BRB No. 04-0531 BLA

JIMMY BRADLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/28/2004
	)	
THREE OAKS MINING 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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jimmy Bradley, Prestonsburg, Kentucky, *pro se*.

Denise M. Davidson (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2003-BLA-0041) of Administrative Law Judge Thomas M. Burke 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).[1] This case is before the Board for a third time.[2] Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge found that the newly submitted evidence of record did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b), and therefore, did not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found that claimant failed to establish a mistake in a determination of fact. Accordingly, the administrative law judge denied claimant's petition for modification.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that the administrative law judge properly determined that claimant was not entitled to a new pulmonary evaluation pursuant to 30 U.S.C. §932(b) at the Director's expense on modification, but has not otherwise participated 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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

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[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.

[2]The record indicates that claimant filed an application for benefits on December 11, 1990, which was denied by Administrative Law Judge Daniel L. Leland on September 29, 1992, due to claimant's failure to establish any required element of entitlement. Director's Exhibits 1, 63. On appeal, the Board affirmed the denial of benefits. *Bradley v. Three Oaks Mining Corp.,* BRB No. 94-2863 BLA (Mar. 29, 1996) (unpub.); Director's Exhibit 67. Claimant filed a petition for modification on September 26, 1996 which was denied by Administrative Law Judge Robert L. Hillyard on April 30, 1998, again due to claimant's failure to establish any necessary element of entitlement. Director's Exhibits 68, 104. The Board affirmed the denial of benefits on appeal. *Bradley v. Three Oaks Mining Corp.,* BRB No. 98-1168 BLA (Sep. 30, 1999) (unpub.). Director's Exhibit 111. Claimant filed the present petition for modification on September 28, 2000. Director's Exhibit 114.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 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*).[3] After consideration of the administrative law judge's Decision and Order, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. At Section 718.202(a)(1), the administrative law judge weighed all of the x-ray readings of record submitted since the previous denial of benefits, and permissibly credited the September 27, 2001 negative reading of Dr. Sargent, based on his superior qualifications in the field of radiology.[4] Decision and Order at 7-8 ; Director's Exhibits 118, 120, 124, 126; *Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1995); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987). As the record supports the administrative law judge's weighing of the x-ray evidence of record, his determination pursuant to Section 718.202(a)(1) is affirmed.

The administrative law judge also properly found that claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3), as the record contains no biopsy evidence, and the presumptions contained in 20 C.F.R. §§718.304, 718.305, and 718.306, are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 7; *Dixon v. North Camp Coal Co.,* 8 BLR 1-344 (1985).

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[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The record indicates that Dr. Sargent is a Board-certified radiologist and B reader. Director's Exhibit 126. Dr. Jarboe, who interpreted the December 4, 2001 x-ray as negative for the presence of pneumoconiosis, is a B reader. Director's Exhibit 120. Drs. Myer and Hieronymus, who diagnosed the existence of pneumoconiosis based on their interpretations of the September 27, 2001 x-ray, have no specialized qualifications in the field of radiology. Director's Exhibits 118, 124.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical reports and rationally accorded less weight to Dr. Hieronymus's diagnosis of pneumoconiosis, which the administrative law judge found inconclusive because this physician indicated that claimant's work and medical history, and his physical exam were "compatible with a diagnosis of Coal Workers' Pneumoconiosis," Director's Exhibit 118, and because "to the extent that Dr. Hieronymus based his diagnosis on x-ray ray evidence, his diagnosis is not supported by the record." Decision and Order at 10; *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988). The administrative law judge further found that this physician "did not articulate how the underlying objective data led him to conclude the etiology of Claimant's disease," Decision and Order at 10, and did not provide any information which would indicate that his status as a treating physician afforded him a greater understanding of claimant's condition. Decision and Order at 9-11; Director's Exhibit 118*; Cornett v. Benham Coal, Inc.,* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Griffith v. Director, OWCP,* 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994); *Clark,* 12 BLR at 1-155; *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1998)(*en banc*). The administrative law judge permissibly credited Dr. Jarboe's opinion, that claimant did not have pneumoconiosis, as well-reasoned and supported by his examination and objective test results, and due to this physician's superior qualifications as a Board-certified pulmonologist. Decision and Order at 9-11; Director's Exhibits 119, 120; *Worhach v. Director, OWCP,* 17 BLR 1-105 (1993); *Clark,* 12 BLR at 1-155; *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985). We therefore affirm the administrative law judge's findings pursuant to Section 718.202(a)(4).

We also hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence of record was insufficient to establish the presence of a totally disabling respiratory impairment. Pursuant to Section 718.204(b)(2)(i), (ii), the administrative law judge considered the newly submitted pulmonary function study and arterial blood gas study dated December 4, 2001, and rationally determined that they did not establish total respiratory disability as they both produced non-qualifying values.[5] Decision and Order at 12-13; Director's Exhibit 120; *Schetroma v. Director, OWCP,* 18 BLR 1-19 (1993). We also affirm the administrative law judge's findings at Section 718.204(b)(2)(iii), as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 12; *see generally Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991).

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[5] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

The administrative law judge then considered the relevant newly submitted medical reports of record at Section 718.204(b)(2)(iv), and permissibly accorded little weight to Dr. Hieronymus's opinion, because the administrative law judge found that this physician did not state a rationale for his disability opinion, and because the physician's conclusion appeared to be merely a recommendation against further coal dust exposure, not a finding that claimant lacked the pulmonary capacity to perform his previous coal mine work. Decision and Order at 13; Director's Exhibit 118; *Zimmerman v. Director, OWCP,* 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Clark,* 12 BLR at 1-155. The administrative law judge also permissibly credited Dr. Jarboe's opinion, that claimant did not have a totally disabling respiratory impairment, as well-reasoned and better supported by the objective evidence of record. Decision and Order at 13; Director's Exhibits 119, 120; *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark,* 12 BLR at 1-155. As the administrative law judge's findings at Section 718.204(b) are supported by substantial evidence, they are affirmed.[6]

Because we have affirmed the administrative law judge's determination that the newly submitted evidence does not support a finding of the existence of pneumoconiosis or a totally disabling respiratory impairment, we also affirm the administrative law judge's finding that claimant has not established a change in conditions at Section 725.310 (2000). Decision and Order at 8-13; *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); *Kovac v. BCNR Mining Corp.,* 14 BLR 1-156 (1990), *modified on recon.,* 16 BLR 1-71 (1992). In addition, we affirm the administrative law judge's determination that the record evidence as a whole does not establish a mistake in a determination of fact. Decision and Order at 8, 9, 11, 13, 14; *Worrell,* 27 F.3d at 230, 18 BLR at 2-296. We therefore affirm the administrative law judge's denial of claimant's request for modification and the denial of benefits.

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

SO ORDERED.

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[6] We further affirm the administrative law judge's finding that claimant is not entitled to an additional pulmonary evaluation at the Director's expense, as the instant case is a petition for modification, which is a continuation of the original claim, and because the record indicates that the Director discharged his duty under Section 413(b) of the Act, 30 U.S.C. §923(b), by providing claimant with the examination of Dr. Fritzhand to substantiate the present claim. Decision and Order at 2-3; Director's Exhibit 19; *Hodges v. BethEnergy Mines, Inc.,* 18 BLR 1-85 (1994); *Hall v. Director, OWCP,* 14 BLR 1-51 (1990)(*en banc*).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge