BRB No. 99-0327 BLA

AUDY ESTEP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
EASTERN COAL 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 on Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Audy Estep, Phyllis, Kentucky, *pro se*.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Modification (97-BLA-1535) of Administrative Law Judge Robert L. Hillyard denying benefits on a request for modification in 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 claimant's prior claim was finally denied on August 7, 1995, and that in February 1996, claimant filed additional medical evidence. As this evidence was filed within one year of the previous denial, the administrative law judge determined that

claimant had requested modification pursuant to 20 C.F.R. §725.310.[1] The administrative law judge found that claimant had a smoking history of one pack of cigarettes a day for forty-two years and that claimant had worked twenty-nine years in coal mine employment. Upon review of the newly submitted evidence, the administrative law judge found it insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or a totally disabling respiratory impairment at 20 C.F.R. §718.204(c). Thus, the administrative law judge concluded that claimant had failed to establish a change in conditions pursuant to Section 725.310. The administrative law judge also reviewed the newly submitted evidence and determined that there had not been a mistake in a determination of fact in the prior denial. Accordingly, benefits were denied. On appeal, claimant generally challenges the denial of his request for modification. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.

[1]Claimant filed his first application for benefits on March 2, 1995. *See* Director's Exhibit 1. The district director denied this claim on August 7, 1995 on the grounds that the evidence was insufficient to establish the existence of pneumoconiosisconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to pneumoconiosis. *Id.* Claimant took no further action regarding this claim.

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 conclusions of law are rational, supported by substantial evidence, and in accordance with law.[2] 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 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*).

Initially, we note that claimant alleged thirty-two years of coal mine employment in his application for benefits and that the administrative law judge credited him with twenty-nine years of coal mine employment based on claimant's hearing testimony and Social Security records. Decision and Order at 3. As the difference between the length of coal mine employment alleged by claimant and the length of coal mine employment credited by the administrative law judge would not

[2]Claimant also appeared at the hearing without the assistance of counsel. Hearing Transcript at 5. The administrative law judge discussed claimant's efforts to obtain counsel and his inability to find counsel to take his case. *Id.* As claimant acknowledged that he could not find counsel and indicated his willingness to proceed with the hearing and the administrative law judge informed claimant of the relevant issues and gave him the opportunity to object to the admission of his adversary's evidence, claimant was not prejudiced. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

affect claimant's entitlement to any presumption, the error, if any, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In determining whether claimant established a change in conditions or a mistake in a determination of fact at Section 725.310, the administrative law judge properly conducted an independent assessment of the newly submitted evidence, in conjunction with the previous evidence of record, and the prior finding that claimant failed to show the existence of pneumoconiosis or the presence of a totally disabling respiratory impairment due to pneumoconiosis under the Act. *See* 20 C.F.R. §725.310; *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); Decision and Order at 10-13. The administrative law judge reviewed the medical opinion evidence related to medical examinations and testing conducted after August 5, 1995, the date of the denial by the district director of claimant's initial claim for benefits.[3] Decision and Order at 11-12; *Nataloni, supra*; *Kovac, supra*. Thus, the administrative law judge considered only the x-ray dated January 26, 1996. Director's Exhibits 18, 30, 31, 36, 37; Decision and Order at 11. The administrative law judge correctly noted that Dr. Rubenstein, who interpreted this x-ray as positive for pneumoconiosis, and Drs. Sargent, Wiot, Barrett, and Spitz, who interpreted this x-ray as negative for pneumoconiosis, were Board-certified radiologists and B readers. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.* 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 11. The administrative law judge properly concluded that the weight of the newly submitted x-ray interpretations was negative for pneumoconiosis, and, therefore, insufficient to establish a change in conditions at Section 725.310. While the administrative law judge did not consider Dr. Broudy's reading of a film dated November 5, 1996, this does not constitute an error requiring remand as this x-ray would also be insufficient to show a change in condition because Dr. Broudy, a B reader, interpreted the x-ray as negative for pneumoconiosis. *See* 20 C.F.R. §725.310; *Larioni, supra*.

The administrative law judge next considered the medical opinions of Drs. Broudy, Fino and Guberman. Decision and Order at 11-12. The administrative law judge determined that Dr. Broudy's medical report was based on a medical examination and a review of claimant's medical evidence. *See* Director's Exhibits

[3]The medical evidence submitted during the processing of claimant's request for modification also included reports, x-ray interpretations and objective test results based on medical examinations performed prior to August 5, 1995. *See* Director's Exhibits 32-38; Claimant's Exhibit 1; Employer's Exhibit 3.

36, 40. Thus, the administrative law judge properly found this report documented. *See Church, supra*. The administrative law judge also concluded that Dr. Broudy's medical opinion, that claimant does not suffer from pneumoconiosis, was well-supported and well-explained, and, therefore, entitled to substantial weight. Decision and Order at 11. Thus, the administrative law judge rationally found the medical opinion of Dr. Broudy reasoned, *Church, supra*, and he, therefore, permissibly accorded substantial weight to this opinion. *Id*.; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). The administrative law judge next noted that although Dr. Fino did not examine claimant, he reviewed the medical evidence of record. The administrative law judge reasonably accorded some weight to Dr. Fino's medical opinion that claimant does not suffer from pneumoconiosis as he found Dr. Fino's report supported by objective medical evidence of record. Decision and Order at 11; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-43 (1985).

The administrative law judge declined to accord determinative weight to Dr. Guberman's opinion that claimant suffered from coal workers' pneumoconiosis and resting hypoxemia probably secondary to coal workers' pneumoconiosis. In so doing, the administrative law judge properly concluded that Dr. Guberman failed to discuss the effects of claimant's smoking history on his condition. Decision and Order at 11; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Director's Exhibit 18. While the administrative law judge improperly found Dr. Guberman's opinion insufficient to establish the existence of pneumoconiosis because the physician relied, in part, on a positive x-ray and the administrative law judge found the weight of the x-ray evidence negative for pneumoconiosis, *see Church, supra*, the administrative law judge provided a valid alternative rationale for not according this report determinative weight at Section 718.202(a)(4).[4] *See Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984).

[4]In light of the decision to affirm the administrative law judge's weighing of Dr. Guberman's report, we need not address his additional reasons for not according determinative weight to Dr. Guberman's report. Decision and Order at 11.

At Section 718.204(c), the administrative law judge reviewed the pulmonary function study and blood gas study evidence dated January 26, 1996 and November 5, 1996. He properly concluded that these tests were nonqualifying under the regulatory criteria and insufficient to establish a total disabling respiratory impairment. Decision and Order at 12; 20 C.F.R. §718.204(c)(1) and (2), Appendices B and C. The administrative law judge found the medical opinions in which Drs. Fino and Broudy stated that claimant can perform his usual coal mine employment from a respiratory standpoint entitled to greater weight than the medical opinion in which Dr. Guberman stated that claimant is totally and permanently disabled from his usual coal mine employment. In reaching this conclusion, the administrative law rationally found the reports of Drs. Fino and Broudy entitled to greater weight as they were well-reasoned and better supported by the objective tests of record. *See Church, supra*; *Lucostic, supra*. As the administrative law judge provided a proper rationale for not according determinative weight to the medical opinion of Dr. Guberman, we need not consider the other reasons articulated by the administrative law judge for according less weight to Dr. Guberman's report. *See Carpeta, supra*. We, therefore, affirm the administrative law judge's finding that the weight of the newly submitted medical evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, and, therefore, to show a change in conditions at Section 725.310 as it is rational and supported by substantial evidence.[5] *See* 20 C.F.R. §725.310; *Nataloni, supra*; *Kovac, supra*.

To determine if a mistake in a determination of fact had occurred in the prior denial, the administrative law judge correctly reviewed the record for examinations and testing performed before the date of the prior denial. *See Nataloni, supra*; *Kovac, supra*. The administrative law judge properly found the weight of the x-ray interpretations by the highly qualified physicians overwhelmingly negative, and, thus, insufficient to show a mistake in the prior determination that claimant failed to establish the existence of pneumoconiosis by x-ray. Decision and Order at 12; 20 C.F.R. §725.310; *see Nataloni, supra; Kovac, supra*; Director's Exhibits 32-38; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge found the reports of Drs. Fritzhand and Broudy supported by the objective tests and entitled to substantial weight. Decision and Order at 12-13. He, however, found the report of

[5]The administrative law judge did not make any findings at 20 C.F.R. §718.202(a)(2) and (3). We, however, need not remand this case for additional findings as the record does not contain any biopsy or autopsy evidence, nor is claimant entitled to any of the presumptions at Section 718.202(a)(3) as this living miner's claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2), (3).

Dr. Baker, in which he diagnosed coal workers' pneumoconiosis and a respiratory disability, entitled to less weight. The administrative law judge permissibly concluded that Dr. Baker's report was entitled to less weight because his diagnosis was "based on an abnormal x-ray and significant duration of exposure" and the weight of the x-ray evidence was negative. Decision and Order at 13; Director's Exhibit 33 at 3; *see Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge also correctly determined that Dr. Baker did not have an accurate picture of claimant's health as the physician did not address claimant's smoking history or its effect on his diagnosis of a respiratory impairment related to coal mine employment. Decision and Order 13; *see Trumbo, supra*; Director's Exhibit 33. Furthermore, the administrative law judge acted within his discretion when he found that the medical reports in which Drs. Fritzhand and Broudy concluded that claimant does not have a respiratory impairment related to or aggravated by coal mine employment are supported by the objective evidence of record. Decision and Order at 13; *see Lucostic, supra*. We, therefore, affirm the finding of the administrative law judge that the medical evidence predating the denial of benefits was insufficient to establish a mistake in a determination of fact regarding the existence of pneumoconiosis as it is rational and supported by substantial evidence.

The administrative law judge also concluded that this evidence failed to establish a mistake in the prior determination that claimant did not demonstrate the presence of a totally disabling respiratory impairment. The administrative law judge properly concluded that the pulmonary function study and blood gas study evidence was nonqualifying under the regulatory criteria and, therefore, did not show the presence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(c)(1), (2), Appendices B and C; Director's Exhibit 33. The administrative law judge likewise acted within his discretion when he accorded substantial weight to the opinions in which Drs. Broudy and Fritzhand stated that claimant could perform his usual coal mine employment or work of a comparable physical demand from a respiratory standpoint because these reports were supported by the objective tests of record and well-reasoned. *See Church, supra*. Similarly, the administrative law judge permissibly declined to accord determinative weight to the medical opinion in which Dr. Baker indicated that claimant should have no further dust exposure and may have difficulty doing sustained manual labor on an eight-hour basis even in a dust free environment. The administrative law judge had earlier observed with respect to Dr. Guberman's opinion that "[a]n opinion stating that the claimant should not work in a dusty environment is insufficient to establish a claimant's inability to perform his usual coal mine work. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988)." Decision and Order at 12. The administrative law judge specifically rejected Dr. Baker's opinion because the physician failed to adequately explain his total disability finding in light of his nonqualifying objective tests. Decision

and Order at 13; *see Clark, supra*; *Lucostic, supra*. We, therefore, affirm the finding of the administrative law judge that the evidence predating the denial of the claim was insufficient to demonstrate the presence of a mistake in a determination of fact regarding the existence of a totally disabling respiratory or pulmonary impairment as it is supported by substantial evidence. Finally, although the administrative law judge did not explicitly consider the issue of mistake of fact in light of a weighing of all of the evidence of record, *see Worrell, supra*, we hold that his finding that the evidence postdating the denial of benefits was insufficient to establish the elements previously adjudicated against claimant is equivalent to a finding that this evidence cannot demonstrate a mistake of fact. Therefore, remand is not required. *See Larioni, supra*.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge