

BRB No. 99-1167 BLA

WILLARD O. THORP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
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.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Amy E. Wilmot (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0287) of Administrative Law Judge Donald W. Mosser (the administrative law judge) denying his request for modification of 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 for benefits on February 13, 1984. In the initial Decision and

Order, Administrative Law Judge Ainsworth H. Brown credited claimant with at least thirty-six and one-half years of coal mine employment, and found the 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. However, Judge Brown found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Brown denied benefits. By Decision and Order dated November 23, 1990, the Board affirmed Judge Brown's denial of benefits. *Thorp v. Peabody Coal Co.*, BRB No. 88-1777 BLA (Nov. 23, 1990)(unpub.).

Claimant filed a request for modification on April 19, 1991. On March 1, 1993, Administrative Law Judge Bernard J. Gilday, Jr. issued a Decision and Order - Denying Modification and Benefits, Director's Exhibit 75, which the Board affirmed in part and vacated in part, remanding the case for further consideration, *Thorp v. Peabody Coal Co.*, BRB No. 93-1260 BLA (Apr. 29, 1994)(unpub.). On March 7, 1995, Judge Gilday issued a Decision and Order on Remand Denying Modification and Benefits.

Claimant filed a second request for modification on December 6, 1995. In a Decision and Order dated July 28, 1999, the administrative law judge found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge, therefore, found the evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310. The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.<sup>1</sup>

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<sup>1</sup>Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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).

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). We disagree. Whereas Dr. Simpao opined that claimant suffers from a disabling pulmonary impairment, Director's Exhibit 105; Claimant's Exhibit 1, Drs. Branscomb,<sup>2</sup> Fino and Selby opined that claimant does not suffer from a totally disabling respiratory or pulmonary impairment, Employer's Exhibits 1, 3, 4. The administrative law judge properly accorded greater weight to the opinion of Dr. Selby over the contrary opinion of Dr. Simpao because of Dr. Selby's superior qualifications.<sup>3</sup> See *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). Further, the administrative law judge properly accorded greater weight to Dr. Selby's opinion because he found it to be better supported by the underlying objective evidence.<sup>4</sup> See *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel, supra*; *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). In addition, the administrative law judge properly found that Dr. Selby's opinion is corroborated by the opinions of Drs. Branscomb and Fino.<sup>5</sup> See *Walker v.*

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<sup>2</sup>Dr. Branscomb opined that "it is entirely possible that minimal CWP is present" and that "[a]t this level one would not encounter pulmonary impairment." Employer's Exhibit 4. Dr. Branscomb also opined that "[t]here is no objective indication of any progression in his level of pulmonary disability." *Id.*

<sup>3</sup>The administrative law judge stated that "Dr. Selby is a pulmonary specialist." Decision and Order at 11. Whereas Dr. Selby is Board-certified in internal medicine and pulmonary diseases, Employer's Exhibit 1, Dr. Simpao is not Board-certified in internal medicine or pulmonary diseases, Employer's Exhibit 5.

<sup>4</sup>The administrative law judge stated that the opinion of Dr. Selby "is consistent with the objective medical evidence of record." Decision and Order at 11. In contrast, the administrative law judge stated that Dr. Simpao "does not support his conclusions...with specific objective medical evidence of disability." *Id.*

<sup>5</sup>The administrative law judge stated that the opinion of Dr. Selby "is supported on review by Drs. Fino and Branscomb, both of whom are pulmonary specialists." Decision and Order at 11.

*Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject claimant's assertions that the administrative law judge mischaracterized the evidence and erred in discounting the opinion of Dr. Simpao.

We also reject claimant's assertion that the administrative law judge should have accorded determinative weight to the opinion of Dr. Simpao based on his status as claimant's treating physician. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, see *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, see *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); cf. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); see also *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel, supra*; *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).<sup>6</sup>

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<sup>6</sup>We reject claimant's assertion that the administrative law judge erroneously confused the issues of total disability and total disability due to pneumoconiosis in considering Dr. Simpao's opinion. Although the administrative law judge stated that claimant "has not established [that] modification is appropriate under Section 725.310 because he has not shown that he is totally disabled due to pneumoconiosis," Decision and Order at 11, the context of the administrative law judge's analysis of the medical evidence clearly indicates that the administrative law judge considered the conflicting medical opinion evidence under 20 C.F.R. §718.204(c)(4), not 20 C.F.R. §718.204(b).

Since the administrative law judge rationally found that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310. See *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, we affirm the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. See *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Although the administrative law judge observed that "[a]t the hearing, claimant's counsel stated [that claimant] was not claiming a mistake of fact, only a change in condition," Decision and Order at 4, the administrative law judge reviewed all of the evidence of record with respect to total disability in finding that claimant failed to establish a mistake in a determination of fact, Decision and Order at 10-11. We, therefore, affirm the administrative law judge's denial of claimant's request for modification.

Accordingly, the administrative law judge's Decision and Order denying claimant's request for modification and claim is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

## Administrative Appeals Judge