BRB No. 97-1097 BLA

JOSEPH MINIARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CHANEY CREEK COAL CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph Miniard, Chappel, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order (96-BLA-753) of Administrative Law Judge Donald W. Mosser 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). This case is before the Board for the third time. Claimant originally filed for benefits on October 30, 1986. Decision and Order at 3; Director's Exhibit 1. In a Decision and Order issued February 21, 1991, Administrative Law Judge Charles W. Campbell found that claimant established ten and one-half years of

coal mine employment. The administrative law judge also found, however, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Benefits were accordingly denied and claimant appealed. In a Decision and Order dated August 26, 1992, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(3), but vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and the denial of benefits and remanded the case for further consideration. *Miniard v. Chaney Creek Coal Corp.*, BRB No. 91-1012 BLA (Aug. 26, 1992) (unpub.).

On remand, Administrative Law Judge Daniel J. Roketenetz found that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) based on the true doubt rule and that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge further found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. Claimant appealed, employer cross-appealed, and in *Miniard v. Chaney Creek Coal Corp.*, BRB Nos. 94-2513 BLA and 94-2513 BLA-A (Apr. 27, 1995) (unpub.), the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), affirmed the administrative law judge's finding that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) and affirmed the denial of benefits.

Within one year, claimant filed a new application for black lung benefits, which the district director considered as a request for modification of the previous denial. Director's Exhibits 85, 87. Claimant did not submit any additional evidence with the application and the district director denied the request for modification. Claimant requested a hearing and the case was referred to the Office of Administrative Law Judges. While the case was pending, employer submitted new x-ray readings and medical opinions. Administrative Law Judge Donald W. Mosser found that, based on the newly submitted evidence, claimant again failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(c) and failed to establish modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were again denied. In the instant appeal, claimant generally contends that benefits should have been awarded. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings of fact and conclusions of law if rational, supported by substantial evidence, and consistent with applicable 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 order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that substantial evidence supports the denial of benefits under 20 C.F.R. Part 718. The administrative law judge properly found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a). The administrative law judge correctly concluded that the three negative x-ray interpretations, the only new x-ray readings of record, did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 4, 7; Employer's Exhibits 1-3. The administrative law judge therefore rationally found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Additionally, as the record contains no biopsy or autopsy evidence, and as none of the presumptions found at 20 C.F.R. §§718.304, 718.305, and 718.306 are applicable,[1] the administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis at Sections 718.202(a)(2) and (3). *See* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Finally, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as the newly submitted medical opinions of Drs. Dahhan, Fino and Broudy, who found that claimant did not suffer from pneumoconiosis, did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Perry*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 5-7; Employer's Exhibits 1, 3-4. We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus failed to establish a change in conditions pursuant to Section 725.310, as it is supported by substantial evidence.

[1] The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305 applies to claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant probative evidence as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence of record failed to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c)(1)-(2), the administrative law judge properly found that inasmuch as all of the recent pulmonary function study and blood gas study evidence of record was non-qualifying, total disability was not established pursuant to Section 718.204(c)(1)-(2).[2] *See* Decision and Order at 4-5, 7; Employer's Exhibit 1. Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right-sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3). *See* Decision and Order at 7; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. (en banc)* 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). Based on the foregoing, we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(c)(1)-(3).

In addition, the administrative law judge reasonably determined that the medical opinions of Drs. Broudy, Fino and Dahhan concluded that claimant did not have a totally disabling respiratory impairment. *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1291 (1984); Decision and Order at 7. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge properly found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) and were thus insufficient to establish a change in conditions pursuant to Section 725.310.[3] *Nataloni v. Director, OWCP,* 17 BLR 1-82 (1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Finally, we note that the administrative law judge properly considered the evidence submitted in connection with claimant's prior claim and rationally concluded that there was no mistake in fact in the

[2]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), (2).

[3]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

original denial of benefits. Decision and Order at 6-7. *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni*, *supra*. Consequently, we affirm the administrative law judge's denial of claimant's petition for modification as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge