

BRB No. 97-1582 BLA

ALBERT D. ELKINS )  
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 Claimant-Respondent )  
 )  
 v. )  
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 DIRECTOR, OFFICE OF WORKERS' ) DATE ISSUED:  
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 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Petitioner ) DECISION and ORDER

Appeal of the Decision and Order of Edith Barnett, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Sarah M. Hurley (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (95-B LA-1107) of Administrative Law Judge Edith Barnett awarding 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> Considering claimant's modification

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<sup>1</sup> Claimant filed his initial claim for benefits on June 6, 1973, which was denied by the Social Security Administration on December 11, 1973. Director's Exhibit 38. Claimant filed his second claim for benefits with the Department of Labor on June

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20, 1980, which was denied by the district director on October 23, 1980. Director's Exhibit 38. After denial of claimant's request for reconsideration, Administrative Law Judge Robert J. Shea denied benefits on April 14, 1986, finding fifteen years of coal mine employment, but that the evidence of record was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). Director's Exhibit 38. On appeal, the Board affirmed this decision. Director's Exhibit 38. Claimant filed a third claim for benefits on November 30, 1989, which was denied by Administrative Law Judge Charles P. Rippey on May 10, 1991, finding that claimant failed to establish a material change in conditions. Director's Exhibit 38. Claimant filed the instant claim on March 1, 1993, which was denied by the district director on July 23, 1993, finding that claimant failed to establish the existence of pneumoconiosis. Director's Exhibits 1, 15. Claimant subsequently requested modification pursuant to 20 C.F.R. §725.310. The district director denied the request for modification finding 1.35 years of coal mine employment and the existence of pneumoconiosis, but that claimant failed to establish that the pneumoconiosis arose out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibits 26, 28, 35. Claimant again requested modification and the district director found the existence of pneumoconiosis was established, but that total disability due to pneumoconiosis arising out of coal mine employment was not established and

request, the administrative law judge initially found a mistake in a determination of fact, concluding that the district director should have credited claimant with fifteen rather than 1.35 years of coal mine employment. The administrative law judge considered the evidence of record and concluded that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203, and total disability pursuant to 20 C.F.R. §718.204(c)(4). Thus, the administrative law judge found that modification was established pursuant to 20 C.F.R. §725.310 and that claimant was entitled to benefits under 20 C.F.R. Part 718. Accordingly, benefits were awarded. On appeal, the Director contends that the administrative law judge erred in finding the evidence of record sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant responds, urging affirmance of the award of benefits.

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 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 pursuant to Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precluded entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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denied benefits in the June 30, 1994 decision. Claimant subsequently requested a hearing before an administrative law judge. Decision and Order at 3.

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. In determining whether claimant has established modification pursuant to Section 725.310, 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 evidence of record was sufficient to establish total disability pursuant to Section 718.204(c) and therefore sufficient to establish modification. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Contrary to the Director's argument, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Baker and Sundaram, finding claimant totally disabled, than to the contrary opinion of Dr. Spagnola, as they were examining physicians, the opinions were better reasoned and conformed more closely with the evidence of record. Director's Exhibits 9, 12, 24, 40; Decision and Order at 8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Further, contrary to the Director's contentions, Dr. Sundaram was aware of claimant's smoking history as indicated in his treatment notes and that claimant's effort was poor on the pulmonary function study but that the technician noted that it was the result of claimant's best ability.<sup>2</sup> 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is sufficient to establish total disability pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

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<sup>2</sup> The administrative law judge rationally accorded no weight to the June 18, 1993 opinion of Dr. Baker as the physician relied on an inaccurate length of coal mine employment determination. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984).

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge