BRB No. 99-0896 BLA

WILLIAM CARPENTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRIPLE ELKHORN MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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-Denial of Benefits of Daniel J. Rokententz, Administrative Law Judge, United States Department of Labor.

William Carpenter, Stambaugh, Kentucky, *pro se.*

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (98-BLA-0624) of Administrative Law Judge Daniel J. Roketenetz on a petition for modification with respect to 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.*[1] The case is before the Board for the fourth time. In his most recent decision and

[1] Claimant is William Carpenter, the miner.

order, the administrative law judge found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a). Accordingly, the administrative law judge denied the claim. Employer, in response to claimant's appeal, asserts that the administrative law judge's findings are supported by substantial evidence, and urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a brief in the instant case.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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).

The pertinent procedural history of this case is as follows: Claimant filed his original claim with the Department of Labor (DOL) on February 11, 1980. Director's Exhibit 1. Administrative Law Judge Robert J. Shea held a hearing and awarded benefits under the Part 727 regulations in a Decision and Order dated September 2, 1987. 20 C.F.R. Part 727. Director's Exhibit 64. Following employer's appeal to the Board, the Board vacated the administrative law judge's determinations finding that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a)(1), (a)(2), and (a)(4), and that rebuttal was not established pursuant to Section 727.203(b)(3). *Carpenter v. Triple Elkhorn Mining Co.*, BRB No. 87-2586 BLA (Nov. 12, 1991)(unpub.); Director's Exhibit. 80. On remand, Judge Shea again awarded benefits in a Decision and Order dated September 21, 1992. Director's Exhibit 87. Following employer's second appeal, the Board again vacated the administrative law judge's findings, and remanded the case to the administrative law judge. *Carpenter v.*

[2] We affirm, as unchallenged on appeal, and not adverse to claimant, the administrative law judge's findings that the record establishes 10.75 years of coal mine employment, and that employer is the putative responsible operator. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

Triple Elkhorn Mining Co., BRB No. 93-0196 BLA (Sept. 22, 1994)(unpub.); Director's Exhibit 105. On remand, Judge Shea denied benefits under Part 727 in a Decision and Order dated April 11, 1995. Director's Exhibit 106. On appeal, the Board affirmed the administrative law judge's Decision and Order. *Carpenter v. Triple Elkhorn Mining Co.*, BRB No. 95-1450 BLA (March 22, 1996)(unpub.); Director's Exhibit 118. Claimant then appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the administrative law judge's denial of benefits. *Carpenter v. Triple Elkhorn Mining Co.,* No. 96-3435 (6th Cir. April 2, 1997). Director's Exhibit 121. Claimant then proffered new evidence to the court, which treated the filing as a request for reconsideration and denied the request on July 2, 1997. Director's Exhibit 129. On July 14, 1997, claimant filed a new claim with DOL, which the administrative law judge treated as a motion for modification. Director's Exhibit 130. At claimant's request and without objection from the Director or employer, the administrative law judge rendered a decision on the record which he had reopened. The administrative law judge's denial of claimant's motion for modification is the decision before the Board.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order denying benefits is supported by substantial evidence and contains no reversible error therein. The administrative law judge considered the newly submitted x-ray interpretations and correctly found that Dr. Zadeh submitted a positive x-ray reading, but that the same x-ray was re-read as negative by Drs. Sargent, Binn and Abromowitz, all of whom are dually-qualified readers.[3] Decision and Order at 7. He correctly found that the remaining x-ray evidence was negative with the exception of Dr. Myer's interpretation of the June 21, 1997 film as unreadable. *Id*. The administrative law

[3]A B-reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R §718.202(a)(1)(ii)(E); 42 C.F.R §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A dually-qualified reader is both a B-reader and a board-certified radiologist.

judge then rationally found that the preponderance of the x-ray interpretation evidence was insufficient to establish a change of conditions pursuant to Section 725.310(a). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1985); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985). Accordingly, we affirm the administrative law judge's finding that the newly submitted x-ray interpretations are insufficient to establish a change of conditions pursuant to Section 725.310(a).

With respect to the administrative law judge's findings regarding the pulmonary function evidence, he correctly noted that the only study conducted since the prior denial, the April 23, 1997 study, produced qualifying values, Director's Exhibit 122, but found the study invalidated by three physicians, who are either Board-certified in internal medicine and/or pulmonary disease. Director's Exhibit 125; Employer's Exhibits 4, 5; Decision and Order at 7. The administrative law judge determined that a preponderance of the pulmonary function study evidence by highly-qualified physicians indicated that the April 1997 study was invalid, and therefore rationally found the pulmonary function study evidence was insufficient to establish a change in conditions. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(Brown, J., dissenting). *Clark, supra; Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987); *Winchester v. Director v. OWCP*, 9 BLR 1-177 (1986). We affirm this finding as supported by substantial evidence.

The administrative law judge also correctly found that the record contained no new blood gas studies and that the record contained no evidence that the miner had cor pulmonale with right-sided congestive heart failure.

Finally, the administrative law judge considered the newly submitted medical opinions of four physicians on the issues of pneumoconiosis and total disability. The administrative law judge found that only Dr. Zadeh opined that claimant suffered from pneumoconiosis and was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 136, 138; Claimant's Exhibit 1; Employer's Exhibit 6; Decision and Order at 8. The administrative law judge rationally concluded, however, that Dr. Zadeh's opinion was "neither well-reasoned nor well documented," because the physician's opinion was not based upon credited objective evidence. *Id; see McMath v. Director, OWCP,* 12 BLR 1-6 (1987); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1986); *Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Clark*, *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); Decision and Order at 8. The administrative law judge then correctly noted that Drs. Dahhan, Branscomb, and Fino opined that claimant did not suffer from pneumoconiosis and was not totally disabled by a respiratory or pulmonary impairment. Decision and Order at 7-8. The

administrative law judge thus properly concluded that the opinions of Drs. Dahhan, Branscomb, and Fino are legally insufficient to sustain claimant's burden of establishing a total respiratory disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986). We affirm, therefore, the administrative law judge's finding that the medical reports do not establish a change in conditions pursuant to Section 725.310(a), as it is supported by substantial evidence and is in accordance with applicable law.

Further, we affirm the administrative law judge's determination that the evidence in the prior decisions by Judge Shea and the newly submitted evidence does not establish a mistake in a determination of fact as it is supported by substantial evidence and consistent with applicable law. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). As these findings preclude entitlement pursuant to the Part 727 regulations, *see Coen*, *supra*; *Rysz v. Director, OWCP*, 7 BLR 1-18 (1984), and the Part 718 regulations, *see Trent*, *supra*; *Perry*, *supra*, we affirm the denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge