

BRB No. 04-0296 BLA

DANIEL CRAWFORD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SANDY FORK MINING COMPANY)	DATE ISSUED: 09/28/2004
)	
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 Denying Modification of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edward Collett, PSC), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, PSC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (2003-BLA-05458) of Administrative Law Judge Stuart A. Levin denying 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, after noting that the instant claim was a modification request, found at least ten years of qualifying coal mine employment and that employer was the proper responsible operator. Decision and Order Denying Modification at 2-4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order Denying

¹Claimant filed his claim for benefits with the Department of Labor on February 14,

Modification at 4. After considering all of the evidence of record, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204 and thus failed to establish modification pursuant to 20 C.F.R. §725.310. Decision and Order Denying Modification at 5-10. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to the instant appeal.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one 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 Denying Modification, 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

2001, which was denied by the district director on November 19, 2001 as claimant failed to establish any element of entitlement. Director's Exhibits 2, 24. Claimant subsequently requested modification on July 19, 2002, which was denied by the district director on November 12, 2002. Director's Exhibits 26, 29. Claimant requested a formal hearing before the Office of Administrative Law Judges on November 19, 2002. Director's Exhibit 31.

²The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and contains no reversible error.³ The administrative law judge properly determined that the initial claim for benefits was denied because claimant did not establish the existence of totally disabling pneumoconiosis arising out of coal mine employment. Director's Exhibit 24; Decision and Order Denying Modification at 2. Considering the relevant evidence of record, the administrative law judge rationally found that claimant failed to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant's assertion that the administrative law judge erred in finding that the existence of pneumoconiosis was not established lacks merit. The administrative law judge permissibly found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 8, 9, 25; Employer's Exhibits 1, 2, 4, 5, 7; Decision and Order Denying Modification at 5; *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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kuchwara*, 7 BLR 1-167.

Claimant further asserts that the administrative law judge failed to find the existence of pneumoconiosis established based upon the medical opinions of Drs. Baker and Hussain. Claimant's Brief at 4-6. We disagree. In determining if the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally considered whether the opinions of record were supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order Denying Modification at 6-7. The administrative law judge acted within his discretion, as fact-finder, in concluding that the opinions of Drs. Baker and Hussain were insufficient to meet claimant's burden of proof as he found the opinions of the physicians not to be as thorough or persuasive since their diagnosis of pneumoconiosis was based upon their own positive x-ray readings, which were reread as negative by Dr. Wiot, a highly qualified expert.⁴ *See Jericol Mining, Inc. v.*

³This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

⁴Dr. Wiot is a B reader and a Board-certified radiologist. Director's Exhibit 25; Employer's Exhibits 1, 2. The record does not indicate that Drs. Baker and Hussain have any special qualifications for the interpretation of x-rays. Director's Exhibits 8, 9.

Napier, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Worhach*, 17 BLR 1-105; *Clark*, 12 BLR 1-149; *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order Denying Modification at 7; Director's Exhibits 8, 9.

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Broudy and Dahhan, than to the opinions of Drs. Baker and Hussain, as the findings of the physicians were based upon a more extensive consideration and discussion of the medical evidence and were supported by the objective medical evidence of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Hutchens*, 8 BLR 1-16; Decision and Order Denying Modification at 7; Employer's Exhibits 5, 7. We therefore affirm the administrative law judge's credibility determinations with respect to the medical opinion evidence as they are supported by substantial evidence and are in accordance with law.

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 6-9; Decision and Order Denying Modification at 9-10; Director's Exhibits 8, 9; Employer's Exhibits 5, 7; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge, in the instant case, properly considered this evidence and permissibly found that the report by Dr. Baker was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as the physician's opinion was based on the need to limit further exposure to coal dust and did not clearly assess claimant's physical ability to do his usual coal mine employment or comparable work.⁵ Director's Exhibit 9; Decision and Order Denying Modification at 9; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988); *Fagg*, 12 BLR 1-77; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Lucostic*, 8 BLR 1-46.

⁵Dr. Baker diagnosed coal workers' pneumoconiosis, chronic bronchitis, mild resting arterial hypoxemia and mild restrictive ventilatory defect and opined that claimant was 100% occupationally disabled for work in the coal mining industry or similar dusty occupations as he should limit further exposure to coal dust. Director's Exhibit 9.

Further, claimant's assertion that he is entitled to a presumption of total disability lacks merit. Claimant's Brief at 6. Claimant is not entitled to a presumption of disability as the record does not contain any evidence of complicated pneumoconiosis and the instant claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); Director's Exhibit 2; Decision and Order Denying Modification at 2, 5; *Kubachka v. Windsor Power House Coal Corp.*, 11 BLR 1-171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Rather, claimant must establish each element of entitlement by a preponderance of the evidence. See *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. Moreover, opinions finding no significant or compensable impairment need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel*, 8 BLR 1-139. Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, fully addressed all of the relevant medical evidence, including the opinion of Dr. Baker, and rationally found that this evidence could not carry claimant's burden of proof.⁶ Decision and Order Denying Modification at 8-10; Director's Exhibits 8, 9, 23; Employer's Exhibits 3, 5, 7; *Zimmerman*, 871 F.2d 564, 12 BLR 2-254; *Taylor*, 12 BLR 1-83; *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

Finally, claimant, citing the Board's decision in *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), argues that he is unable to perform comparable and gainful work because of his age, work experience and education. Claimant's argument lacks merit. Initially, the Board's decision in *Bentley* is inapposite.⁷ Moreover, under Section 718.204(b), the test for total disability is medical, not vocational. See 20 C.F.R. §718.204(b); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); see also *Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d

⁶Dr. Hussain opined that claimant has a mild impairment and retains the respiratory capacity to perform his last work in the mines or comparable work in a dust-free environment. Director's Exhibit 8. Dr. Dahhan opined that claimant retains the respiratory capacity to continue his previous coal mining or job of comparable physical demand with no evidence of pulmonary impairment and/or disability. Employer's Exhibit 5. Dr. Broudy opined that claimant retains the respiratory capacity to return to his previous job in and around the mining industry or a job requiring similar arduous manual labor. Employer's Exhibit 7.

⁷In *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), a case decided under the 20 C.F.R. Part 410 regulations, the Board noted 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(a), (b)(1).

485, 7 BLR 2-124 (6th Cir. 1985). Thus, claimant's arguments are rejected. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to total disability, we affirm the administrative law judge's credibility determinations as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Budash*, 9 BLR 1-48; *Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis or total disability, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. 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*, 12 BLR 1-149; *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 as the evidence of record is insufficient to establish the existence of pneumoconiosis or total disability, claimant has failed to establish modification pursuant to 20 C.F.R. §725.310 as it is supported by substantial evidence and is in accordance with law. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge