BRB No. 03-0151 BLA

THOMAS BRANHAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRUMAN HANDSHOE TRUCKING	)	DATE ISSUED: 08/28/2003
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 B Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Thomas Branham, Pikeville, Kentucky, pro se.

John T. Chafin (Kazee, Kinner, Chafin & Patton), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (01-BLA-1108) of Administrative Law Judge Daniel J. Roketenetz rendered 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).[1] Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Considering the newly submitted evidence, in conjunction with the previously submitted evidence, the administrative law judge concluded that the evidence failed to establish the existence of pneumoconiosis and a totally disabling respiratory impairment, elements previously adjudicated against claimant, and, therefore, found that neither a mistake in a determination of fact nor a change in conditions had been shown. The administrative law judge, therefore, found that claimant failed to establish a basis for modification of the prior denial. Accordingly, benefits were again denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers= Compensation Programs, has filed a letter indicating that he 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. *McFall v. Jewell Ridge Coal Corp.*, 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=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*).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order,

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

request modification of a denial of benefits. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Further, even if a claimant only avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, there is no need for a smoking gun factual error, changed conditions or startling new evidence), to modify the prior order. *See Worrell, supra*; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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 Decision and Order of the administrative law judge is supported by substantial evidence. The administrative law judge reasonably determined that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the numerical superiority of the negative readings by physicians with superior qualifications. Decision and Order at 9; Director=s Exhibits 131, 132, 138, 140, 146, 156, 158; Employer=s Exhibits 1, 2; 20 C.F.R. '718.202(a)(1); *Staton v. Norfolk & Western Ry. 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). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) as there was no biopsy evidence of record, this was a living miner=s claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 9, 10; *see* 20 C.F.R. ''718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Turning to the medical opinion evidence, the administrative law judge permissibly accorded little weight to Dr. Sundaram=s opinion because it was vague, poorly reasoned, and not documented, despite Dr. Sundaram=s status as a treating physician. This was proper. 20 C.F.R. '718.104(d)(5); *see Eastover Mining Co. v. Williams*, 2003 WL 21756342 (6th Cir. July 31, 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR ,(6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *see also Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Thus, since Dr. Sundaram provided the only diagnosis of pneumoconiosis in the record and the administrative law judge properly found his opinion entitled to little weight, the administrative law judge=s determination that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4) must be upheld.[2]

[2] The administrative law judge accorded greater weight to the opinions of Drs. Dahhan, Fino and Rosenberg, finding no evidence of pneumoconiosis, as supported by the objective evidence of record and based on the physicians= superior qualifications as pulmonary specialists. Director=s Exhibit 132; Employer=s Exhibits 1, 4. Thus, the

administrative law judge rationally found the opinions to be well-reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

Turning to the issue of total disability, the administrative law judge properly found the evidence insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i)-(iii) as all of the pulmonary function studies and blood gas studies of record produced non-qualifying values[3] and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 12-13; Director=s Exhibits 131, 132, 148, 156; Employer=s Exhibit 1; 20 C.F.R. ' 718.204(b)(2)(i)-(iii). As for the medical opinion evidence, the administrative law judge noted that the opinions of Drs.Dahhan, Fino, and Rosenberg finding no impairment were reasoned and documented, and thus, sufficient to establish that claimant was not totally disabled. *See* Director=s Exhibits 132; Employer=s Exhibits 1, 4. This was rational. *See Napier*, 301 F.3d 703, BLR ; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 46 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) and 13 BLR 1-46 (1986), *aff=d on recon*. 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff=d sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Thus, the administrative law judge rationally found the evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

The administrative law judge is empowered to weigh the medical evidence of record and 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 if the administrative law judge=s findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge=s finding that the evidence of record was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment and, therefore, failed to establish a basis for modification of the prior denial of benefits. *See Worrell*, 27 F.3d 227, 18 BLR 2-290; *Trent*,11 BLR 1-26; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry*, 9 BLR 1-1.[4]

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[3] A Aqualifying@ pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C respectively. A Anon-qualifying@ study exceeds those values. *See* 20 C.F.R. ' 718.204(b)(2)(i), (ii).

[4] While the administrative law judge did not specifically discuss the evidence

submitted prior to the most recent request for modification, the administrative law judge noted he had reviewed the decisions of the prior administrative law judges; found that no mistake in a determination of fact had been made; incorporated their summaries of the medical evidence; and considered the newly submitted medical evidence in conjunction with the previously submitted evidence to determine whether entitlement to benefits was established. Decision and Order at 6.

Accordingly, the Decision and Order B Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge