BRB No. 98-0402 BLA

BOBBY WIREMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CREST COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED: 12/28/98
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Bobby Wireman, Gunlock, Kentucky, *pro se*.

Richard A. Dean (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order Denying Benefits (96-BLA-1829) of Administrative Law Judge Richard A. Morgan 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). This claim, filed on December 16, 1992, was previously denied by Administrative Law Judge Paul H. Teitler, because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Claimant appealed to the Board, but while the case was pending on appeal, claimant requested that the Board remand the case to the district director for consideration of additional evidence. The Board treated claimant's request as a request for modification and remanded the case to the

district director. *Wireman v. Crest Coal Co.,* BRB Nos. 96-0167 BLA and 96-0167 BLA-A (Order Dec. 11, 1995)(unpub.). On remand, the district director denied claimant's request for modification and Administrative Law Judge Richard A. Morgan (the administrative law judge) found that claimant failed to establish a change in conditions or a mistake in a determination of fact in the prior denial pursuant to 20 C.F.R. §725.310.[1] The administrative law judge also concluded that, based on his review of all the evidence of record, claimant did not prove the existence of pneumoconiosis under Section 718.202(a). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer argues that the administrative law judge's Decision and Order Denying Benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 supported by substantial evidence, are rational, and are consistent 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).

After considering the administrative law judge's Decision and Order Denying Benefits and the relevant evidence of record, we conclude that substantial evidence supports his finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a). In considering the newly submitted x-ray evidence, consisting of one negative reading by Dr. Broudy, the administrative law judge properly found that it did not support a finding of pneumoconiosis under Section 718.202(a)(1). Decision and Order Denying Benefits at 4, 10; Employer's Exhibit 1. Under Section 718.202(a)(2), the administrative law judge considered the newly submitted biopsy report and properly found that this evidence did not establish pneumoconiosis, as the biopsy tissue came from claimant's shoulder and showed no evidence of pneumoconiosis. Decision and Order Denying Benefits at 10. Also, since the record contains no evidence of complicated pneumoconiosis, *see* 20

[1]A formal hearing was conducted on July 29, 1997 by the administrative law judge to consider claimant's request for modification. Decision and Order Denying Benefits at 2; 30 U.S.C. §932(a), as implemented by 20 C.F.R. §725.451*; Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998).

C.F.R. §718.304, and the presumptions of pneumoconiosis at 20 C.F.R. §§718.305 and 718.306 are inapplicable to this living miner's claim filed after January 1, 1982, the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(3). *Id.*

Relevant to Section 718.202(a)(4), the administrative law judge properly found that the newly submitted medical opinions of Drs. Broudy and Potter did not support a finding of pneumoconiosis. None of the medical records or statements by Dr. Potter, claimant's treating physician, diagnosed pneumoconiosis or any occupational coal dust related breathing impairment. Although Dr. Potter indicated that claimant exhibited a respiratory impairment based on the results of a pulmonary function study, the doctor never determined the etiology of the impairment. Claimant's Exhibit 1; Director's Exhibit 41; *see Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). In contrast, Dr. Broudy, after examining claimant and considering claimant's negative x-ray, non-qualifying pulmonary function study, coal mine employment, medical and smoking histories, diagnosed chronic bronchitis with mild chronic airways obstruction due to cigarette smoking. He determined that claimant did not suffer from pneumoconiosis or an occupational pulmonary or respiratory impairment. Employer's Exhibit 1. The administrative law judge properly relied on the contrary opinion of Dr. Broudy, as the objective evidence of record supports his diagnosis and, within a proper exercise of his discretion, found Dr. Potter's records and statement not reasoned. Decision and Order Denying Benefits at 11, 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Accordingly, we affirm the administrative law judge's finding that the newly submitted evidence did not establish the existence of pneumoconiosis under Section 718.202(a).

Substantial evidence also supports the administrative law judge's finding that there is no mistake in a determination of fact in the prior denial with respect to the issue of the existence of pneumoconiosis. The administrative law judge correctly noted that of the ten x-ray interpretations of record considered by Judge Teitler, only two are positive for pneumoconiosis. The administrative law judge properly found the two positive x-ray readings by Drs. Sundaram and Lim, neither of whom is a B reader, outweighed by the nine negative readings of record by qualified B readers. *Sheckler v. Clinchfield Coal Co.,* 7 BLR 1-128 (1984); Decision and Order Denying Benefits at 12; Director's Exhibits 10, 11, 16, 37-39, 41; Employer's Exhibit 2. Moreover, the administrative law judge properly found the opinion of Dr. Sundaram, the only physician of record who diagnosed pneumoconiosis or any occupational lung disorder, outweighed by the contrary opinions of the pulmonologists of record, Drs. Mettu, Broudy and Dahhan. *McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); Decision and Order Denying Benefits at 12; Director's Exhibits 8, 39, 41. Thus, the administrative law judge, after considering all of the evidence of record *de novo,* properly found that the evidence of

record did not establish a mistake in a determination of fact in the prior denial with respect to the issue of the existence of pneumoconiosis. *Kovac v. BCNR Mining Corp.*,14 BLR 1-156 (1990), *modified on recon.,*16 BLR 1-71 (1992); *see also Consolidated Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Inasmuch as we have affirmed the administrative law judge's determination that the newly submitted evidence did not support a finding of pneumoconiosis under Section 718.202(a) and his determination that the prior claim was properly denied on the ground that claimant did not establish the existence of pneumoconiosis, we also affirm the administrative law judge's finding that the evidence of record as a whole is insufficient to prove that claimant has pneumoconiosis pursuant to Section 718.202(a). Decision and Order Denying Benefits at 13. Because claimant has failed to demonstrate an essential element of entitlement, the denial of benefits under Part 718 is affirmed. *See Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOM D. NELSON, Acting
Administrative Appeals Judge