

BRB No. 00-0159 BLA

DONALD JOHNSON)
)
 Claimant-Petitioner)
)
 v.)
)
 DIXIE LEE COAL COMPANY,) DATE ISSUED:
 INCORPORATED)
)
 and)
)
 AMERICAN BUSINESS AND)
 MERCANTILE INSURANCE MUTUAL,)
 INCORPORATED)
)
 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 on Request for Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Donald Johnson, Weeksbury, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer and carrier.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; 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, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits on Request for Modification (99-BLA-0147) of Administrative Law Judge Thomas F. Phalen, Jr., 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). The administrative law judge credited claimant with fourteen years of qualifying coal mine employment based on the stipulation of the parties, and adjudicated this claim, filed on June 24, 1987, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that new evidence submitted in support of claimant's request for modification was sufficient to establish total respiratory disability pursuant to Section 718.204(c)(4), an element of entitlement previously adjudicated against claimant, thus claimant established a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge then reviewed all of the evidence of record and found it sufficient to establish total respiratory disability pursuant to Section 718.204(c)(4), but insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), or disability causation pursuant to Section 718.204(b). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's challenge to its designation as the responsible operator herein.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement.

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Turning to the issue of disability causation, the administrative law judge properly found that the record contained no evidence of complicated pneumoconiosis, thus the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was not applicable. Decision and Order at 13, 19. The administrative law judge accurately reviewed the evidence submitted in support of the instant request for modification, and determined that while no physician opined that pneumoconiosis contributed to claimant's disability, both Drs. Broudy and Fino affirmatively attributed claimant's disability to smoking, thus claimant failed to establish disability causation pursuant to Section 718.204(b).¹ Decision and Order at 17; see *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). The administrative law judge also accurately reviewed the evidence contained in the record prior to claimant's most recent modification request, and determined that although Dr. Hieronymous opined that claimant was totally and permanently disabled for employment in a dusty environment due to his pneumoconiosis,² Drs. Sutherland, Broudy, Vuskovich, Fino, Lane and Anderson found no pneumoconiosis and opined that, at that time, claimant had no disability or impairment related to his coal mine employment. Decision and Order at 18; see generally *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). The administrative law judge permissibly found no mistake of fact in his review of the determinations of Administrative Law Judges Daniel L. Leland and Paul H. Teitler, as affirmed by the Board in *Johnson v. Dixie Lee Coal Co., Inc.*, BRB No. (May 24, 1994)(unpub.), Director's Exhibit 58, and *Johnson v. Dixie Lee Coal Co., Inc.*, BRB No. (July 10, 1996)(unpub.), Director's Exhibit 87, that the weight of the previously submitted evidence was insufficient to establish entitlement pursuant to 20 C.F.R. Part 718, see *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), and acted

¹Dr. Broudy additionally indicated that claimant's exercise study showed a reduced exercise capacity due to cardiac disease, unrelated to his dust exposure in coal mine employment. Director's Exhibit 103; Employer's Exhibit 8 at 24.

²The administrative law judge correctly acknowledged that a medical opinion which merely advises against a return to the dusty atmosphere of a coal mine without addressing the claimant's physical capacity to return to work is insufficient to establish the existence of a totally disabling respiratory impairment. Decision and Order at 15; *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

within his discretion as trier-of-fact in according determinative weight to the newly submitted opinion of Dr. Broudy, which he found was supported by the extensive medical data, symptomatology and progression of claimant's condition. Decision and Order at 17-19; *see generally* *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985) . The administrative law judge's findings pursuant to Section 718.204(b) are supported by substantial evidence, and thus are affirmed. Inasmuch as claimant has failed to establish disability causation, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits, and we need not address employer's arguments regarding its designation as the responsible operator herein and the issues of total respiratory disability at Section 718.204(c) and a change in conditions at Section 725.310, nor reach the remaining issues of the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a), 718.203(b). *See Trent, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge