

BRB No. 97-0403 BLA

ANGELO LUSSI)
)
 Claimant-Petitioner)
)
 v.)
)
 POPPLE BROTHERS)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Upon Remand Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Angelo Lussi, Pittston, Pennsylvania, *pro se*.

James E. Pocius (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Upon Remand Denying Benefits (94-BLA-1335) of Administrative Law Judge Ralph A. Romano (the administrative law judge) 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). This case is before the Board for the second time. Claimant's initial claim was denied by Administrative Law Judge Frank D. Marden on June 16, 1992. See Director's Exhibit 75. Judge Marden found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and that even if claimant had established the existence of pneumoconiosis, benefits would be denied because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Claimant did not appeal Judge Marden's denial of benefits. Instead,

claimant filed a new application for benefits. This application was dated July 7, 1992 by claimant and was date stamped April 8, 1993 by the Department of Labor. See Director's Exhibit 76. The district director denied claimant's request for modification, see Director's Exhibit 104, and claimant requested that the case be transferred to the Office of Administrative Law Judges, see Director's Exhibit 105.

A hearing was held before the administrative law judge on November 2, 1994. In the ensuing Decision and Order Denying Benefits, the administrative law judge determined that the second claim constituted a duplicate claim pursuant to 20 C.F.R. §725.309. He noted the stipulation of the parties to thirty years of coal mine employment, and determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). The administrative law judge also found that the evidence failed to establish that claimant has a totally disabling respiratory or pulmonary condition, or that pneumoconiosis is a substantial factor in claimant's disability. The administrative law judge also found that claimant failed to establish a material change in conditions. Accordingly, benefits were denied. Decision and Order Denying Benefits.

On appeal, the Board noted the procedural history of this case. The Board affirmed the administrative law judge's length of coal mine employment finding and held that claimant is precluded from establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3), and is precluded from demonstrating total disability pursuant to Section 718.204(c)(1)-(3). The Board also held that the administrative law judge improperly considered the instant claim to be a duplicate claim rather than a petition for modification. Consequently, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge to determine whether there was a basis for modification in this case. See *Lussi v. Popple Brothers*, BRB No. 95-1344 BLA (Apr. 24, 1996)(unpub.).

On remand, the administrative law judge considered the previously submitted evidence and the newly submitted evidence, and determined that it did not demonstrate a mistake in a determination of fact or a change in conditions under 20 C.F.R. §725.310. See Decision and Order Upon Remand Denying Benefits.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a brief on appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this 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).

After consideration of the administrative law judge’s findings and the evidence of record, we hold that the administrative law judge’s findings are supported by substantial evidence and are therefore affirmed. In finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge properly considered the qualifications of the physicians who interpreted the x-rays, *see Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Dixon v. Director, OWCP*, 8 BLR 1-150 (1985), and properly relied upon the preponderance of the negative interpretations in the record, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff’g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We affirm this finding as it is supported by substantial evidence.

We also affirm the administrative law judge’s finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and total disability pursuant to Section 718.204(c)(4). The administrative law judge permissibly relied on the opinions of Drs. Dittman and Levinson based on their superior qualifications. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Warman v. Pittsburg and Midway Coal Mining Co.*, 4 BLR 1-601 (1982), *aff’d*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988).

Consequently, we affirm the administrative law judge’s finding that claimant has not established a change in conditions on modification under Section 725.310. We also affirm the administrative law judge’s finding that there was no mistake in a determination of fact. This finding is supported by substantial evidence. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Accordingly, the administrative law judge's Decision and Order Upon Remand 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