BRB No. 04-0588 BLA

GORMAN SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 01/27/2005
	)	
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 on Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Gorman Shepherd, Hueysville, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification (2003-BLA-182) of Administrative Law Judge Linda S. Chapman denying modification and 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).[1] The administrative law judge found that the instant claim was a request for modification and, based on the date of filing, considered entitlement in this living miner's claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that the newly submitted evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b), and thus did not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge additionally found that a review of all the evidence of record did not establish that there was a mistake in a determination of fact in the prior benefits

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[1] 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial claim for benefits on August 3, 1988, which was denied on July 19, 1994 based on findings that claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) (2000), 718.204(c) (2000). Director's Exhibit 27. Claimant filed a second application for benefits on September 20, 1995, which was denied in a decision effective March 23, 1998, based on findings that claimant did not establish either the existence of pneumoconiosis or total disability and thus did not demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Director's Exhibit 28. On March 22, 1999, claimant filed a third application for benefits, which was treated as a duplicate claim and denied by Administrative Law Judge Thomas F. Phalen, Jr. on May 18, 2001 because claimant did not establish the existence of pneumoconiosis, total disability, or a material change in conditions. Director's Exhibits 1, 28, 43. On July 6, 2001, claimant filed a request for modification, which the district director denied on August 16, 2001. Director's Exhibits 44, 48. Claimant requested a formal hearing. Subsequently, claimant requested permission to withdraw his 1999 claim and file a new claim. Director's Exhibits 50, 52. The district director, after seeking clarification from claimant and addressing employer's objections to withdrawal, denied claimant's request to withdraw his 1999 claim and referred the case to the Office of Administrative Law Judges for a hearing. Director's Exhibits 53-56, 68, 70, 71.

denial pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs has indicated that he will not 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1980); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

This case involves claimant's two requests for modification of the denial of his duplicate claim that he filed in 1995.[3] Thus, in considering this claim, the administrative law judge should have considered whether the evidence developed since the 1994 denial of claimant's first claim was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), rather than determining whether claimant established a basis for modification of the previous administrative law judge's denial of benefits. *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). This error is harmless, however, in view of the administrative law judge's proper determination that neither the

[3] Review of the record reflects that claimant's March 22, 1999 claim was filed within one year of the effective date of the March 23, 1998 decision denying claimant's 1995 duplicate claim. *See* n.2, *supra*. The 1995 duplicate claim thus remained pending. *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20, 1-25 (1996). Subsequent to Administrative Law Judge Thomas F. Phalen, Jr.'s May 2001 decision purporting to deny the March 22, 1999 claim as a newly filed duplicate claim, claimant then filed a second, timely modification request.

newly submitted evidence nor the entirety of the record evidence established the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Pursuant to Section 718.202(a)(1), the administrative law judge properly found that all of the new x-ray readings, including those rendered by physicians who are board-certified radiologists and B-readers, were negative for the existence of pneumoconiosis. Director's Exhibits 46, 47, 60, 65, 69; Employer's Exhibit 1; Decision and Order on Modification at 6, 9; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Pursuant to Section 718.202(a)(2), the administrative law judge permissibly found that the newly submitted biopsy evidence was at best in equipoise and that claimant thus failed to carry his burden to establish the existence of pneumoconiosis by a preponderance of the biopsy evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); Decision and Order on Modification at 6-7, 9-10; Director's Exhibit 44; Employer's Exhibit 2. Additionally, we affirm the administrative law judge's finding that the evidence of record did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3), since none of the presumptions set forth therein are applicable to this claim.[4] *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order on Modification at 9-10.

The administrative law judge also properly considered the newly submitted medical opinion evidence and properly determined that the medical opinions were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge rationally considered the quality of the evidence in determining whether the opinions of record were supported by their underlying documentation and were adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Decision and Order on Modification at 8-10. The administrative law judge acted within her discretion, as fact-finder, in concluding that the opinion of Dr. Powell

[4] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. 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 is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is inapplicable.

was insufficient to meet claimant's burden of proof as the physician, who is not a pathologist and who did not review the biopsy tissue slides, did not offer any explanation for his diagnosis of pneumoconiosis other than the biopsy results, which the administrative law judge found "equivocal." Decision and Order on Modification at 10; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-89; Director's Exhibit 62.

Moreover, the administrative law judge permissibly accorded greater weight to the contrary opinions of Drs. Fino and Caffrey because she found that these physicians offered well reasoned and documented opinions that were supported by the objective medical evidence of record. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-89; Decision and Order on Modification at 10; Employer's Exhibits 1, 2. We therefore affirm the administrative law judge's credibility determinations with respect to the medical opinion evidence as they are supported by substantial evidence and are in accordance with law.

With respect to 20 C.F.R §718.204(b)(2), the administrative law judge permissibly found that the newly submitted objective evidence was insufficient to establish the existence of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), because the pulmonary function studies were non-qualifying[5] and the only valid blood gas study evidence was non-qualifying. *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order on Modification at 7, 11; Director's Exhibits 61, 63, 64; Employer's Exhibit 1. The administrative law judge rationally determined that the January 16, 2002, qualifying exercise blood gas study was entitled to little probative value as it was invalidated by Dr. Burki, a board-certified pulmonary specialist, who opined that the test was technically unacceptable because its PCO2 values were too high for its reported PO2 values. Decision and Order on Modification at 7, 11; Director's Exhibit 64; *see Winchester*, 9 BLR at 1-178. The administrative law judge further properly found that the record contained no evidence of cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinion evidence of record and rationally concluded that the opinions were insufficient to carry claimant's burden of proof, as no physician opined

[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(b)(2)(i), (ii).

that claimant has a totally disabling respiratory or pulmonary impairment.[6] Decision and Order on Modification at 8-9, 11; Director's Exhibit 62; Employer's Exhibits 1, 2; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

The administrative law judge additionally found that a review of all the evidence of record, old and new, did not reflect that Administrative Law Judge Thomas F. Phalen, Jr., made a mistake in a determination of fact in the prior determination that claimant did not establish either the existence of pneumoconiosis or total disability. Decision and Order at 12; 20 C.F.R. §725.310 (2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Finally, the administrative law judge found that, even assuming that claimant had established the existence of pneumoconiosis, a review of all the evidence of record did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Substantial evidence supports the administrative law judge's findings, which we therefore affirm.

Because claimant has failed to establish the existence of pneumoconiosis or that he is totally disabled, a finding of entitlement is precluded. *Anderson*, 12 BLR at 1-112. We therefore affirm the denial of benefits.

[6] Dr. Fino opined that claimant has mild obstructive lung disease secondary to smoking which does not prevent him from performing his last coal mine job or one requiring similar effort. Director's Exhibits 32, 34; Employer's Exhibit 1. Dr. Caffrey offered no opinion with respect to total disability. Employer's Exhibit 2. Dr. Powell opined that claimant could perform his previous coal mine employment. Director's Exhibit 62.

Accordingly, the administrative law judge's Decision and Order on Modification-Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge