BRB No. 95-2254 BLA

MERT E. PRIVETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
ITMANN COAL 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 of George E. Fath, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (94-BLA-1812) of Administrative

[1] Claimant is Mert E. Privett, the miner, whose claim for benefits filed on September 15, 1989 was denied in a Decision and Order issued on April 24, 1992. Director's Exhibits 1, 43. Claimant filed a timely request for modification on September 17, 1992. Director's Exhibit 44.

Law Judge George A. Fath denying 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). Initially, Administrative Law Judge Robert J. Shea credited claimant with twenty-one years of coal mine employment and found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

Claimant timely requested modification pursuant to Section 725.310 and submitted new evidence. On modification, Judge Fath credited claimant with twenty years of coal mine employment and found that he had one dependent pursuant to the parties' stipulation. Considering the entire evidentiary record to determine whether a mistake in the determination of fact or a change in conditions[2] was established, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis and, accordingly, denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence pursuant to Section 718.202(a)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman &*

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[2] The administrative law judge erroneously referred to "material change in conditions" when he meant "change in conditions" pursuant to 20 C.F.R. §725.310. Decision and Order at 2, 4.

[3] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, and pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Grylls Associates, Inc., 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(4), the administrative law judge weighed the opinions of Drs. Rasmussen and Forehand that claimant's chronic obstructive pulmonary disease was caused by both smoking and coal dust exposure, against the opinions of Drs. Hippensteel, Fino, Zaldivar, and Dahhan that his respiratory impairment was due solely to smoking. Decision and Order at 8-9; Director's Exhibits 44, 54; Claimant's Exhibits 1, 2; Employer's Exhibits 16-19. The administrative law judge accorded greater weight to the diagnoses of Drs. Hippensteel and Fino based on their superior qualifications.[4] The administrative law judge also found their opinions to be "more persuasive" and "logical" because the physicians explained that, in view of claimant's negative chest x-rays at the time he retired in 1987, the continued deterioration in his respiratory capacity during the time that he was no longer exposed to coal dust but was still smoking suggested that smoking and not coal dust exposure was the cause of his chronic obstructive pulmonary disease. Decision and Order at 8; Director's Exhibits 33, 54; Employer's Exhibits 17, 19. The administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order at 9.

Claimant contends initially that the administrative law judge impermissibly accorded diminished weight to the opinion of Dr. Rasmussen, claimant's treating physician, merely because he was less qualified than the other physicians. Claimant's Brief at 7. We reject claimant's argument because the administrative law judge may, but is not required to, credit a treating physician, *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993), and may accord greater weight to more highly qualified physicians, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), whose opinions he finds to be better reasoned and persuasive, *see Gorzalka v. Big Horn Coal Co*., 16 BLR 1-48 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Inasmuch as the administrative law judge was aware that Dr. Rasmussen was treating claimant, Decision and Order at 7, but permissibly accorded greater weight to the opinions of Drs. Hippensteel and Fino, we reject claimant's contention.

Claimant next asserts that the medical opinions submitted by employer exclude the existence of pneumoconiosis based solely on negative chest x-ray

[4] The record indicates that Dr. Rasmussen is board-certified in internal medicine, while Drs. Hippensteel and Fino are board-certified in both internal and pulmonary medicine. Director's Exhibit 54; Claimant's Exhibit 2; Employer's Exhibit 17. Dr. Forehand's qualifications do not appear in the record.

readings. Claimant's Brief at 8. Contrary to claimant's contention, the physicians who opined that claimant did not have pneumoconiosis based their opinions on a thorough review of his medical history, and Drs. Hippensteel[5] and Zaldivar also examined and tested claimant. Director's Exhibit 54; Employer's Exhibits 16-19. Therefore, we reject claimant's contention.

Claimant, citing *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), contends that the opinions submitted by employer merit no weight because they are based on the erroneous assumption that obstructive disorders cannot be caused by coal mine employment. Claimant's Brief at 6. We disagree. The physicians here did not assume that coal mine employment cannot cause obstructive disorders such as claimant's chronic obstructive pulmonary disease. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, BLR (4th Cir. 1996); *Warth*, *supra*. Rather, they noted the purely obstructive nature of claimant's respiratory impairment and opined that he would likely show some restriction on pulmonary function testing if coal dust exposure were a factor in his chronic obstructive pulmonary disease, which they attributed instead to his lengthy smoking history. Director's Exhibits 32, 54; Employer's Exhibits 17, 19. Therefore, we reject claimant's contention.

We also reject claimant's contention that the opinions submitted by employer are hostile to the Act. Claimant's Brief at 6-10. Contrary to claimant's contention, the physicians credited by the administrative law judge did not state that pneumoconiosis cannot progress absent further coal dust exposure, but opined that it is unlikely for pneumoconiosis to appear on the post-retirement x-rays of a miner such as claimant whose x-rays were negative at the time his coal dust exposure ceased but who continued to smoke. Director's Exhibit 54; Employer's Exhibit 19.

Nor is Dr. Fino's statement that he is trained to establish a single etiology for a respiratory disease where the clinical evidence supports that conclusion hostile to the Act. Contrary to claimant's assertion, Dr. Fino did not arbitrarily discount the possibility that claimant's respiratory impairment could have arisen from both

[5] Dr. Hippensteel stated that the lack of x-ray evidence of pneumoconiosis was "just a part of the puzzle." Director's Exhibit 54. Similarly, Dr. Fino stated that a negative chest x-ray "is not the final say . . . it is one of the pieces of information." Director's Exhibit 32.

smoking and coal dust exposure, but rather explained that based on his review of claimant's medical history, he believed the clinical evidence pointed exclusively to cigarette smoking as the cause of claimant's chronic obstructive pulmonary disease. Employer's Exhibit 23 at 39. Inasmuch as these opinions are not hostile to the Act and the Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order denying modification is affirmed. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge