BRB No. 98-0426 BLA

CHARLES C. COMPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Charles C. Compton, Honaker, Virginia, *pro se*.[1]

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and Nelson, Acting Administrative Appeals Judge.

[1]Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. In a letter dated January 5, 1998, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-0443) of Administrative Law Judge Mollie W. Neal 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, based on the parties' stipulation, credited claimant with seventeen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310[2] and, thus, she denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law

[2]Claimant filed his initial claim on April 2, 1992. Director's Exhibit 37. On May 20, 1992, the Department of Labor (DOL) denied this claim based on claimant's failure to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed another claim on October 12, 1993. Director's Exhibit 1. This claim was denied by the DOL on January 10, 1994, May 12, 1994 and November 30, 1994 based on claimant's failure to establish a material change in conditions. Director's Exhibits 9, 18, 23. Claimant filed a request for modification on September 13, 1995. Director's Exhibit 26.

judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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 rational, supported by substantial evidence, and in accordance with 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).

The administrative law judge stated that "the regulations at 20 C.F.R. §725.310 require that the record be reviewed to determine whether the miner has demonstrated a change in conditions since the May 1994 denial or a mistake in a determination of fact was made in the denial, i.e. whether Claimant failed to establish a 'material change in conditions' since the May 1992 denial of his first claim pursuant to 20 C.F.R. §725.309." Decision and Order at 2-3. After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The Department of Labor denied claimant's previous claim because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 37. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

[3]Inasmuch as the administrative law judge's length of coal mine employment finding, which is not adverse to this *pro se* claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence of record. Of the seventeen newly submitted x-ray interpretations of record, fourteen readings are negative for pneumoconiosis, Director's Exhibits 7, 8, 16, 20, 32, 36; Employer's Exhibits 1-3, and three readings are positive, Director's Exhibits 17, 29. The administrative law judge properly accorded greater weight to the negative x-ray readings provided by physicians who are B-readers and/or Board-certified radiologists.[4] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, since fourteen of the seventeen x-ray interpretations of record are negative for pneumoconiosis, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Further, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy or autopsy evidence. Additionally, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e);

[4]Whereas Dr. Bassali, who is a B-reader, read the October 29, 1993 x-ray as positive for pneumoconiosis, Drs. Binns, Gogineni, Sargent, Spitz and Wiot, who are B-readers and Board-certified radiologists, reread the same x-ray as negative. Further, whereas Dr. Bassali as well as Dr. Fisher, who is a B-reader and Board-certified radiologist, read the March 9, 1994 x-ray as positive for pneumoconiosis, Drs. Binns, Gogineni, and Sargent, who are equally and/or better qualified, reread the same x-ray as negative. In addition, the administrative law judge correctly stated that "[a]ll of the physicians interpreting [the November 7, 1996 x-ray], which include a B-reader and three dually-qualified physicians, did not find pneumoconiosis." Decision and Order at 8.

Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Next, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the relevant newly submitted medical opinions of Drs. Fino, Forehand and Sargent. The administrative law judge stated that "no physician of record has diagnosed Claimant with coal workers' pneumoconiosis." Decision and Order at 10. Drs. Fino and Sargent opined that claimant does not suffer from pneumoconiosis. Director's Exhibit 36; Employer's Exhibit 4. Dr. Forehand opined that claimant suffers from atherosclerotic cardiovascular disease. Director's Exhibit 5. Since the administrative law judge properly found that none of these physicians diagnosed pneumoconiosis or any chronic lung disease arising out of coal mine employment, *see Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. Since none of the newly submitted pulmonary function studies or arterial blood gas studies of record yielded qualifying[5] values, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibits 4, 6, 36. Additionally, since the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3).

Finally, we address the administrative law judge's evaluation of the newly submitted medical reports of record. Drs. Fino and Sargent opined that claimant does not suffer from a disabling respiratory impairment.[6] Director's Exhibit 36; Employer's Exhibit 4. Dr. Forehand opined that claimant's cardiac status leaves

[5]A "qualifying" 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 "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[6]Dr. Sargent opined that claimant retains the respiratory capacity to do his last job. Director's Exhibit 36. However, Dr. Sargent opined that it is likely that claimant is disabled by his arteriosclerotic cardiovascular disease. *Id*.

claimant totally disabled and unable to return to his last coal mining job. Director's Exhibit 5. Therefore, since none of these physicians opined that claimant suffers from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter*, *supra*. Additionally, since the administrative law judge properly found the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310.[7] *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8, 1-11 (1994); *Napier v. Director, OWCP,* 17 BLR 1-111, 1-113 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Moreover, we affirm the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge properly based his conclusion that claimant failed to establish a mistake in a determination of fact "upon the newly submitted evidence, as well as the record as a whole." Decision and Order at 13. The administrative law judge's finding in this regard is supported by substantial evidence, inasmuch as the

[7]In determining whether the newly submitted evidence is sufficient to establish a change in conditions at 20 C.F.R. §725.310, the administrative law judge appears to have considered medical evidence dated October 29, 1993 and March 9, 1994 which was submitted prior to claimant's September 13, 1995 request for modification. Although none of the pulmonary function studies, arterial blood gas studies or medical opinions dated October 29, 1993 supports a finding of pneumoconiosis or total disability, the record does contain interpretations of x-rays dated October 29, 1993 and March 9, 1994 which support a finding of pneumoconiosis. However, any error by the administrative law judge in considering this evidence in her change in conditions finding at 20 C.F.R. §725.310 is harmless since the administrative law judge provided valid bases for discrediting the x-ray evidence which supports a finding of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

record before the district director contained one positive x-ray reading and fourteen negative x-ray readings, the relevant objective studies were nonqualifying, none of the medical reports submitted with the duplicate claim contained a diagnosis of pneumoconiosis or any respiratory or pulmonary condition related to dust exposure in coal mine employment, nor did the reports contain a diagnosis of a totally disabling respiratory or pulmonary impairment. Director's Exhibits 4-8, 16-22.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge