BRB No. 99-1099 BLA

CLAUDE J. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A & D COAL COMPANY, 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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Claude J. Smith, Kegley, West Virginia, *pro se.*

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

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order (1998-BLA-0332) of Administrative Law Judge Joseph E. Kane 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 found that claimant established sixteen years of qualifying coal mine employment and pursuant to 20 C.F.R. §725.310, considered all of the evidence of record and found that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(c).

[1]Claimant is Claude J. Smith, the miner, who filed a claim for benefits on August 27, 1992. Director's Exhibit 1. The claim was administratively denied by the district director on February 4, 1993, February 16, 1994 and July 29, 1994, because claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibits 22, 34, 39. The claim was referred to the Office of Administrative Law Judges.

Consequently, the administrative law judge found that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to Section725.310. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, responds, declining to submit a response brief on 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially we address the administrative law judge's finding that the instant claim involves a petition for modification pursuant to Section 725.310. Claimant sought modification of the denial of benefits rendered by the district director and after claimant's modification request was denied, claimant requested a formal hearing before an administrative law judge. Director's Exhibits 22, 24, 34, 37. The Board has held that in cases where claimant seeks modification of a denial of benefits by the district director, the administrative law judge shall conduct a *de novo* hearing on the merits of entitlement instead of making a preliminary determination regarding the grounds for modification inasmuch as the modification finding is subsumed in the administrative law judge's finding on the merits of entitlement. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). In the instant case, because the administrative law judge considered all of the evidence of record in making his findings pursuant to Sections 718.202(a) and 718.204(c), without considering any findings or determinations made with respect to the claim by the district director, the administrative law judge's statement that he considered of this claim as a request for modification pursuant to Section 725.310 is harmless error. *Motichak, supra; Kott, supra; Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the x-ray evidence which consists of twenty-five interpretations of four x-rays dated September 23, 1992, July 5, 1994, December 7, 1994 and July 31, 1998. Decision and Order at 7-8; Director's Exhibits 20, 21, 43-45; Employer's Exhibits 1-10. Of the twenty-one interpretations of the July 5, 1994 x-ray, twelve are positive for the existence of pneumoconiosis while nine are negative. Director's Exhibits 43, 44; Employer's Exhibits 1, 3-10. Nine of the positive interpretations of the July 5, 1994 x-ray were submitted by physicians who are both Board-certified radiologists and B readers, while seven of the negative interpretations of that x-ray were submitted by physicians who are dually qualified. Director's Exhibits 43, 44; Employer's Exhibits 1, 3-6, 9, 10. The administrative law judge noted the physicians' qualifications and found that the "slight preponderance" of the readings of the July 5, 1994 x-ray are positive[2] for the existence of pneumoconiosis, but that the September 23, 1992 x-ray

[2]It is obvious from the administrative law judge's findings that he made a mistake in writing that "a slight preponderance of the readings of the July 5, 1994, x-

and "both of the two most recent x-rays of record," all of which were read by B readers, were interpreted as being negative for the existence of pneumoconiosis. Decision and Order at 7. The administrative law judge then rationally concluded that, "on the whole, the x-ray evidence is preponderantly negative for pneumoconiosis." Decision and Order at 7-8; Director's Exhibits 20, 21, 43-45; Employer's Exhibits 1-10; *Lafferty v. Cannelton Industries*, Inc., 12 BLR 1-190 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Consequently, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

We also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3) inasmuch as the record contains no biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306; Decision and Order at 7; Director's Exhibit 1.

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ray of record is negative." Decision and Order at 7. Clearly the administrative law judge intended to write that the preponderance of the readings of the July 5, 1994 x-ray is positive inasmuch as a count of the interpretations of that x-ray indicates that the preponderance of those readings are positive. Director's Exhibits 43,44; Employer's Exhibits 1, 3-10.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Bird and Qazi, both of whom opined that claimant has pneumoconiosis, and the opinions of Drs. Vasudevan, Zaldivar and Castle, all of whom opined that claimant does not have pneumoconiosis. Decision and Order at 8; Director's Exhibits 16, 23, 43, 45; Employer's Exhibit 2. The administrative law judge rationally found Dr. Bird's opinion to be not well-reasoned and entitled to little or no probative value because he "did not offer any medical basis or explanation for his conclusion." Decision and Order at 8; Director's Exhibit 23; *Lafferty, supra; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge then stated that Dr. Qazi's opinion does not comport with the objective evidence of record because his opinion that claimant has pneumoconiosis is based on a positive x-ray interpretation when the x-ray evidence was found to be negative for the existence of pneumoconiosis. Decision and Order at 8. The administrative law judge acted within his discretion in concluding that the opinions of Drs. Bird and Qazi are less persuasive than the well-reasoned and "objectively based" opinions of Drs. Vasudevan, Zaldivar and Castle on the basis of the latter physicians' superior credentials.[3] Decision and Order at 8; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty, supra; Clark, supra; McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Perry, supra; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). As a result, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

[3]Drs. Vaseduvan, Zaldivar and Castle are Board-certified in internal medicine and pulmonary diseases. Director's Exhibits 16, 45. Dr. Bird is Board-certified in family medicine. Decision and Order at 5. Dr. Qazi is Board-certified in internal medicine and cardiovascular diseases. Director's Exhibits 43.

Pursuant to Section 718.204(c)(1), the administrative law judge properly found that none of the pulmonary function studies of record yielded qualifying results.[4] Decision and Order at 9; Director's Exhibits 15, 45; Employer's Exhibit 2. The administrative law judge next considered the four arterial blood gas studies of record and rationally found that because two of the studies yielded qualifying results and two yielded non-qualifying results, the arterial blood gas study evidence is in equipoise and is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(2). Decision and Order at 9; Director's Exhibits 17, 19, 45; Employer's Exhibit 2; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F. 2d 730, 17 BLR 2-64 (3d Cir. 1993); *Lafferty, supra*. Further, because the evidence does not contain evidence of cor pulmonale with right sided congestive heart failure, claimant did not establish total respiratory disability pursuant to Section 718.204(c)(3).

Finally, the administrative law judge considered the medical opinion evidence of record and acted within his discretion in finding that the opinion of Dr. Qazi, the only physician to opine that claimant has a totally disabling respiratory impairment, is insufficient to support a finding that claimant has total respiratory disability because he "did not discuss what medical evidence demonstrated that claimant did not have the pulmonary ability to perform his last coal mine employment." Decision and Order at 9; *Lafferty, supra; Clark, supra.* The administrative law judge rationally concluded that claimant did not establish total respiratory disability by a preponderance of the medical opinion evidence. Decision and Order at 9; *Lafferty, supra; Perry, supra.* As a result, we affirm the administrative law judge's findings that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4) and, consequently, failed to establish either a mistake in a determination of fact or a change in conditions pursuant to Section 725.310.

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

[4]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 yields values that exceed those values.

REGINA C. McGRANERY
Administrative Appeals Judge