BRB No. 05-0526 BLA

ROBERT D. HUFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/29/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Robert D. Huff, Letcher, Kentucky, *pro se*.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (01-BLA-0842) of Administrative Law Judge Joseph E. Kane 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 found that this case involved claimant's request for modification of the administrative

[1] Susie Davis, president of the Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

law judge's previous denial of his claim, and based on the date of filing, considered entitlement pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 1, 3-4. The administrative law judge found that the evidence of record did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b), and thus did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] Decision and Order at 4-5. Consequently, the administrative law judge concluded that there was no basis for granting claimant's modification request, and he denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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 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. 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*).

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[2] Claimant filed his initial application for benefits on June 14, 1995, which the administrative law judge denied on June 30, 1999 because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 1, 108. Claimant filed a second application for benefits on August 25, 1999, which was treated as a request for modification because it came within one year of the denial. Director's Exhibit 109.

[3] Because this claim was pending on January 19, 2001, the effective date of revisions to the regulations, the former version of 20 C.F.R. §725.310 applies to this claim. 20 C.F.R. §725.2(c).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of a denial of benefits. Modification may be granted if there are changed conditions or if there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310 (2000). When a request for modification is filed, "[t]he fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact or change in conditions," *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997), including whether "the ultimate fact (disability due to pneumoconiosis) was wrongly decided . . . ." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).[4]

Pursuant to Section 718.202(a)(1), the administrative law judge considered both the originally submitted x-ray readings and the new x-ray readings submitted on modification, and found that the x-rays did not establish the existence of pneumoconiosis and thus, did not demonstrate a change in conditions or mistake of fact. Decision and Order at 4-6. The administrative law judge weighed thirty-seven readings of the thirteen[5] originally submitted x-rays and determined that although five of those x-rays were read as positive for pneumoconiosis, they were countered by eight x-rays read as negative by physicians with superior qualifications as Board-certified radiologists and B-readers. The administrative law judge therefore found that the old "x-ray evidence does not support a finding of pneumoconiosis where the majority of the x-rays and the most heavily weighted x-rays, do not support a finding of pneumoconiosis." Decision and Order at 6. Substantial evidence supports the administrative law judge's finding, which is in accordance with law. *See 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); *McFall*, 12 BLR at 1-177.

Similarly, the administrative law judge considered five readings of three new x-rays submitted on modification and found Dr. Sundaram's positive reading of the August 21, 2000 x-ray outweighed by Dr. Wiot's and Dr. Dahhan's negative readings of the November 9, 2000 x-ray, based on the latter two readers' superior qualifications. Review of the record confirms that Dr. Wiot is a Board-certified radiologist and B-reader, and that Dr. Dahhan is a B-reader, but does not disclose Dr. Sundaram's radiological qualifications, if any. Director's Exhibits 17, 18, 29, 44, 122. The administrative law

[4] This cases arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] The administrative law judge stated in his decision that he considered twelve original x-rays, but he actually discussed thirteen x-rays.

judge additionally found that Dr. Hashem, a Board-certified radiologist and B-reader, read the September 24, 1999 and August 21, 2000 x-rays as negative, and made additional comments that were not definitive diagnoses of pneumoconiosis.[6] Decision and Order at 4; Director's Exhibit 122. Thus, the administrative law judge found that the new x-rays did not support a finding of the existence of pneumoconiosis. Review of the record reflects that the administrative law judge conducted a proper qualitative analysis of the x-ray readings and that substantial evidence supports his findings. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *McFall*, 12 BLR at 1-177. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2), the administrative law judge considered two pathologists' interpretations of an August 21, 1996 biopsy of claimant's right lung, and noted accurately that the pathologists found the biopsy negative for pneumoconiosis. Director's Exhibit 44 at 111; Employer's Exhibit 13. We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by biopsy evidence pursuant to Section 718.202(a)(2).

The administrative law judge did not make a finding pursuant to Section 718.202(a)(3), providing certain presumptions which, if applicable, may establish the existence of pneumoconiosis. However, review of the record reflects that the presumptions listed at Section 718.202(a)(3) are inapplicable in this case because this is a living miner's claim filed after January 1, 1982, in which the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.304, 718.305, 718.306.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the eight originally submitted medical opinions and the two new medical opinions submitted on modification, along with CT scan evidence of record, and found that the existence of pneumoconiosis was not established. The administrative law judge first noted accurately that an April 20, 1995 CT scan was read negative for pneumoconiosis.[7] Director's

[6] As summarized by the administrative law judge, Dr. Hashem read the September 24, 1999 x-ray as "negative chest." Decision and Order at 4; Director's Exhibit 122 at 31. Dr. Hashem read the August 21, 2000 x-ray as "negative for acute process," and commented that there were scattered nodules "which could be related to coal workers' pneumoconiosis . . . ." Decision and Order at 4; Director's Exhibit 122 at 33. The record reflects that Dr. Hashem did not classify the August 21, 2000 x-ray under the ILO standards for determining the existence of pneumoconiosis required by the regulations. 20 C.F.R. §§718.202(a)(1); 718.102(b); Director's Exhibit 122 at 33.

[7] The administrative law judge did not mention a September 28, 1999 CT scan reading that was submitted on modification, but any error by the administrative law judge

Exhibit 29; Employer's Exhibits 10, 11. Turning to the eight original medical opinions, the administrative law judge noted that three physicians diagnosed claimant with pneumoconiosis, but he reasonably considered that these physicians, Drs. Lane, Myers, and Sundaram, based their diagnoses on positive x-ray readings that the administrative law judge had found outweighed by the negative readings from readers with superior credentials. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003). Substantial evidence supports the administrative law judge's finding.[8] Director's Exhibits 12, 14, 31, 34. The administrative law judge also acted within his discretion in discounting Dr. Sundaram's diagnosis because the April 20, 1995 CT scan that Dr. Sundaram ordered was read as negative for pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Director's Exhibit 29; Employer's Exhibits 10, 11. Finally, the administrative law judge accurately noted that although Dr. Myers diagnosed claimant with chronic obstructive pulmonary disease, Dr. Myers did not relate the disease to coal mine dust exposure.[9] *See* 20 C.F.R. §718.201(a)(2); Director's Exhibit 31.

Considering the two new medical opinions by Drs. Sundaram and Dahhan, the administrative law judge rationally found Dr. Sundaram's diagnosis of pneumoconiosis "undermined" by Dr. Sundaram's reliance on a positive x-ray reading that the administrative law judge had found did not establish the existence of pneumoconiosis. *See Williams*, 338 F.3d at 514, 22 BLR at 2-649; Director's Exhibit 122 at 25.

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was harmless because the scan was not read as positive for pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The record reflects that Dr. Kabir, a radiologist, read the September 28, 1999 CT scan as revealing "probably . . . a benign granuloma," and he reported that "[n]o other abnormality is noted in this study." Director's Exhibit 122 at 32.

[8] Based on a February 21, 1994 x-ray, Dr. Lane diagnosed "coal workers' pneumoconiosis, category 1/1." Director's Exhibit 34. Citing a March 2, 1994 x-ray, Dr. Myers diagnosed "Silicosis, Category 1/1." Director's Exhibit 31. Dr. Sundaram diagnosed coal workers' pneumoconiosis, citing a July 11, 1995 x-ray he initially read as 1/1, and later, as 1/0. Director's Exhibits 12, 14.

[9] Although the administrative law judge did not mention diagnoses of chronic obstructive pulmonary disease listed in Dr. Sundaram's 1995 treatment notes, Director's Exhibit 29, the record reflects that Dr. Sundaram also did not relate the disease to dust exposure in claimant's coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Larioni*, 6 BLR at 1-1278.

Additionally, the administrative law judge was within his discretion to find that Dr. Sundaram's reference to "prolonged exposure to coal dust" as a basis for his diagnosis, Director's Exhibit 122 at 24, 25, was not "a well-reasoned conclusion." Decision and Order at 4; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89 and n.4. By contrast, the administrative law judge found that Dr. Dahhan based his conclusion that claimant does not have pneumoconiosis on reportedly normal physical examination findings, normal tests, and symptoms and history. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89 and n.4; Director's Exhibit 122 at 6-7. Substantial evidence supports the administrative law judge's findings, which are in accordance with law. *McFall*, 12 BLR at 1-177. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4). Based on the foregoing discussion, we also affirm the administrative law judge's findings that claimant did not establish a change in conditions or mistake of fact regarding the existence of pneumoconiosis. *See* 20 C.F.R. §725.310 (2000); *Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27. Therefore, we need not address the administrative law judge's findings regarding total disability pursuant to Section 718.204(b)(2).

Accordingly, the administrative law judge's Decision and Order denying benefits 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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BETTY JEAN HALL
Administrative Appeals Judge