BRB No. 98-0459 BLA

EDMOND L. WATERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAPOCA ENERGY 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Edmond Waters, Grundy, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order

[1] Claimant is the miner, Edmond L. Waters, whose application for benefits filed on October 26, 1994, was denied on October 19, 1995. Director's Exhibits 1, 25. Claimant submitted additional evidence to the district director and requested modification on February 29, 1996. Director's Exhibit 30. The district director denied claimant's modification request on November 1, 1996. Director's Exhibit 36. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 48.

[2] Tim White, a benefits counselor with Stone Mountain Health Services of

(97-BLA-622) of Administrative Law Judge Michael P. Lesniak 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 parties stipulated that claimant established fourteen years of coal mine employment. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, benefits were 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, as party-in-interest, has declined to participate in this appeal.

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 Corp.*, 12 BLR 1-176 (1989). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement.

Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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 and contains no reversible error therein. In the instant case, the administrative law judge correctly found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge considered the x-ray readings of record pursuant to 20 C.F.R. §718.202(a)(1), and rationally credited the negative interpretations based on their numerical superiority, by according more weight to the opinions of those physicians with superior qualifications, and by relying on the uniformly negative readings of the most recent film.[3] *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-3 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). As this finding is supported by substantial evidence, it is affirmed.

We further affirm the administrative law judge's finding that the existence of pneumoconiosis cannot be established pursuant to 20 C.F.R. §718.202(a)(2), (3), since the record contains no biopsy evidence, and the presumptions contained at 20 C.F.R. §§718.304, 718.305, 718.306 are inapplicable to this living miner's claim filed after January 1, 1982 with no evidence of complicated pneumoconiosis in the record. *See* Director's Exhibit 1; Decision and Order at 8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge thoroughly considered the medical reports of record, and rationally rejected Dr. Patel's diagnosis of "possible" pneumoconiosis as too equivocal to support claimant's burden of proof on this issue. *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Dir. 1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). The administrative law judge also properly determined that the remaining medical reports did not establish that claimant suffers from pneumoconiosis. We therefore affirm the administrative law

[3] The administrative law judge's Decision and Order does not reflect consideration of Dr. Wiot's negative interpretation of his x-ray dated April 4, 1995. A remand is not required however, since this reading supports the administrative law judge's finding on this issue.

judge's finding that the preponderance of the medical opinions do not establish the existence of pneumoconiosis as supported by substantial evidence. *Perry*, *supra*.

We further find no error in the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge considered all the relevant evidence, which includes two non-qualifying pulmonary function studies,[4] two non-qualifying arterial blood gas studies, and rationally determined that total disability had not been established at Section 718.204(c)(1), (2). As the record contains no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge rationally found that this element could not be established at Section 718.204(c)(3). The administrative law judge then considered the three medical reports of record, and properly concluded that total disability could not be established at Section 718.204(c)(4), since no physician's report of record diagnosed a total respiratory disability. Since the administrative law judge's findings are supported by the record and applicable law, they are affirmed. *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986).

The administrative law judge is empowered to weigh the medical evidence 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 inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111

[4] 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), (2).

(1989); *Clark*, *supra*. Consequently, we affirm the administrative law judge's findings pursuant to Sections 718.202(a) and 718.204(c), as they are supported by substantial evidence and are in accordance with law.[5] Moreover, since claimant has failed to establish a required element of entitlement under Part 718, we affirm the denial of benefits. *See Trent*, *supra*; *Perry*, *supra*.

[5] As the instant case was a denial of modification by the district director which was subsequently transferred to the Office of the Administrative Law Judges, the administrative law judge properly considered the evidence of record *de novo* as it was not necessary for the administrative law judge to make a specific preliminary determination regarding the grounds for modification inasmuch as the modification finding is subsumed in the administrative law judge's findings on the merits of entitlement. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge