BRB No. 98-0831 BLA

LEO W. AMBROSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SIMCO-PEABODY COAL COMPANY	)	DATE ISSUED: __9/29/99_____
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 Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Paul (Rick) Rauch (McNamar, Fearnow & McSharar, P.C.), Indianapolis, Indiana, for claimant.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., 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 - Denying Benefits (96-BLA-0080) of Administrative Law Judge Rudolf L. Jansen 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 determined that this case involves a request for modification of the Decision and Order Denying Benefits of Administrative Law Judge J. Michael O'Neill, dated August 28, 1992, and affirmed by the Board in a Decision and Order issued April 29, 1994.[1] The administrative law judge credited claimant with thirty-nine years

[1] In the previous Decision and Order, Administrative Law Judge J. Michael O'Neill credited claimant with thirty-nine years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's March 19, 1990 filing date. Weighing the medical evidence, Judge O'Neill found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

of coal mine employment, based on a stipulation of the parties, and found that claimant's usual coal mine employment was that of a tipple attendant with duties including working on the coal belt, cleaning and shoveling coal, and dumping coal from coal cars into hoppers. In considering claimant's request for modification, the administrative law judge found the newly submitted evidence of record insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, the administrative law judge found the newly submitted evidence insufficient to establish that pneumoconiosis was a contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in failing to address whether claimant satisfied the requirements of a claim for modification, particularly,

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§718.202(a)(1)-(4). In addition, Judge O'Neill found the evidence demonstrated total respiratory disability pursuant to 20 C.F.R. §718.204(c), but that the medical evidence was insufficient to establish that pneumoconiosis was a contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge O'Neill denied benefits. Director's Exhibit 34.

On appeal, the Board affirmed Judge O'Neill's denial of benefits, holding that he reasonably found the relevant evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement under Part 718. *Ambrose v. Simco-Peabody Coal Co.*, BRB No. 92-2700 BLA (Apr. 29, 1994)(unpub.); Director's Exhibit 35.

whether employer's concession of total respiratory disability was sufficient to establish a "material change in conditions." In addition, claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant further contends that the administrative law judge erred in finding that the evidence of record was insufficient to establish that pneumoconiosis was a contributing cause of claimant's total disability. In response, employer urges affirmance of the administrative law judge's denial of benefits, arguing that claimant is merely seeking a reweighing of the evidence and has failed to provide any specific allegations of error in the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief 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 applicable 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 considering whether a claimant has established a change in conditions pursuant to Section 725.310, an administrative law judge must consider all of the

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[2] The parties do not challenge the administrative law judge's decision to credit the miner with thirty-nine years of coal mine employment or his findings pursuant to 20 C.F.R. §718.202(a)(1)-(3). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision. *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In addition, the administrative law judge must consider the entire record in addressing whether there was a mistake in a determination of fact. 20 C.F.R. §725.310; *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Eifler v. Director, OWCP*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal, and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits. Initially, we reject claimant's contention that employer's concession of total respiratory disability was sufficient to establish a "material change in conditions." Contrary to claimant's contention, the administrative law judge found that claimant established total disability in the previous decision, *see* Director's Exhibit 34, and, thus, properly determined that claimant, in order to establish a change in conditions pursuant to Section 725.310, must establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or that pneumoconiosis was a contributing cause of claimant's total disability pursuant to Section 718.204(b), the two elements of entitlement previously adjudicated against claimant.[3] Decision and Order at 4; Director's Exhibit 34; *see Franklin,*

[3] In addition, a review of claimant's Petition for Review and brief does not show a specific challenge to the administrative law judge's failure to render a finding regarding

supra; Nataloni, supra.

We also reject claimant's contention that the administrative law judge erred in finding that the newly submitted medical opinion evidence was insufficient to establish that claimant's severe obstructive lung impairment was related to coal dust exposure or his coal mine employment pursuant to Section 718.202(a)(4). Initially, contrary to claimant's contention, the administrative law judge considered all of the newly submitted medical opinions of record, in their entirety, and found that while these medical opinions provided different conclusions as to the cause of claimant's severe obstructive lung impairment, nonetheless, the opinions of Drs. Garcia, Renn, Selby, Tuteur and O'Bryan were reasoned and documented, inasmuch as each physician's opinion was adequately supported by its underlying documentation. Decision and Order at 8-15, 18; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, in weighing these opinions, the administrative law judge reasonably exercised his discretion as trier-of-fact in according greater weight to the opinion of Dr. Renn, that claimant's respiratory impairment was not related to his coal mine employment, finding that Dr. Renn had a more complete picture of claimant's pulmonary condition.[4]

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a mistake in a determination of fact. Consequently, claimant has waived this issue on appeal. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Dr. Renn, following a review of the medical evidence of record, diagnosed asthma, arteriosclerotic heart disease, angina pectoris, high blood pressure and an esophageal hiatus hernia. In addition, Dr. Renn noted that the degree of emphysema

Decision and Order at 19-20; *see Clark, supra*; *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see generally Shepherd v. Director, OWCP*, 6 BLR 1-485 (1983). In particular, the administrative law judge found that Dr. Renn's opinion was entitled to greater weight than the opinion of Dr. Garcia, the lone medical opinion that claimant's respiratory impairment was due to his coal mine employment,[5] inasmuch as Dr. Renn, in rendering his opinion, reviewed the entire record, including the contrary opinion of Dr. Garcia and its supporting objective evidence. *Id*. Additionally, we reject the remainder of claimant's contentions regarding the individual medical opinions of record inasmuch as they do not allege any specific legal error on the part of the administrative law judge in weighing these opinions but rather seek a reweighing of these opinions, which the Board is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Since the administrative law judge weighed all of the newly submitted medical opinions and found that the weight of these opinions did not ascribe claimant's severe obstructive lung impairment to coal dust exposure or claimant's coal mine employment, we affirm his finding that claimant failed to establish pneumoconiosis pursuant to Section

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from which claimant suffered was not beyond the amount that one would expect in a person of claimant's age. Finally, Dr. Renn specifically opined that claimant does not have a totally disabling respiratory or pulmonary impairment significantly related to or substantially aggravated by coal dust exposure. Employer's Exhibits 48, 56.

[5] Dr. Garcia diagnosed coal dust induced pulmonary emphysema, which arose, at least in part, from his coal mine employment. Claimant's Exhibits 3, 10.

718.202(a)(4). 20 C.F.R. §718.202(a)(4); Decision and Order at 19-20; Director's Exhibits 33, 36; Claimant's Exhibits 3, 10; Employer's Exhibits 11, 39, 48, 54, 56, 58, 64; *see Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *see also Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990).

Furthermore, we affirm the administrative law judge's finding that the newly submitted medical opinions were insufficient to establish that pneumoconiosis was a contributing cause of the claimant's total respiratory disability pursuant to Section 718.204(b).[6] Contrary to claimant's contention, the administrative law judge was not required to accord less weight to the medical opinions of Drs. Renn, Tuteur, Selby and O'Bryan because these physicians did not diagnose pneumoconiosis inasmuch as their opinions were not contrary to the administrative law judge's findings pursuant to Section 718.202(a). Rather, the administrative law judge determined that claimant had not established a respiratory impairment related to his coal mine employment pursuant to Section 718.202(a), *see* discussion, *supra*. Consequently, the administrative law judge properly considered all of the new medical opinions and reasonably exercised his

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[6] In this case arising within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, pursuant to Section 718.204(b), in order to be a contributing cause, pneumoconiosis must be a necessary, but need not be a sufficient condition of the miner's total disability. Claimant must prove a simple "but for" nexus to be entitled to benefits. 20 C.F.R. §718.204(b); *Hawkins v. Director, OWCP*, 907 F.2d 697, 14 BLR 2-17 (7th Cir. 1990); *Shelton v. Old Ben Coal Co.*, 899 F.2d 690, 15 BLR 2-116 (7th Cir. 1991).

discretion in according greater weight to the opinion of Dr. Renn, who considered the multiple causes of claimant's respiratory or pulmonary disability and opined that it was due to claimant's asthma, which he did not attribute to coal dust exposure, and not to claimant's emphysema, in finding that pneumoconiosis was not a contributing cause of claimant's total disability. Decision and Order at 21-22; *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991)*; Hawkins v. Director, OWCP*, 907 F.2d 697, 14 BLR 2-17 (7th Cir. 1990); *Shelton v. Old Ben Coal Co.*, 899 F.2d 690, 15 BLR 2-116 (7th Cir. 1991); *see also Migliorini, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge