

BRB No. 97-0854 BLA

J.T. SMITH)
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 Claimant-Petitioner)
)
 v.)
)
 LAUREL FORK COAL COMPANY, INC.) DATE ISSUED:
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 and)
)
 FIRST SOUTHERN 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 Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

John T. Chafin (Kazee, Kinner & Chafin), Prestonsburg, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-BLA-0400) of Administrative Law Judge Donald W. Mosser 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 case is before the Board for the second time. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and therefore claimant had failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a). The administrative law judge found further that assuming the evidence could be sufficient to

establish the existence of pneumoconiosis, it failed to establish claimant's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(c)(1), (4); 718.204(b). Accordingly, the administrative law judge denied modification and the claim.

Claimant filed an application for benefits on October 26, 1982. Director's Exhibit 1. Following a formal hearing held on February 27, 1987, Administrative Law Judge Eric Feirtag issued a Decision and Order on September 16, 1987 denying the claim pursuant to 20 C.F.R. Part 718 based upon his finding that the evidence failed to establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a). Director's Exhibit 25. Following claimant's appeal, the Board affirmed the administrative law judge's denial of benefits pursuant to Part 718. *Smith v. Laurel Fork Coal Co.*, BRB No.87-2983 BLA (April 9, 1991)(unpub.). Claimant then filed new evidence which was properly considered a motion for modification on March 27, 1992. Director's Exhibit 40. Following a new hearing, Chief Administrative Law Judge Nahum Litt issued a Decision and Order denying the motion for modification, and thereby, the claim in a Decision and Order dated August 23, 1994. Director's Exhibit 64. Claimant took no appeal from this denial. Claimant then filed a second claim on June 14, 1994, which was properly considered another motion for modification pursuant to Section 725.310, as it was filed within one year of the administrative law judge's denial. Director's Exhibit 77. Following administrative processing, a third hearing was held on June 27, 1996, before Administrative Law Judge Donald W. Mosser, who issued a Decision and Order on March 5, 1997 denying benefits. Claimant then filed the instant appeal on March 19, 1997.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the x-ray interpretation evidence at Section 718.202(a)(1). Claimant asserts that the interpretations of Drs. Baker, Bassali and Mathur are sufficient to establish the existence of pneumoconiosis. Claimant also challenges the administrative law judge's analysis of the medical opinions of record pursuant to Section 718.202(a)(4), asserting that they are sufficient to establish the existence of pneumoconiosis. Claimant finally challenges the administrative law judge's finding that the evidence fails to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(b). Claimant asserts that the opinions of Drs. Baker and Bassali are sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to the standard set forth in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Employer, in response, urges affirmance of the administrative law judge's denial of modification and benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not file a response brief in the instant appeal.¹

¹ Inasmuch as no party challenges the administrative law judge's findings that the evidence establishes 13 years of qualifying coal mine employment, and total disability pursuant to Section 718.204(c), but fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3), we affirm these findings. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 conclusions of law are rational, supported by substantial evidence, and 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).

Claimant challenges the administrative law judge's finding that the evidence fails to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Claimant acknowledges that the administrative law judge utilized the correct standard as set forth in *Adams, supra*, Claimant's Brief at 9, but asserts that the opinions of Drs. Baker and Bassali are sufficient to satisfy the *Adams* standard. Claimant also asserts that the administrative law judge erred by crediting Dr. Broudy's opinion, as he relied upon an inaccurate work history. Claimant asserts further that the opinions of Drs. Lane and Kraman should not have been credited, because they both were not examining physicians. We disagree. The administrative law judge accurately summarized the eleven opinions of record and correctly found that only Dr. Baker opined that claimant's total disability was due to pneumoconiosis. Decision and Order at 15; Director's Exhibits 5, 40, 71 and 79. While claimant asserts that Dr. Bassali also opined total disability due to pneumoconiosis, the record reflects that Dr. Bassali only submitted x-ray interpretations with notations to the effect that the diagnosis is due to coal dust exposure based upon history. Dr. Bassali's x-ray interpretation report however is insufficient to establish that claimant's total disability is a result of pneumoconiosis pursuant to Section 718.204(b). Further, there is no merit to claimant's contention that it was error for the administrative law judge to credit Dr. Broudy's opinion based upon an erroneous coal mine employment history, as Dr. Broudy utilized a 12 year coal mine employment history, and the administrative law judge found 13 years, a difference that is insignificant. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986). In addition, contrary to claimant's contention, the administrative law judge may rely upon the opinions of Drs. Lane and Kraman, non-examining physicians, since they are consistent with the record. See *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). The administrative law judge then weighed Dr. Baker's opinion against the opinions of Drs. Westerfield, Vuskovich, Dahhan, Broudy, Lane and Kraman, all of whom opined that claimant's disability was not due to pneumoconiosis. The administrative law judge rationally found that the latter opinions were entitled to greater weight because they were better documented and reasoned, Decision and Order at 12-13, 15-16; see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987), and because he found that they constituted a preponderance of the evidence. See *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). We affirm, therefore, the administrative law judge's finding that the evidence fails to establish that claimant's total disability was due to pneumoconiosis at Section 718.204(b), and thereby, affirm his finding that the evidence fails to establish a change in conditions at Section 725.310(a). See *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). As this finding precludes entitlement pursuant to the Part 718 regulations, we affirm the administrative law

judge's denial of modification and of benefits. See *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry, supra*.²

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

² We hold that it is not necessary to address claimant's contentions with respect to Section 718.202(a), as they are rendered moot by our disposition of the case. See *Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).