BRB No. 99-0962 BLA

BEN PENNINGTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Timothy J. Walker, London, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1024) of Administrative Law Judge Robert L. Hillyard denying modification and 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). The administrative law judge found that the instant case was a modification request and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 2, 5-6. Considering the proper standard, the administrative law judge concluded that the newly submitted evidence of record was

[1]Claimant filed his claim for benefits on December 16, 1993, which was denied by the Benefits Review Board on April 28, 1997. Director's Exhibits 1, 45. Claimant filed a modification request on January 8, 1998. Director's Exhibit 46.

insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

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 into the Act 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*).

[2]The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. The United States Court of Appeals for the Sixth Circuit has held that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been made by claimant.[3] *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Furthermore, in determining whether claimant has established a change in conditions 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 newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(c) and therefore insufficient to establish modification.[4] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Worrell, supra*.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]The administrative law judge's determination that the prior decision did not contain a mistake of fact is unchallenged on appeal, and therefore is affirmed. *Skrack, supra*.

Considering the newly submitted evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin, supra*. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the fact that the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 46, 50-52; Decision and Order at 3, 6-7; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). Further, the administrative law judge considered the entirety of the newly submitted medical opinion evidence of record, *i.e.*, the opinions of Drs. Bushey and Broudy, and permissibly accorded greater weight to Dr. Broudy's opinion, that claimant does not have pneumoconiosis, as the physician's opinion was better explained, supported by the objective evidence and in light of his superior credentials.[5] Decision and Order at 7; Director's Exhibits 46, 52; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.* 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Piccin, supra*; *Kozele v. Rochester*

[5]Dr. Bushey noted that claimant has a back injury and diagnosed chronic lung disease with pulmonary emphysema and fibrosis, compatible with coal workers' pneumoconiosis 2/1 and opined that claimant is totally disabled from any gainful labor. The record indicates that Dr. Bushey is claimant's treating physician but is devoid of any other qualifications for the physician. Director's Exhibit 46. Dr. Broudy, who is a B-reader and board-certified in internal medicine with a subspecialty in pulmonary medicine, opined that claimant was not suffering from coal workers' pneumoconiosis and that claimant retained the respiratory capacity to perform coal mine employment or similar arduous labor. Director's Exhibit 52.

and Pittsburgh Coal Co., 6 BLR 1-376 (1983). Contrary to claimant's contention, the administrative law judge properly noted that Dr. Bushey was claimant's treating physician and further provided a rational reason for finding his opinion entitled to less weight. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Wetzel, supra*; Decision and Order at 5, 7. Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Perry, supra*.

The administrative law judge, in the instant case, also permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(4). *Piccin, supra*. Contrary to claimant's contention, the administrative law judge permissibly concluded that the newly submitted evidence was insufficient to establish total disability as Dr. Bushey did not address whether claimant's disability was due to a respiratory impairment or to his back condition and Dr. Broudy opined that claimant retained the respiratory capacity to perform the work of a miner or similar arduous labor. Director's Exhibits 46, 52; Decision and Order at 7-8; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields, supra*; *Budash, supra*; *Gee, supra*; *Perry, supra*. Additionally, the administrative law judge rationally accorded greater weight to Dr. Broudy's opinion as it was better explained, supported by the objective evidence and in light of the physician's superior credentials. Decision and Order at 7-8; Director's Exhibits 46, 52; *Worhach, supra*; *Clark, supra*; *Martinez, supra*; *Fields, supra*; *Minnich, supra*; *Budash, supra*; *Gee, supra*; *Perry, supra*; *King, supra*; *Wetzel, supra*; *Lucostic, supra*; *Hutchens, supra*; *Pastva, supra*; *Piccin, supra*. Contrary to claimant's contention, opinions finding no significant or compensable respiratory impairment need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel, supra*. Moreover, we reject claimant's arguments that the administrative law judge failed to consider that he is totally disabled for comparable and gainful work because of his age, work experience and education, since the medical opinion evidence does not establish the existence of a totally disabling respiratory impairment under Section 718.204(c).[6] *See* 20 C.F.R. §718.204(c)*; Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Claimant has the general burden of establishing entitlement and bears the risk of non-

[6]Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982) is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

persuasion if his evidence is found insufficient to establish a crucial element. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly found the newly submitted evidence diagnosing pneumoconiosis and a totally disabling respiratory impairment outweighed by the remaining contrary medical evidence, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical evidence of record 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); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Section 718.202(a) and Section 718.204(c) as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Worrell*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge