BRB No. 99-0302 BLA

IVAN E. KISSINGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
KOCHER 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-Denying Benefits on Modification of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

A. Judd Woytek, Bethlehem, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits on Modification (97-BLA-1805) of Administrative Law Judge Paul H. Teitler 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 noted that he

[1]Claimant filed an application for benefits on July 11, 1991. Director's Exhibit 73. The administrative law judge awarded benefits in his Decision and Order issued on June 9, 1993. By Decision and Order issued on April 25, 1995, the Board affirmed in part and vacated in part the award of benefits and remanded the case for the administrative law

previously denied benefits because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Considering claimant's petition for modification, the administrative law judge concluded that claimant failed to to establish a change in conditions or a mistake in a determination of fact in the prior denial pursuant to 20 C.F.R. §725.310. The administrative law judge also concluded, weighing all the evidence on the existence of pneumoconiosis together in accordance to the Third Circuit decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), that claimant did not establish the existence of pneumoconiosis under Section

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judge to reconsider the evidence under 20 C.F.R. §§718.202(a)(1), 718.202(a)(4), 718.204(b) and 718.204(c). *Kissinger v. Kocher Coal Co.*, BRB No. 93-1804 BLA (Apr. 25, 1995)(unpub.). On remand, on September 18, 1995, the administrative law judge issued a Decision and Order denying benefits, finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Subsequently, on October 6, 1995, claimant appealed to the Board. Director's Exhibit 78. However, the Board dismissed claimant's appeal as abandoned on September 30, 1996, pursuant to 20 C.F.R. §802.402. The record does not show that claimant either requested reconsideration or appealed this decision. On January 22, 1997 claimant requested modification of the previous denial. Director Exhibit 82. The administrative law judge considered this a request for modification pursuant to 20 C.F.R. §725.310. Decision and Order-Denying Benefits on Modification at 3.

718.202(a). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's finding under Section 718.202(a)(1) and (a)(4) and argues that the evidence is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to file a brief on appeal.[2]

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 applicable 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).

[2]We affirm, as unchallenged on appeal, the administrative law judge's finding that the existence of pneumoconiosis is not established under 20 C.F.R. §718.202(a)(2) and (a)(3), his finding that claimant failed to establish a mistake in a determination of fact in the previous denial and his acceptance of the parties' stipulation to forty-five years of coal mine employment. *See Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Under Section 718.202(a)(1), referring to the newly submitted readings of x-rays taken on December 5 and 15, 1997, claimant merely alleges that the administrative law judge erred in concluding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. We disagree. The administrative law judge permissibly found the December 5, 1997 x-ray positive for pneumoconiosis, based on a weighing of the readings by qualified readers. Decision and Order-Denying Benefits on Modification at 7. Specifically, the administrative law judge found that two physicians dually qualified as Board-certified radiologists and B readers, and one physician qualified as a B reader, interpreted the x-ray as positive for pneumoconiosis, while only one dually qualified physician interpreted the x-ray as negative for pneumoconiosis. *Id.;* Employer's Exhibit 1; Claimant's Exhibits 10, 12, 15. The administrative law judge properly found that the x-ray taken on December 15, 1997 was negative for pneumoconiosis, based on a weighing of the readings by qualified readers. Specifically, the administrative law judge found that of the twelve readings of this x-ray, four of the readings by qualified dually physicians were positive for pneumoconiosis, while six of the readings by dually qualified physicians were negative. Accordingly, substantial evidence supports the administrative law judge's finding that the newly submitted x-ray evidence is evenly balanced, and thus claimant did not establish by a preponderance of the evidence, that the newly submitted x-ray evidence is positive for pneumoconiosis. Decision and Order-Denying Benefits on Modification at 7. Inasmuch as the administrative law judge additionally found no mistake in his finding that the previously submitted x-ray evidence did not establish the existence of pneumoconiosis,[3] the administrative law judge properly found that pneumoconiosis was not established at Section 718.202(a)(1).

Under Section 718.202(a)(4), referring to the newly submitted medical opinion evidence, claimant argues that the administrative law judge improperly rejected the medical opinions of Drs. Kraynak and Kruk. Claimant asserts that these opinions are documented and reasoned, and further notes Dr. Kraynak's status as claimant's treating physician. With regard to Dr. Dittman's contrary medical opinion that claimant does not have pneumoconiosis, claimant asserts that while Dr. Dittman possesses a "more extensive curriculum vitae than Dr. Kraynak this factor alone does not automatically render his opinion as well reasoned and well documented." Claimant additionally asserts that Dr. Dittman only examined claimant twice since 1992.

[3]This finding is unchallenged on appeal. *See* note 2, *supra.*

Contrary to claimant's contentions, the administrative law judge acknowledged Dr. Kraynak's status as claimant's treating physician. However, the administrative law judge, within his discretion, assigned more weight to Dr. Dittman's opinion, based, in part, on Dr. Dittman's superior qualifications as a physician who is Board-certified in internal medicine.[4] *See Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order-Denying Benefits on Modification at 11; Employer's Exhibit 3, 9. The administrative law judge properly found that, in contrast, Dr. Kraynak is only Board-eligible in family medicine. Decision and Order-Denying Benefits on Modification; Claimant's Exhibits 2, 17.

[4]In addition, the administrative law judge properly found that Dr. Ditttman's December 5, 1997 x-ray showing radiographic evidence of arteriosclerotic changes and not of pneumoconiosis was supported by the reports of Drs. Gaylor, Wheeler, Duncan, and Soble. Decision and Order-Denying Benefits on Modification at 12; Employer's Exhibits 13, 14, 18, 20. The administrative law judge also properly found that Dr. Dittman's opinion was supported by normal pulmonary function studies and blood gas studies that do not indicate the presence of any pulmonary disease. *Id; See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Additionally, the administrative law judge properly found Dr. Kraynak's opinion not well-reasoned because Dr. Kraynak reviewed the negative x-ray reading by Dr. Ciotola and the medical report of Dr. Dittman finding claimant did not suffer from pneumoconiosis, but did not address these findings in making his diagnosis. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order-Denying Benefits on Modification at 11; Claimant's Exhibit 17 at 8. Similarly, the administrative law judge properly found Dr. Kruk's opinion not well-documented or well-reasoned because he diagnosed pneumoconiosis even though his physical examination "did not reveal anything unusual" and did not explain his conclusion or provide evidence to support his diagnosis of pneumoconiosis. *Siwiec, supra; Clark, supra;* Decision and Order at 12; Claimant's Exhibit 10. In light of the foregoing, we affirm the administrative law judge's determination that the newly submitted evidence does not support a finding of pneumoconiosis under Section 718.202(a)(4). Inasmuch as the administrative law judge additionally found no mistake in his finding that the previously submitted medical opinion evidence did not established the existence of pneumoconiosis,[5] the administrative law judge properly found that pneumoconiosis was not established at Section 718.202(a)(4).

Inasmuch as we have affirmed the administrative law judge's determination that the newly submitted evidence does not support a finding of pneumoconiosis under Section 718.202(a), and his determination that a review of the record does not reveal a mistake in a determination of fact in the previous denial with respect to the issue of pneumoconiosis, we affirm the administrative law judge's finding, that upon weighing all of the evidence relating to pneumoconiosis in accordance with the Third Circuit's decision in *Williams*, claimant has not established the existence of pneumoconiosis. Decision and Order-Denying Benefits on Modification at 12.

Because claimant has failed to establish the existence of pneumoconiosis under Section 718.202(a), a requisite element of entitlement, an award of benefits under 20 C.F.R. Part 718 is precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Therefore, we need not address claimant's arguments under Section 718.204(b) and (c). *Endrezzi v. Bethlehem Mines Corp.*, 8 BLR 1-11 (1985).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits on Modification is affirmed.

SO ORDERED.

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[5]This finding is unchallenged on appeal. *See* note 2, *supra*.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge