BRB No. 00-1130 BLA

JAMES C. WILBURN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld & Schiller), Pittsburgh, Pennsylvania, for claimant.

Maryellen Corna (Porter, Wright, Morris & Arthur, LLP), Columbus, Ohio, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-51) of Administrative Law Judge Donald W. Mosser 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).[1] The administrative law judge found that the instant case was a request for

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

modification and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4, 7. The administrative law judge determined that claimant established at least twenty-five years of coal mine employment and noting the proper modification standard, concluded that the newly submitted and prior evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 3-4, 7-10. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Sections 718.202(a)(1) and (4) (2000) and in failing to find disability causation established pursuant to Section 718.204(b) (2000). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter

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on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]Claimant filed his initial claim for benefits on January 19, 1983, which was finally denied on April 29, 1983. Director's Exhibit 34. Claimant filed a second application for benefits on June 29, 1994, which was finally denied on February 11, 1999, as the evidence failed to establish the existence of pneumoconiosis or that claimant's total disability was due to pneumoconiosis. Director's Exhibits 1, 36, 37, 38. Claimant filed a subsequent claim which was considered a modification request, the subject of the instant appeal, on March 3, 1999. Director's Exhibits 39, 40.

indicating that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one 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*).

[3]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203 and 718.204(c) (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The United States Court of Appeals for the Sixth Circuit held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been made by claimant.[4] Furthermore, in determining whether claimant has established a change in conditions pursuant to Section 725.310 (2000), the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge, in the instant case, rationally determined that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis or total disability causation pursuant to Sections 718.202(a) and 718.204(b) (2000) and therefore insufficient to establish modification.[5] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Worrell, supra*.

Initially, claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), is without merit.[6] The administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

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[4]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the State of Ohio. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]The administrative law judge properly determined that claimant's prior claim was denied because the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability causation. Decision and Order at 3, 8-10; Director's Exhibit 38.

[6]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Considering the newly submitted evidence, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin, supra*. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the fact that all of the newly submitted x-ray readings were negative in accordance with the ILO classification system. *See* 20 C.F.R. §718.102 (2000); Director's Exhibit 44; Employer's Exhibit 1; Claimant's Exhibit 1; Decision and Order at 4, 7; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Claimant further contends that the administrative law judge erred in failing to find the medical opinion evidence established the existence of pneumoconiosis and that his total disability was due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.204(b). Claimant specifically contends that the administrative law judge committed error in according greater weight to the opinion of Dr. Lockey over the opinions of Drs. Ottaviano and Triplett, claimant's treating physicians. Claimant's Brief at 5-9. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Moreover, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating or attending physician. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Clark, supra*; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, a physician's opinion based upon his own tests and observations, or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel, supra*.

The administrative law judge, in the instant case, properly considered the relevant evidence of record and permissibly accorded the opinion of Dr. Lockey, that claimant does not have pneumoconiosis and suffers no impairment due to coal dust exposure, greater weight as the opinion was well documented, the physician considered all of the medical evidence of record and in light of Dr. Lockey's superior credentials in the field of pulmonary medicine. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Dillon v.*

Peabody Coal Co., 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 7, 9-10; Employer's Exhibits 1, 2. Moreover, the administrative law judge rationally accorded less weight to the opinion of Dr. Ottaviano as he found the physician's opinion not well-documented and well-reasoned since Dr. Ottaviano does not appear to be aware of claimant's past smoking history and his diagnosis of pneumoconiosis is based upon two x-ray readings, one of which was reread as negative by a highly qualified expert and the other of which was not read as positive. *See Tedesco, supra*; *Worhach, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon, supra*; *Fields, supra*; *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Perry, supra*; *Wetzel, supra*; *Lucostic, supra; Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *Piccin*, *supra; Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 8, 10; Director's Exhibit 44; Claimant's Exhibit 1. Additionally, the administrative law judge permissibly accorded less weight to the opinion of Dr. Triplett as it is not well documented or reasoned since the physician did not take a smoking or coal mine employment history.[7] *Id.* Also, although Drs. Ottaviano and Triplett are the miner's treating/attending physicians, the administrative law judge has provided valid reasons for finding their opinions entitled to less weight. *See Tussey, supra*; *Fitch, supra*; *Wetzel, supra*; *Hutchens, supra*; *Arnoni, supra*;

[7]Contrary to claimant's assertions, the opinion of Dr. Triplett, that claimant suffers from acute exacerbation of chronic obstructive pulmonary disease, and Dr. Lockey's opinion that claimant has an airways obstruction due to chronic obstructive pulmonary disease, are insufficient to establish the presence of pneumoconiosis as defined by the Act, *i.e.*, a chronic dust disease arising out of coal mine employment. *See* 20 C.F.R. §§718.202(a)(4), 718.201 (2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986)

Piccin, supra; Rowe, supra; Decision and Order at 8, 10. Moreover, claimant's contention, that the administrative law judge erred in failing to accord determinative weight to the opinions of the physicians that examined claimant on behalf of the Department of Labor, lacks merit. Claimant's Brief at 5-6. The administrative law judge is not required to accord any additional or determinative weight to the physician's opinion on this basis. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the newly submitted evidence does not establish that claimant has pneumoconiosis or is totally disabled due to pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Worrell, supra*; *Clark, supra*; *Trent, supra*; *Perry, supra*. 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, supra*; Worley v. Blue Diamond Coal Co., *12 BLR 1-20 (1988)*. Furthermore, since the determination of whether claimant has pneumoconiosis or his total disability is due to pneumoconiosis is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's finding. *Anderson, supra*. Consequently, the administrative law judge rationally found that the newly submitted medical opinions of record failed to establish the existence of pneumoconiosis or that claimant's total disability is due to pneumoconiosis pursuant to Sections 718.202(a) and 718.204(b) (2000) and were thus insufficient to establish a change in conditions pursuant to Section 725.310 (2000). *Nataloni, supra*; *Wojtowicz, supra*; *Kovac, supra*; *Clark, supra*; *Lucostic, supra*. Finally, we note that the administrative law judge properly considered the previously submitted evidence and rationally concluded that there was no mistake in fact in the original denial of benefits. Decision and Order at 4, 7-10; Director's Exhibits 36, 38; *Worrell, supra*; *Nataloni, supra*. Therefore, the administrative law judge's denial of claimant's petition for modification is supported by substantial evidence and is in accordance with law. *Worrell, supra*. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310 (2000), we affirm the denial of benefits. *Worrell, supra*.

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

NANCY S. DOLDER
Administrative Appeals Judge