BRB No. 99-1296 BLA

HOWARD B. DICKSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: _____
	)	
	)	
NORTH AMERICAN COAL CORPORATION	)	
	)	
	)	
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 - Denial of Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Howard B. Dickson, Jr., Powhatan Point, Ohio, *pro se*.

David J. Millstone (Squire, Sanders & Dempsey L.L.P.), Cleveland, Ohio, for employer.

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

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order on Modification (1998-BLA-0205) of Administrative Law Judge Robert L. Hillyard denying benefits on a request for modification in 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).[1] This case has been before the Board previously. In the original Decision and

[1] Claimant is Howard B. Dickson, the miner, who filed his claim for benefits with the

Order issued June 20, 1985, Administrative Law Judge Daniel L. Leland noted employer's stipulation to approximately thirty-five years of coal mine employment and adjudicated the merits of the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1) and that, therefore, claimant was entitled to the benefit of the rebuttable presumption of total disability due to pneumoconiosis contained in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The administrative law judge further found that the presumption was rebutted on the grounds that claimant did not have pneumoconiosis and that his respiratory impairment did not arise out of, or in connection with, coal mine employment, but rather was due to organic heart disease. Accordingly, benefits were denied. Decision and Order at 2; Director's Exhibit 27.

Claimant appealed the denial of benefits to the Board and in *Dickson v. North American Coal Corp.*, BRB No. 85-1695 BLA (Dec. 22, 1987)(unpub.), the Board affirmed the administrative law judge's finding that rebuttal was established on the ground that claimant's respiratory impairment did not arise out of coal mine employment, but rather was due to organic heart disease, and affirmed the denial of benefits. Decision and Order at 2; Director's Exhibit 43.

On November 15, 1988, within one year of the Board's affirmance of the denial, claimant requested modification. Decision and Order at 2; Director's Exhibits 52, 57. In a Decision and Order issued November 28, 1990, Administrative Law Judge Gerald M. Tierney found that the additional evidence submitted with claimant's modification request failed to establish a change in condition or a mistake in a determination of fact such as to warrant modification of the previous denial pursuant to Section 725.310. Accordingly, modification and benefits were denied. Decision and Order at 2; Director's Exhibit 65.

Claimant appealed the denial of benefits to the Board, but also submitted additional evidence and requested modification while the case was pending at the Board. By Order dated June 3, 1992, the Board dismissed the appeal and remanded the case to the district director for modification proceedings. Decision and Order at 2; Director's Exhibits 68-69. The district director denied modification and the case was forwarded to the Office of Administrative Law Judges. In a Decision and Order issued on April 23, 1997, Administrative Law Judge Rudolf L. Jansen found that the evidence was sufficient to

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Department of Labor on June 11, 1980. Decision and Order - Denial of Request for Modification at 2; Director's Exhibit 1.

establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) and that, therefore, claimant was entitled to the benefit of the rebuttable presumption of total disability due to pneumoconiosis contained in Section 718.305. The administrative law judge further found that the presumption was rebutted on the grounds that claimant did not have pneumoconiosis and that his respiratory impairment did not arise out of, or in connection with, coal mine employment, but rather was due to his cardiac condition. Thus, the administrative law judge concluded that claimant was not entitled to modification pursuant to 20 C.F.R. §725.310. Accordingly, modification and benefits were denied. Decision and Order at 2; Director's Exhibit 92.

On July 28, 1997, within one year of the denial, claimant requested modification. Decision and Order at 2; Director's Exhibit 93. In the Decision and Order issued August 20, 1999, the subject of the instant appeal, Judge Hillyard found that although claimant was entitled to the benefit of the rebuttable presumption of total disability due to pneumoconiosis contained in Section 718.305, the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or that claimant's respiratory impairment arose out of, or in connection with, coal mine employment and was thus insufficient to establish a change in conditions since the previous denial. The administrative law judge further found that there was no mistake in a determination of fact in the prior denials. The administrative law judge thus found that the evidence did not warrant modification pursuant to 20 C.F.R. §725.310. Accordingly, modification and benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

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. *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, are supported by substantial evidence, and are 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).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that substantial evidence supports the denial of benefits under 20 C.F.R. Part 718. The administrative law judge properly found that the newly submitted evidence as well as the evidence submitted in connection with the original file failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a) even though claimant had the benefit of the presumption contained in Section 718.305. In his consideration of the x-ray

evidence, the administrative law judge rationally concluded that the x-ray evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to Section 718.202(a)(1) as he correctly found that none of the newly submitted x-ray readings were positive for the presence of pneumoconiosis. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 4, 8; Claimant's Exhibit 7; Employer's Exhibit 1. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Additionally, as the record contains no biopsy evidence, the administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis at Sections 718.202(a)(2). Furthermore, he correctly found that the presumptions found at 20 C.F.R. §§718.304 and 718.306 are inapplicable as the presumption at Section 718.304 requires evidence of complicated pneumoconiosis which is not in the record and the presumption at Section 718.306 does not apply to claims filed by living miners. *See* 20 C.F.R. §718.202(a)(3); Decision and Order at 8.

Moreover, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as the weight of the more comprehensive and more credible medical opinions did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Decision and Order at 8-9. The administrative law judge found that Dr. Knight's diagnosis of pneumoconiosis was outweighed by the contrary opinions of Drs. Rosenberg and Altmeyer, both of whom found that claimant did not suffer from pneumoconiosis. The administrative law judge rationally determined that Dr. Knight's diagnosis was unreasoned and unsupported by the objective evidence while the opinions of Drs. Rosenberg and Altmeyer were well-reasoned and documented and both physicians possessed superior qualifications. *Clark*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 9-10; Claimant's Exhibits 1-2, 7; Employer's Exhibits, 1, 3. We therefore affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In addition, the administrative law judge permissibly relied on the opinions of Drs. Rosenberg and Altmeyer to find that claimant's respiratory impairment did not arise out of, or in conjunction with, his coal mine employment based on their qualifications and since their findings were supported by the objective evidence and more comprehensive. *Id*. The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the evidence failed to establish

the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)- (4) or that claimant suffers from a disabling respiratory or pulmonary impairment arising out of coal mine employment and, thus, we affirm his finding that the evidence failed to establish a change in conditions pursuant to Section 725.310. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 10. Finally, the administrative law judge properly reviewed the prior denials and rationally concluded that there was no mistake in a determination of fact in those decisions. *See Nataloni*, *supra*; Decision and Order at 10. Consequently, we affirm the administrative law judge's denial of claimant's petition for modification as it is supported by substantial evidence and is in accordance with law.

Accordingly, the Decision and Order of the administrative law judge 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