BRB No. 97-1210 BLA

LAWRENCE SKIDMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: _____)
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
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 - Denial of Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Cynthia Skidmore[1], Pennington Gap, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart, Eskridge and Jones), Abingdon, Virginia , for employer.

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

PER CURIAM:

[1]The claimant is Cynthia Skidmore, widow of the miner, who is pursuing the living miner's claim. The miner, Lawrence Skidmore, died on April 13, 1997 while the instant claim was pending with the Office of Administrative Law Judges.

Claimant, without the representation of counsel,[2] appeals the Decision and Order - Denial of Request for Modification (96-BLA-1101) of Administrative Law Judge Robert L. Hillyard 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).

A summary of the procedural history of this case is as follows: The miner, Lawrence Skidmore, filed his original claim for benefits with the Social Security Administration (SSA) on August 27, 1970. The claim was denied by SSA on February 5, 1979 and was finally denied by the Department of Labor on August 22, 1979. The miner did not pursue that claim. He filed a second claim for benefits on November 17, 1982. The administrative law judge credited the miner with twenty-three years, two months and three days of coal mine employment and found a material change in conditions pursuant to 20 C.F.R. §725.309(d) under the then-controlling standard in *Spese v. Peabody Coal Co.,* 11 BLR 1-174 (1988), *dismissed with prejudice,* No. 88-3309 (7th Cir. 1989)(unpub.), which was ultimately overruled by *Peabody Coal Co. v. Spese* 117 F.3d 667, 21 BLR 2-113 (7th Cir. 1997) *(en banc*). The administrative law judge found that neither the existence of pneumoconiosis nor total respiratory disability was established, *see* 20 C.F.R. §§ 718.202(a) and 718.204(c), and denied benefits. The miner appealed, and on May 24, 1994, the Board affirmed the administrative law judge's denial of benefits based on the administrative law judge's finding that total respiratory disability was not established at Section 718.204(c). *Skidmore v. Clinchfield Coal Co.,* BRB No. 91-1615 BLA (May 24, 1994)(unpublished). On May 19, 1995, the miner requested modification pursuant to 20 C.F.R. §725.310. After the district director denied modification, the miner requested a hearing and on October 21, 1996, the administrative law judge ordered the parties to show cause why a hearing was necessary. Employer responded to the order stating that a hearing was not necessary. Neither the miner nor the Director, Office of Workers' Compensation Programs, responded. Hence, the administrative law judge rendered his Decision and Order on the record, *see Wojtowicz v. Duquesne Light Co*., 17 BLR 1-32 (1985).

The administrative law judge reaffirmed his length of coal mine employment finding of twenty-three years, two months and three days. He considered the evidence submitted after the prior denial and found that claimant failed to establish both the existence of pneumoconiosis at Section 718.202(a) and total respiratory disability at Section 718.204(c). Hence, the administrative law judge found that the miner failed to establish a change in conditions pursuant to Section 725.310. After he reviewed all the medical evidence of record, the administrative law judge found that claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310. Accordingly,

[2]Claimant's appeal was filed on her behalf by Ron Carson, a benefits counselor with Stone Mountain Health Services in St. Charles, Virginia. By Order dated June 9, 1997, the Board advised claimant that her appeal would be reviewed under the provisions provided at 20 C.F.R. §§802.211(e), 802.220. *See generally Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995).

he denied benefits.

On appeal, claimant generally contends that he is entitled to benefits. Employer, in response, urges affirmance of the administrative law judge's decision and order. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

In an appeal by a claimant filed 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. 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).

After consideration of the administrative law judge's Decision and Order - Denial of Request for Modification and the relevant evidence of record, we conclude that the administrative law judge's Decision and Order contains no reversible error, and therefore must be affirmed.

This petition for modification is governed by the holding in *Jessee v. Director, OWCP,* 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see also Kingery v. Hunt Branch Coal Co.,* 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP,* 17 BLR 1-82 (1993). In making his finding at Section 718.202 with respect to a change in conditions at Section 725.310, the administrative law judge reviewed the newly submitted x-ray evidence[3], considered the number of individual x-rays, the totality of the interpretations, and the qualifications of the readers.[4] He reasonably relied on the interpretations of the majority of physicians who were both B-readers and Board certified radiologists to find the x-ray evidence to be negative for pneumoconiosis. Decision and Order at 8. *Sheckler v. Clinchfield Coal Co.,*

[3]The administrative law judge found that the newly submitted x-ray evidence included fourteen interpretations of five different x-rays. He found twelve of the interpretations to be negative and only two to be positive. Decision and Order at 7-8. Eight of the negative interpretations are by B-readers. Six of those negative interpretations are by readers who are both B-readers and Board-certified radiologists.

[4]The administrative law judge erred in failing to identify Dr. Navani as a Board certified radiologist. *See* Claimant's Exhibit 4. The error is harmless inasmuch as, on balance, the majority of negtive x-ray interpretations were the readers who were both B-readers and Board certified radiologists, as the administrative law judge found . *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). In his prior Decision and Order, the administrative law judge correctly identified Dr. Navani as both a Board-certified radiologist and B-reader. [1991] Decision and Order at 5,11.

7 BLR 1-128 (1984). We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as supported by substantial evidence.[5] *See generally Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

The administrative law judge properly found that Section 718.202(a)(2) is not applicable inasmuch as there are no biopsy or autopsy results in the record. He properly found that the presumptions provided at Section 718.202(a)(3) are not available in this miner's claim filed after January 1, 1982, and in which there is no evidence of complicated pneumoconiosis. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Turning to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Sargent[6] and Fino, who opined that the miner did not have pneumoconiosis, Employer's Exhibits 14, 35, Dr. Kanwal, who opined that the miner had pneumoconiosis, Claimant's Exhibit 2, and the discharge summary from the Lee County Community Hospital which included coal worker's pneumoconiosis in a list of diagnoses. Claimant's Exhibit 4. The administrative law judge reasonably gave greater weight to the

[5]Employer submitted on modification negative x-ray rereadings of x-rays which were taken during the prior adjudication of this claim. Employer's Exhibits 1, 2, 4, 5, 6, 7, 10, 11, 16, 18, 19. Inasmuch as these negative interpretations are not probative of the issue of a change in conditions on modification at Section 718.202(a)(1) , the administrative law judge properly refrained from considering them. Moreover, the administrative law judge's failure to consider this negative x-ray evidence with respect to the issue of a mistake in fact at Section 725.310, *see infra*, is harmless error since the negative x-ray evidence supports the administrative law judge's finding that there was no mistake in a determination of fact with respect to his original finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). *See Larioni, supra.*

[6]The administrative law judge noted that Dr. Sargent diagnosed disabling rheumatoid arthritis and rheumatoid nodules in the lung. Employer's Exhibit 14.

opinions of Drs. Sargent and Fino over the opinion of Dr. Kanwal and the hospital diagnosis because Dr. Kanwal's opinion was conclusory and offered no basis or rationale for his diagnosis, *see generally Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 21 BLR 2-280 (4th Cir. 1997); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985), and because the impression of coal worker's pneumoconiosis listed in the hospital record lacked a rationale. Moreover, the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case arises, has held that the administrative law judge makes credibility determinations with respect to the medical witnesses *, see Doss v. Itmann Coal Co.,* 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). We therefore affirm the administrative law judge's finding that the evidence submitted since the prior denial is insufficient to establish the existence of pneumoconiosis or a change in conditions at Section 725.310.

With respect to Section 718.204(c), the administrative law judge first considered the two pulmonary function studies submitted since the prior denial. He found that the values for the miner's January 29, 1995 test and the post-bronchodilator values for the June 20, 1996 test were non-qualifying. He reasonably found the qualifying pre-bronchodilator values of the miner's June 20, 1996 test to be invalid based on the invalidation reports by Drs. Castle and Sargent who questioned claimant's effort on that part of the test.[7] *See Siegel v. Director, OWCP,* 8 BLR 1-156 (1985)(2-1 opinion, Brown, J. dissenting); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); Director's Exhibit 49; Employer's Exhibit 14. We thus affirm the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability at Section 718.204(c)(1). Regarding Section 718.204(c)(2), the administrative law judge properly found that neither of the two blood gas studies submitted after the prior denial of benefits is qualifying. Thus, the administrative law judge properly found the evidence insufficient to establish total respiratory disability at Section 718.204(c)(2). Director's Exhibit 45; Employer's Exhibit 14. The administrative law judge properly found Section 718.204(c)(3) inapplicable because there is no evidence in the record of cor pulmonale with right sided congestive heart failure. We thus affirm this finding.

With respect to Section 718.204(c)(4), the administrative law judge properly relied on the opinions of Drs. Sargent and Fino, who opined that the miner did not experience total respiratory disability and could return to his usual coal mine employment, over the contrary opinion of Dr. Kanwal. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*). He properly gave little weight to the opinion of Dr. Kanwal inasmuch as

[7]The administrative law judge noted that Dr. Sargent attributed the mild obstructive impairment suggested by the pre-bronchodilator test conducted at his behest, more to patient effort than to actual obstruction. The administrative law judge noted that Dr. Castle believed that the pre-bronchodilator study showed less than maximal effort throughout the entire vital capacity maneuver on each and every study and showed that the mouthpiece was partially obstructed as though with the tongue. Decision and Order at 6, 9; Employer's Exhibits 14, 34.

he found it conclusory and found that it contained no rationale to support the diagnosis.[8] *See Akers, supra.* Thus, we affirm the administrative law judge's finding that total respiratory disability is not established at Section 718.204(c)(4) and Section 718.204(c) as a whole, and his finding of no change in conditions pursuant to Section 725.310. *See Kingery, supra; Nataloni, supra.*

Turning to the question of whether there is a mistake in a determination of fact pursuant to Section 725.310, the administrative law judge reviewed the entirety of the medical evidence, including the evidence submitted prior to modification, namely, "109 x-ray interpretations, eleven pulmonary function studies, ten arterial blood gas studies, medical reports by Drs. Fino, Robinette, Byers, Kanwal, Buddington, Navani, Odom and hospital records...." Decision and Order at 10. Inasmuch as the administrative law judge properly reviewed the entirety of the medical record and reasonably concluded that there was no mistake in a determination of fact with respect to the existence of pneumoconiosis at Section 718.202(a) or total respiratory disability at Section 718.204(c), we affirm his finding that modification is not established at Section 725.310, *see Jessee, supra,* and further affirm his denial of benefits.

[8]The administrative law judge correctly determined that the Lee County Community Hospital records did not address the extent or degree of disability, if any. Decision and Order at 10; Claimant's Exhibit 4.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge