

BRB No. 06-0409 BLA

ELBERT O. SHEPPARD)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 11/29/2006
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Petition for Modification of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Petition for Modification (05-BLA-0020) of Associate Chief Administrative Law Judge Thomas M. Burke rendered 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. Decision and Order at 4. Considering the newly submitted evidence in conjunction with the previously submitted evidence in this request for modification, the administrative law judge concluded that the evidence established the existence of pneumoconiosis and therefore established a change in conditions pursuant to 20 C.F.R. §725.310. The

administrative law judge, however, further found that total disability due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find that Dr. Rasmussen's report established total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial 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 rational, supported by substantial evidence, and in accordance with applicable 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 20 C.F.R. 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 precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 Decision and Order of the administrative law judge is supported by substantial evidence.

Claimant contends that Dr. Rasmussen's March 24, 2004 report supports a finding of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant argues that the "plain language of the report, properly read, provides substantial support for the conclusion that the total disability of [claimant] is causally connected to his coal mine dust exposure." Claimant's Brief at 8. In addition, claimant argues that the administrative law judge mischaracterized Dr. Rasmussen's opinion when he found it resulted in a general statement regarding all miners instead of a personal evaluation of claimant. Claimant's Brief at 6.

The record indicates that Dr. Rasmussen listed claimant's occupational, smoking and medical histories, the results of his physical examination, an x-ray, pulmonary function study, blood gas study, and an incremental treadmill exercise study. Director's Exhibit 94. Dr. Rasmussen stated, "[t]hese studies indicate very poor exercise tolerance. He has at least minimal loss of lung function. He is not able to perform moderate or heavy manual labor." *Id.* He also stated: "[t]he two risk factors for this patient's impaired function are his cigarette smoking and his coal mine dust exposure. Both

contribute. Both cause COPD,” and that “[t]he patient’s coal mine dust exposure is a contributing factor.” *Id.*

The administrative law judge acknowledged that Administrative Law Judge Richard Morgan had previously found claimant to be totally disabled due to cardiac problems. Decision and Order at 10. The administrative law judge found that Dr. Rasmussen’s opinion was not well reasoned on the issue of disability causation, and gave it little weight since it was unclear if claimant’s “impaired function” was primarily pulmonary or respiratory, or referred to his cardiac and respiratory health. Decision and Order at 10. Additionally, the administrative law judge found that Dr. Rasmussen failed to explain his conclusion that claimant’s coal mine dust exposure was a contributing factor to his impaired function and did not offer an opinion that it was a “substantially contributing cause” of claimant’s total disability. Decision and Order at 10; *see* 20 C.F.R. § 718.204(c)(1). Furthermore, the administrative law judge noted that while “Dr. Rasmussen cites three articles apparently in support of his statement that both coal mine dust exposure and cigarette smoking can cause diminished lung function,” the doctor “offers no explanation as to the articles’ conclusions or how those conclusions apply to the present case.” Decision and Order at 10.

The administrative law judge acted within his discretion as fact-finder and found that the opinion of Dr. Rasmussen did not explain how claimant’s total disability was due to pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge further reasonably determined that Dr. Rasmussen’s report did not explain how the articles cited specifically related to claimant’s case. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

The administrative law judge is empowered to weigh the evidence and to draw his own inferences, *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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 , 1-113 (1989). Based on the foregoing, we affirm the administrative law judge’s finding that Dr. Rasmussen’s newly submitted opinion fails to establish that claimant suffers from a totally disabling pulmonary or respiratory impairment due to pneumoconiosis. We therefore affirm, as supported by substantial evidence, the administrative law judge’s finding at 20 C.F.R. §718.204(c) and his determination that claimant failed to establish a change in conditions at 20 C.F.R. §725.310 (2000) sufficient to warrant modification of the prior denial of

benefits. We further affirm the administrative law judge's finding that the prior denial contained no mistake in a determination of fact at 20 C.F.R. §725.310 (2000).

Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability due to pneumoconiosis and, therefore, a basis for modification of the prior denial of benefits, as it is supported by substantial evidence and is in accordance with law. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order Denying Petition for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge