BRB No. 00-0507 BLA

WALTER WEDDINGTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TENNESSEE CONSTRUCTION COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Walter Weddington, Pikeville, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-0201) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) 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). The administrative law judge credited claimant with nineteen and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. Further, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. 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

[1]Claimant filed a claim for benefits on June 19, 1992. Director's Exhibit 1. On August 23, 1996, Administrative Law Judge Richard E. Huddleston issued a Decision and Order denying benefits, Director's Exhibit 85, which the Board affirmed, *Weddington v. Tennessee Construction Co.*, BRB No. 96-1691 BLA (June 26, 1997)(unpub.). The bases of Judge Huddleston's denial were claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 85. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed a request for modification on May 20, 1998. Director's Exhibit 95.

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).

In finding the newly submitted 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 the eight newly submitted x-ray interpretations of record, six readings are negative for pneumoconiosis, Director's Exhibit 103; Employer's Exhibits 1, 2, 5-7, 9, and two readings are positive, Claimant's Exhibit 1. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians.[2] *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Thus, inasmuch as it is supported by substantial evidence, 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)(1).

Next, 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)(2) since there is no biopsy or autopsy evidence demonstrating the existence of pneumoconiosis. In addition, 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)(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); Director's Exhibit 1. Lastly, this claim

[2]Administrative Law Judge Robert L. Hillyard (the administrative law judge) stated, "[b]ased on the greater qualifications of Drs. Fino, Broudy, Wheeler, and Scott, I accord their interpretations greater weight." Decision and Order at 9. The administrative law judge observed that "[a]ll five of the recent readings by Board-certified Radiologists and/or B readers are negative." *Id*.

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

Further, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Dr. Sundaram opined that claimant suffers from pneumoconiosis, Claimant's Exhibit 1, Drs. Branscomb, Broudy and Fino opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 103; Employer's Exhibits 1, 3, 7, 9. The administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb, Broudy and Fino than to the contrary opinion of Dr. Sundaram, because of their superior qualifications.[3] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge permissibly discredited the opinion of Dr. Sundaram because Dr. Sundaram's diagnosis of pneumoconiosis was based in part on a positive interpretation of an x-ray that was subsequently reread as negative by a physician with superior qualifications.[4] *See Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984). Inasmuch as it is supported by substantial evidence, 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, Director's Exhibits 99, 103, we hold that the newly

[3]The administrative law judge observed that "Dr. Branscomb [is] a Board-certified Internist." Decision and Order at 9. The administrative law judge also observed that "Dr. Broudy [is] a Board-certified Internist and Pulmonologist." *Id*. Similarly, the administrative law judge observed that "Dr. Fino [is] a Board-certified Internist and Pulmonologist." *Id*. The record does not contain the credentials of Dr. Sundaram.

[4]Whereas Dr. Sundaram read the April 12, 1999 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, Dr. Fino, who is a B-reader, reread the same x-ray as negative, Employer's Exhibit 9. The record does not contain the credentials of Dr. Sundaram.

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

submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Additionally, we hold that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record does not contain evidence of cor pulmonale with right sided congestive heart failure.

Finally, we address 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). The administrative law judge considered the newly submitted opinions of Drs. Branscomb, Broudy, Fino and Sundaram. Whereas Dr. Sundaram opined that claimant suffers from a disabling respiratory impairment, Claimant's Exhibit 1, Drs. Branscomb, Broudy and Fino opined that claimant does not suffer from a disabling respiratory impairment. Director's Exhibit 103; Employer's Exhibits 1, 3, 7, 9. The administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb, Broudy and Fino than to the contrary opinion of Dr. Sundaram because he found their opinions to be better reasoned and documented.[6] See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Further, as previously noted, the administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb, Broudy and Fino than to the contrary opinion of Dr. Sundaram, because of their superior qualifications. *See Martinez, supra*; *Dillon, supra*; *Wetzel, supra*. Inasmuch as it is supported by substantial evidence, 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).

Since the newly submitted evidence is 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 claimant failed to establish a change in conditions at 20 C.F.R. §725.310. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Finally, we affirm the administrative law judge's finding that claimant failed to

[6]The administrative law judge stated, "[b]ased on the greater support for and better explanation of the reports of Drs. Broudy, Fino, and Branscomb,...I find that their opinions are entitled to greater weight than the opinion of Dr. Sundaram." Decision and Order at 10. The administrative law judge observed that "Dr. Sundaram's findings are undercut by the objective pulmonary function and arterial blood gas studies that failed to qualify under the regulations." *Id*. at 9-10.

establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The administrative law judge's finding of "no mistake in [a] determination of fact in the prior denial" is based on his review of all of the evidence of record. Decision and Order at 10.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge