BRB No. 01-0379 BLA

JIM JUDE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PETER CAVE 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 - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Jim Jude, Pilgrim, Kentucky, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order - Denying Benefits (97-BLA-1314) of Administrative Law Judge Joseph E. Kane 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).[2] This case, which was adjudicated

[1] Claimant is Jim Jude, who filed his application for benefits on September 19, 1974. Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20

pursuant to 20 C.F.R. §410.490, is on appeal before the Board for the third time. The procedural history of this case is not dispositive herein and is set forth in the Board's prior decision. *Jude v. Peter Cave Coal Co.*, BRB No. 98-1082 BLA (Jun. 10, 1999)(unpub.). In that decision, the Board vacated Administrative Law Judge Daniel J. Roketenetz's Decision and Order issued on April 23, 1998 in light of the holdings in *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998) and *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998), that a party who requests a hearing on modification is entitled to one, and remanded the case for a formal hearing on claimant's petition for modification pursuant to claimant's request.[3] The Board, therefore, declined to

---

C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by employer and the Director, Office of Workers' Compensation Programs, regarding the impact of the challenged regulations.

[3] On September 9, 1996, claimant requested modification of his clam while his appeal of Administrative Law Judge's Roketenetz's February 22, 1996 Decision and Order was pending before the Board. Director's Exhibit 107. By Order dated September 17, 1996, the Board dismissed claimant's appeal and remanded the case to the district director for consideration of claimant's request for modification and supporting evidence. *Jude v. Peter Cave Coal Co.*, BRB No. 96-0782 BLA (Sep. 17, 1996)(unpub. Order). Subsequently, the district director denied modification on February 7, 1997 and claimant requested a formal hearing with the Office of Administrative Law Judges. Director's Exhibits 113, 114. On June 25, 1997, Judge Roketenetz issued an order requiring each party to state whether it requested an oral hearing on the modification request. Employer responded, requesting that a decision be rendered on the record. The record does not contain evidence demonstrating that claimant, who was not represented by counsel, filed a response to Judge Roketenetz's order. Thereafter, Judge Roketenetz found that a hearing was not necessary. Order Denying Oral Hearing and Requesting Briefs. Subsequently, Judge Roketenetz rendered a Decision and

address the merits of the case, vacated the administrative law judge's Decision and Order denying claimant's request for modification and remanded the case. Accordingly, a formal hearing on modification was conducted by Administrative Law Judge Joseph E. Kane (administrative law judge) on May 17, 2000. The administrative law judge determined that there was no mistake in a determination of fact in Judge Roketenetz's previous finding that claimant had established eight years of qualifying coal mine employment. Next, the administrative law judge determined that because the evidence was insufficient to establish the existence of pneumoconiosis, claimant was not entitled to invocation of the interim presumption of total disability due to pneumoconiosis at Section 410.490(b). Furthermore, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000) and determined that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4)(2000). Accordingly, the administrative law judge found that claimant failed to establish either a mistake in a determination of fact or a change in conditions pursuant to Section 725.309 (2000) and accordingly, denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In claims filed prior to March 31, 1980, in which fewer than ten years of coal mine employment are established, claimants may avail themselves of the presumption of total disability due to pneumoconiosis contained in Section 410.490(b) by establishing the existence of pneumoconiosis based on x-ray, biopsy, or autopsy evidence of pneumoconiosis and by establishing that pneumoconiosis arose out of coal mine employment. *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(*en banc*)(Smith, J., concurring; McGranery, J., concurring and dissenting).

Regarding the length of claimant's coal mine employment, claimant alleged ten years

---

Order on April 23, 1998 denying modification.

of coal mine employment. The administrative law judge found that Judge Roketenetz previously found that claimant had established eight years of qualifying coal mine employment. We affirm the administrative law judge's finding that there was no mistake in the previous determination of eight years. The administrative law judge considered claimant's past and present formal hearing testimonies, former employer and employee affidavits regarding claimant's employment history, Social Security Administration (SSA) earnings records, and claimant's employment history form and credited claimant with eight years of qualifying coal mine employment based on the evidence he found to be credible. Decision and Order at 24. Specifically, the administrative law judge, within a proper exercise of his discretion, found that claimant's previous testimony and statements, including those made to physicians, were significantly inconsistent, and therefore, not credible regarding the time and duration of claimant's employment with various employers. *See Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985). We, therefore, affirm the administrative law judge's determination that there was no mistake in the previous length of coal mine employment finding of eight years, in light of claimant's evidentiary burden to establish the number of years of coal mine employment, *see Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Brewster v. Director, OWCP*, 7 BLR 1-120, 1-121-122 (1984) (claimant bears burden of proof in establishing length of coal mine employment through credible evidence), and as the administrative law judge's method of calculating years of coal mine employment was reasonable and he provided a rational basis for his determination. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985).

Relevant to Section 410.490(b), a review of the record reveals that the x-ray evidence consists of fifty-three interpretations of seventeen chest x-ray films. There is a total of forty-two negative readings provided by fifteen physicians: thirteen Board-certified radiologists who are also B-readers, two B-readers, and one physician whose radiological qualifications are not of record. Director's Exhibits 19, 39, 42-49, 53, 55, 58, 59, 69, 71, 72, 75, 79, 81-84, 111, 115, 116; Employer's Exhibits 1-3. In addition, there is a total of eleven positive interpretations rendered by nine physicians: four Board-certified radiologists who are also B-readers, one physician who is neither a Board-certified radiologist nor B-reader, and four physicians whose radiological qualifications are not contained in the record. Director's Exhibits 16, 20, 21, 50-52, 54, 74, 85, 109.

The administrative law judge, within a proper exercise of his discretion, found that the positive x-ray interpretations provided by Drs. Wright, Pelaez, Saba, Jakobson, and Lafferty were outweighed by the negative interpretations rendered by Drs. Sargent, Felson, Spitz, Wiot, Scott, Wheeler, Quillan, Shipley, Proto, Brandon, Elmer, and Poulos because the latter physicians were Board-certified radiologists who were also B-readers, and therefore, possessed superior radiological expertise. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17

BLR 2-77, 2-87 (6th Cir. 1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 25. Furthermore, the administrative law judge considered the positive readings rendered by Drs. Aycoth, Fisher, and Marshall, who were all Board-certified radiologists and B-readers, but permissibly found that these interpretations were less persuasive because none of these physicians considered whether tuberculosis was a cause of the changes found on x-ray, in spite of claimant's history of tuberculosis as demonstrated by the hospital records and the discussion by Drs. Todd and Vuskovich regarding the resolution of claimant's left upper lobe after the administration of anti-tuberculosis medication, *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999)(*en banc*); *Valazak v. Bethlehem Mines Corp.*, 6 BLR 1-282 (1983). Decision and Order at 26. The administrative law judge, therefore, reasonably found that the negative x-ray readings by Drs. Sargent, Felson, Spitz, Wiot, Scott, Wheeler, Quillan, and Shipley were more credible than the positive readings of Drs. Aycoth, Fisher, and Marshall. 20 C.F.R. §718.202(a)(1); *see Staton, supra*; *Woodward, supra*; *Cranor, supra*; *Valazak, supra*. Decision and Order at 11. Likewise, the administrative law judge reasonably found that the two x-ray interpretations of non-specific fibrosis by Dr. White, who possessed no particular radiological qualifications, corroborated the opinions of Drs. Lane and Vuskovich that x-ray changes as a result of tuberculosis are similar to those of pneumoconiosis. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Decision and Order at 25. Similarly, the administrative law judge rationally determined that Dr. Cole's initial classification of pneumoconiosis and/or tuberculosis found on the March 5, 1984 x-ray film, before he changed his opinion that this film was unreadable, further demonstrated the similarity on x-ray between these two conditions. Decision and Order at 25. Consequently, the administrative law judge properly considered both the qualitative and quantitative nature of the x-ray evidence, permissibly accorded probative weight to the negative readings by the radiologists with superior radiological qualifications, and rationally concluded that the preponderance of the x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 410.490(b). *See Mullins, supra*; *Staton, supra*; *Woodward, supra*; *Cranor, supra*.

Furthermore, a review of the record reveals that there is no biopsy evidence, nor autopsy evidence as this is a living miner's claim. Hence, we affirm the administrative law judge's determination that the evidence of record is insufficient to establish the existence of pneumoconiosis by either biopsy or autopsy evidence. *See* 20 C.F.R. §410.490(b); Decision and Order at 25. Inasmuch as the administrative law judge's determination that claimant is not entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to Section 410.490(b) is rational and supported by substantial evidence, we affirm this determination.

We turn next to the administrative law judge's adjudication of the claim pursuant to 20 C.F.R. Part 718. *See Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989)(claims filed before March 31, 1980, but adjudicated by administrative law judge after that date, should be considered under Part 718 regulations). In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent*, *supra*; *Perry*, *supra*.

Relevant to Section 718.202(a)(1), the administrative law judge relied on his previous discussion of the x-ray evidence under Section 410.490(b) and found that the preponderance of the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 27. The Board has held that where the administrative law judge has made the necessary findings of fact after discussing all of the relevant evidence of record, as in this case, we will review the case by applying those findings to the proper regulations. *See Belcher v. Director, OWCP*, 895 F.2d 244, 13 BLR 2-273 (6th Cir. 1989); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Hamric v. Director, OWCP*, 6 BLR 1-1091, 1-1092 (1984). Consequently, we affirm the administrative law judge's determination that the preponderance of the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) inasmuch as the administrative law judge permissibly found that the negative x-ray evidence of record was more probative. *See Staton*, *supra*; *Woodward*, *supra*; *Cranor*, *supra*.

Relevant to Section 718.202(a)(2), the administrative law judge properly found that the evidence of record did not contain any biopsy evidence and could not therefore, establish the existence of pneumoconiosis under that Section. *See* 20 C.F.R. §718.202(a)(2)(2000); Decision and Order at 27. Additionally, relevant to Section 718.202(a)(3), the administrative law judge properly found that none of the presumptions referenced there, *i.e.*, Sections 718.304 (2000), 718.305 (2000), and 718.306 (2000) was applicable. Relevant to Section 718.304, Dr. Chillag rendered the sole opinion of record that claimant suffered from complicated pneumoconiosis in a report dated April 16, 1975. Director's Exhibit 13. Consistent with the administrative law judge's determination, Dr. Chillag's diagnosis of complicated pneumoconiosis was unsupported, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984), and therefore, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish the presence of complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 27. Likewise, the administrative law judge properly found that the presumption at Section 718.305 (2000) was inapplicable because claimant failed to establish at least fifteen years of qualifying coal mine employment and the presumption at Section 718.306 (2000) was inapplicable because this is a living miner's claim. Decision and Order

at 27. Accordingly, the administrative law judge properly found that none of the presumptions referenced in Section 718.202(a)(3)(2000) was applicable. *See* 20 C.F.R. §718.202(a)(3). Hence, we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2) and (3)(2000) inasmuch as these determinations are rational and supported by the evidentiary record. *See* 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305, 718.306; Decision and Order at 27.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4)(2000), there are thirteen physicians' opinions of record. Drs. Roe, Pelaez, Adongay, Cornish, Riveria, Wright, and Lafferty each diagnosed coal workers' pneumoconiosis. Director's Exhibits 12, 14, 15-17, 37, 40, 55, 76, 109. Drs. Lane, Broudy, Tuteur, Vuskovich, and Dahhan each opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibits 33, 70, 71, 73, 75, 77, 79, 116; Employer Exhibit 1. Furthermore, Dr. Chillag diagnosed the existence of complicated pneumoconiosis. Director's Exhibit 13.

The administrative law judge, within a proper exercise of his discretion, found that the opinions of Drs. Roe, Chillag, Pelaez, Wright, Adongay, Cornish, and Lafferty were less persuasive because these physicians relied heavily, if not entirely, on the x-ray readings accompanying their reports, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989), and failed to address claimant's complete pulmonary history including his cigarette smoking history and medical history of tuberculosis, *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716, 1-719 (1984); Decision and Order at 27. Moreover, the administrative law judge rationally found that the opinions of Drs. Broudy, Lane, Tuteur, Vuskovich, and Dahhan, that claimant does not have coal workers' pneumoconiosis, were entitled to dispositive weight because these physicians performed comprehensive reviews of all of claimant's medical records,[4] and therefore, had a complete picture of claimant's health. *Ibid*. Inasmuch as the administrative law judge properly found that the opinions of Drs. Broudy, Lane, Tuteur, Vuskovich, and Dahhan were entitled to dispositive weight, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000). *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *see also Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); Decision and Order at 27. Hence, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to

[4] Drs. Dahhan and Broudy conducted physical examinations and pulmonary testing of claimant in addition to reviewing additional medical records. Director's Exhibits 33, 75, 79, 116; Employer's Exhibit 1.

Section 718.202(a)(2000), a requisite element of entitlement pursuant to Part 718. *See Trent, supra*; *Perry, supra*.

Consequently, we affirm the administrative law judge's determination that there was no mistake in a determination of fact or a change in conditions pursuant to Section 752.310 (2000), and accordingly, affirm the administrative law judge's finding that claimant is not entitled to benefits.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge