. Director, OWCP [Ondecko],* 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).[2] *Id*.

On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4). The administrative law judge accordingly denied benefits. Claimant appealed. The Board affirmed the administrative law judge's findings under Section 718.202(a)(1) and (a)(4), and, consequently, affirmed the administrative law judge's denial of benefits. *Filohoski v. Reading Anthracite Co.*, BRB No. 95-0513 BLA (June 29, 1995)(unpublished).

On April 8, 1996, claimant filed with the district director a Petition for Modification, which the district director denied on July 26, 1996. The modification request was then referred to the Office of Administrative Law Judges on February 20, 1997. The administrative law judge issued an Order to Show Cause, dated March 31, 1997, as to why a hearing would be necessary on modification. In response to the Order to Show Cause, the parties agreed to waive a hearing. In his Decision and Order Denying Benefits Upon Modification, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis under 718.202(a)(1)-(4). On this basis, the administrative law judge determined that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the weight of the new x-ray evidence was insufficient the existence of pneumoconiosis under Section 718.202(a)(1). Claimant further argues that the administrative law judge erred in crediting Dr. Dittman's medical opinion over the opinion of claimant's treating physician, Dr. Kraynak, which claimant contends is sufficient to establish total disability due to pneumoconiosis. Claimant raises no further contentions on appeal. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not intend to

[2]The decision of the United States Court of Appeals for the Third Circuit was subsequently affirmed by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance 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).

On appeal, claimant contends that the administrative law judge mechanically relied on the numerical superiority of the negative x-ray evidence in discounting the positive interpretation of the March 4, 1996 x-ray, submitted by Dr. Smith, a B reader and Board-certified radiologist. Claimant also contends that employer's numerous negative re-readings of the March 4, 1996 film were cumulative. Additionally, claimant challenges the administrative law judge's consideration of the newly submitted medical opinion evidence, arguing that Dr. Kraynak's opinion, that claimant has pneumoconiosis and is totally disabled due to the disease, should have been accorded determinative weight in view of the doctor's position as claimant's treating physician. These contentions are without merit.

Citing the decision of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arose, in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the administrative law judge stated that he would discuss all four regulatory methods of establishing the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), and weigh all the evidence prior to making a finding regarding that element of entitlement. Decision and Order at 2. The administrative law judge then correctly stated that there were two types of evidence to be considered under Section 718.202(a) given the record in this case, *i.e.*, x-rays and medical opinions.[3] *Id*. The administrative law judge properly found that Dr. Smith's x-ray reading of the March 4, 1996 x-ray was the only new positive x-ray interpretation submitted on modification, and that the remaining interpretations of this film were negative. *Id*; Director's Exhibits 90, 96, 97; Employer's Exhibits 1, 4, 7. Although not noted by the administrative law judge, five of the negative readings of the March 4, 1996 film were submitted by radiologists who, like Dr. Smith, are B readers and Board-certified radiologists. Director's Exhibits 96, 97; Employer's Exhibits 1, 4, 7. Moreover, although also not noted by the administrative law

[3]The existence of pneumoconiosis cannot be established pursuant to 20 C.F.R. §718.202(a)(2) on the record in this case since there is no autopsy or biopsy evidence in the record. *See* 20 C.F.R. §718.202(a)(2). Nor can claimant establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(3), as none of the presumptions thereunder applies. *See* 20 C.F.R. §718.202(a)(3). Specifically, the record does not contain evidence of complicated pneumoconiosis and, consequently, claimant does not qualify for the presumption at 20 C.F.R. §718.304. The instant claim was filed after January 1, 1982 and, therefore, the presumption at 20 C.F.R. §718.305 is inapplicable. Additionally, as this is not a survivor's claim, the presumption at 20 C.F.R. §718.306 does not apply.

judge, the other new x-ray submitted on modification, dated April 30, 1997, was read uniformly as negative, by seven physicians, six of whom are B reader/Board-certified radiologists. Employer's Exhibits 3, 5-7. Inasmuch as substantial evidence supports the administrative law judge's finding that the weight of the new x-ray evidence was insufficient to establish the existence of pneumoconiosis, *see Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985)*; Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), the administrative law judge's failure to note the qualifications of the physicians rendering the interpretations of the March 4, 1996 film and to note that the April 30, 1997 film was read uniformly as negative constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Moreover, contrary to claimant's contention, the administrative law judge was not required to credit the medical opinion of claimant's treating physician. The administrative law judge properly accorded greater weight to Dr. Dittman's contrary medical opinion that claimant does not suffer from pneumoconiosis on the basis of Dr. Dittman's superior qualifications in pulmonary medicine,[4] *see Roberts, supra; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and because Dr. Dittman's opinion was consistent with the objective data upon which he relied. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 3; Employer's Exhibit 8; Claimant's Exhibit 1. We, therefore, affirm the administrative law judge's finding that the new evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a). *See Williams, supra*.

Because claimant raises no further assertions of error, we affirm the administrative law judge's conclusion that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3. Inasmuch as we have affirmed the administrative law judge's finding that claimant failed to establish modification under Section 725.310, we affirm the denial of benefits. *See* 20 C.F.R. §725.310.

[4]Dr. Dittman is Board-certified in internal medicine, and Board-eligible in the subspecialty of pulmonary diseases. Employer's Exhibit 8. Dr. Kraynak is Board-eligible in family practice, and is not Board-certified or Board-eligible in internal medicine or pulmonary diseases. Claimant's Exhibit 1.

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