BRB No. 00-0579 BLA

NINA L. PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Nina L. Phillips, Emma, Kentucky, *pro se*.

Jennifer U. Toth (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (98-BLA-1263) of Administrative Law Judge Daniel J. Roketenetz 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 is before the Board for the

[1] Claimant, Nina L. Phillips filed her application for benefits on March 8, 1995. 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

second time. In the initial Decision and Order, Administrative Law Judge Clement J. Kichuk found that the evidence was insufficient to establish that claimant was a miner within the definition of the Act. Notwithstanding that finding, Judge Kichuk addressed the merits of entitlement pursuant to 20 C.F.R. Part 718 (2000) and found that claimant failed to establish the existence of pneumoconiosis, and accordingly denied benefits. Director's Exhibit 27. Claimant appealed the denial and the Board affirmed Judge Kichuk's determination that claimant failed to establish the existence of pneumoconiosis. Consequently, the Board affirmed the denial of benefits. *Phillips v. Director, OWCP*, BRB No. 97-0724 BLA (Dec. 23, 1997)(unpub.); Director's Exhibit 33. Claimant, thereafter, filed a request for modification on February 19, 1998 with supporting medical evidence. Director's Exhibits 35, 36. Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) determined that there was no mistake of fact in Judge Kichuk's finding that claimant was not a miner as defined under the Act.[3] Furthermore, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Accordingly, the administrative law judge found that claimant failed to establish either a mistake in a determination of fact or

---

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

[3] The administrative law judge determined that claimant failed to establish any of her alleged twelve years of coal mine employment because of the difficulty of "attribut[ing] any sort of productive work to an infant, toddler, or even a four year old child" and because her testimony failed to demonstrate when during her childhood she became a contributing member of the family team. Decision and Order at 6.

change in conditions. Accordingly, the administrative law judge denied benefits.[4]

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial.

[4] Regarding claimant's appearance at the formal hearing before the administrative law judge without representation, a review of the record and hearing transcript reveals that claimant was afforded a full and fair hearing in accordance with 20 C.F.R. §725.362(b) inasmuch as the administrative law judge fully complied with the procedural safeguards delineated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *see* [1999] Hearing Transcript at 4-5.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which the parties have responded.[5] Based on the responses submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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

[5] The Director's brief, dated March 5, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a letter dated March 12, 2001, claimant, who is not represented by counsel, states that she "feel[s] that applying the revised regulations to [her] case must have a position affect [sic] on its outcome" because the definition of a miner as revised will apply to the activities that she performed around the coal mines. Contrary to claimant's statement, however, our review of the pertinent revised regulation defining a miner pursuant to 20 C.F.R. §725.202(a), and our review of the evidence of record on the issue reveals that the ultimate disposition of this case would not be affected by the revised regulation. Moreover, we note that, notwithstanding whether claimant could establish that she was a miner under the revised regulation, we affirm the administrative law judge's determination that claimant failed to establish entitlement on the merits; therefore, the ultimate disposition of this case would not change.

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).

Relevant to Section 718.202(a)(1), the x-ray evidence of record consists of three negative x-ray interpretations. Director's Exhibits 10, 11, 13. The administrative law judge properly found that as none of the three x-ray interpretations diagnosed the existence of pneumoconiosis and that the radiological credentials of the physicians who interpreted the chest films was not of record, the x-ray evidence was insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §§718.102, 718.202(a)(1); *see Langerud v. Director, OWCP*, 9 BLR 1-101, 1-103 (1986); Decision and Order at 7. We, therefore, affirm the administrative law judge's determination inasmuch as it is rational and supported by substantial evidence. 20 C.F.R. §718.202(a)(1); *see 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).

Although the administrative law judge did not specifically render a determination relevant to Section 718.202(a)(2), we deem this omission harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as a review of the evidence of record reveals that there is no biopsy evidence of record, and hence, claimant cannot establish the existence of pneumoconiosis pursuant to this section. *See* 20 C.F.R. §718.202(a)(2). Similarly, the administrative law judge rationally found that the record is devoid of evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3)(2000) inasmuch as there is no evidence of record establishing the existence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000), the instant claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305 (2000), and this is a living miner's claim, *see* 20 C.F.R. §718.306 (2000). *See* 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304-718.306; Decision and Order at 7 n.3. Accordingly, the record is devoid of evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(2) and (a)(3).

With respect to Section 718.202(a)(4), a review of the medical opinion evidence reveals the sole opinion of Dr. Sundaram dated January 17, 1993, who diagnosed purulent bronchitis, chronic obstructive pulmonary disease, and arteriosclerotic heart disease. Director's Exhibits 14, 21. In a letter dated February 12, 1998, Dr. Sundaram stated that claimant "was exposed to coal dust throughout her early childhood and this exposure has caused irrations [sic] to her lungs and could cause progressive shortness of breath and chronic obstructive pulmonary disease." Director's Exhibit 34. The administrative law judge, within a proper exercise of his discretion, found that Dr. Sundaram's February 1998 letter was of little probative value to establish the existence of clinical pneumoconiosis or a pulmonary or respiratory impairment arising out of claimant's coal mine employment

because it was equivocal, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987), and lacked objective support in the record, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 7-8. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Handy v. Director, OWCP*, 16 BLR 1-73, 1-76 (1990); Decision and Order at 7-8. Likewise, we affirm the administrative law judge's determination that neither the x-ray evidence nor the medical opinion evidence, when weighed independently or together, was sufficient to support a finding that claimant suffers from pneumoconiosis. Decision and Order at 8; *see e.g., Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3rd Cir. 1997); Decision and Order at 8.

Relevant to Section 718.204(b)(2)(i), the record contains two pulmonary function studies taken on August 16, 1989 and October 9, 1995, both of which yielded non-qualifying values.[6] Director's Exhibits 12, 16, 21. The administrative law judge properly found that these pulmonary function studies of record produced non-qualifying values, and therefore, failed to demonstrate total disability. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 9. Likewise, the administrative law judge permissibly determined that the sole arterial blood gas study of record dated April 3, 1994 produced non-qualifying values. Director's Exhibit 15. Hence, we affirm the administrative law judge's finding that total disability was not demonstrated by blood gas studies. 20 C.F.R. §718.204(b)(2)(ii); *see Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 9. Similarly, the administrative law judge properly found that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be established by that means. 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989); Decision and Order at 9 n.5.

Relevant to Section 718.204(b)(2)(iv), the medical opinion evidence consists of the opinion of Dr. Sundaram, who indicated claimant's physical limitations on a checkmark form dated April 19, 1996, but did not render an opinion as to whether claimant has a totally disabling respiratory or pulmonary impairment. Director's Exhibit 21. We affirm the administrative law judge's determination that Dr. Sundaram's checkmark form was not a

[6] 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 (2000). A "non-qualifying" study yields values that exceed those values.

well reasoned physician's opinion because Dr. Sundaram does not refer to any medically acceptable clinical and laboratory diagnostic techniques, or other findings to support his assessment of claimant's physical limitations. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986); *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985), Decision and Order at 10. Consequently, we affirm the administrative law judge's finding that claimant failed to demonstrate total disability pursuant to Section 718.204(b)(2)(iv).

Inasmuch as the administrative law judge properly found that claimant failed to satisfy her burden of establishing a change in conditions or a mistake in a determination of fact, we affirm the administrative law judge's finding that claimant failed to demonstrate modification pursuant to Section 725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-295-296 (6th Cir. 1994); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-14-15 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); Decision and Order at 10.[7]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[7] Since we affirm the administrative law judge's findings on the merits of entitlement, and his denial of benefits, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), we need not review the administrative law judge's determination that claimant was not a miner, which was made prior to issuance of the new regulations containing a revision of the definition of a miner at Section 725.202(a).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge