BRB No. 98-1506 BLA

VERNON CHILDERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETH ENERGY MINES, INCORPORATED	)	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 J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0281) of Administrative Law Judge J. Michael O'Neill 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). In the initial Decision and Order, Administrative Law Judge Charles W. Campbell found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1). Judge Campbell further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. 718.203(b). However, Judge Campbell found that the evidence was insufficient to establish total disability

pursuant to 20 C.F.R. 718.204(c)(1)-(4). Accordingly, Judge Campbell denied benefits. By Decision and Order dated September 1, 1992, the Board affirmed Judge Campbell's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). *Childers v. Bethenergy Corp.*, BRB No. 90-2146 BLA (Sept. 1, 1992) (unpublished). The Board, therefore, affirmed Judge Campbell's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. Administrative Law Judge Gerald M. Tierney found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Tierney denied claimant's request for modification. By Decision and Order dated September 28, 1995, the Board affirmed Judge Tierney's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). *Childers v. Beth Energy Mines, Inc.*, BRB No. 95-1158 BLA (Sept. 28, 1995) (unpublished). The Board, therefore, affirmed Judge Tierney's denial of benefits. *Id.*

Claimant subsequently filed another request for modification of his denied claim. Administrative Law Judge J. Michael O'Neill (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 that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge, therefore, found that claimant failed to establish a change in conditions. The administrative law judge also found that claimant failed to establish a mistake in a determination of fact. Accordingly, the administrative law judge denied claimant's request for modification. On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of

entitlement which defeated entitlement in the prior decision. *See 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). In the prior decision, Judge Tierney denied benefits because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). The Board subsequently affirmed Judge Tierney's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). *Childers v. Beth Energy Mines, Inc.*, BRB No. 95-1158 BLA (Sept. 28, 1995) (unpublished). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c).

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).[1] We disagree. Inasmuch as Drs. Fritzhand and Gibson failed to provide a basis for their respective findings of total disability, the administrative law judge acted within his discretion in discrediting their opinions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9-10; Director's Exhibit 109; Claimant's Exhibit 1. The remaining newly submitted medical opinions of record indicate that claimant does not suffer from a totally disabling respiratory or pulmonary impairment.[2] Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R.

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[1]Inasmuch as all of the newly submitted pulmonary function studies and arterial blood gas studies are non-qualifying, the newly submitted evidence is insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibits 109, 112; Employer's Exhibit 4. Moreover, because the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(c)(3).

[2]In a report dated July 2, 1996, Dr. Dahhan opined that from a respiratory standpoint, claimant retained the physiological capacity to return to his previous coal mining work. Director's Exhibit 112. Dr. Dahhan reiterated his opinion during a December 4, 1997 deposition. Employer's Exhibit 4. In a report dated November 19, 1997, Dr. Fino opined that claimant did not suffer from any respiratory impairment. Employer's Exhibit 2. Dr. Fino also opined that from a respiratory standpoint, claimant was neither partially nor totally disabled from returning to his last coal mining job. *Id.* Dr. Fino reiterated his opinion during a December 18, 1997 deposition. Employer's Exhibit 5.

§718.204(c)(4).

Inasmuch as the administrative law judge properly found that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. *Nataloni, supra*.

Inasmuch as no party challenges the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, this finding is also affirmed.[3] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 12.

[3]The Board previously affirmed the prior findings of Administrative Law Judge Charles W. Campbell and Administrative Law Judge Gerald M. Tierney that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. 718.204(c)(1)-(4). *Childers v. Bethenergy Corp.*, BRB No. 90-2146 BLA (Sept. 1, 1992) (unpublished); *Childers v. Beth Energy Mines, Inc.*, BRB No. 95-1158 BLA (Sept. 28, 1995) (unpublished).

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

REGINA C. McGRANERY
Administrative Appeals Judge