BRB No. 00-0214 BLA

GERALD THOMAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN DRIVE MINING COMPANY	)	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 - Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Gerald Thomas, Tazewell, Tennessee, *pro se*.[1]

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-0603) of Administrative Law Judge Mollie W. Neal 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). Claimant filed his initial claim for benefits on May 27, 1993. Director's Exhibit 2. Administrative Law Judge Christine McKenna found that claimant established

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, on behalf of claimant, requested review of the administrative law judge's Decision and Order Denying Benefits, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

fourteen years of coal mine employment and also found that claimant failed to establish the existence of pneumoconiosis arising from coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §§718.204(b), (c). Accordingly, benefits were denied. Director's Exhibit 27. Claimant appealed, and in *Thomas v. Mountain Drive Mining Co.*, BRB No. 96-1403 BLA (March 27, 1997)(unpub.), the Board affirmed the finding of fourteen years of coal mine employment, and affirmed the finding that claimant failed to establish total disability due to pneumoconiosis at Sections 718.204(b), (c), and therefore affirmed the denial of benefits. Director's Exhibit 34. On July 22, 1997, claimant requested modification and submitted new evidence pursuant to 20 C.F.R. §725.310. *See* Director's Exhibit 37-39. Administrative Law Judge Mollie W. Neal (the administrative law judge) reviewed all the newly submitted evidence, in conjunction with the previous evidence, and determined that claimant failed to establish a basis for modification. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *aff'd on recon.*, 16 BLR 1-71 (1992). Benefits were again denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

In an appeal filed by a claimant 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). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are 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).

The administrative law judge reviewed all the evidence of record, old and new, and found that claimant failed to establish the existence of pneumoconiosis on modification. The administrative law judge noted that the preponderance of the old x-ray evidence was negative for the existence of pneumoconiosis and that the new evidence consisted of five x-ray readings of two films. The readings by Drs. Halbert, Poulos, Dahhan and Sargent were negative for the existence of pneumoconiosis, while Dr. Gopalan found "interstitial markings slightly prominent" and "a six millimeter Nodular density in right mid lung zone. A comparison with previous chest films is recommended." Director's Exhibit 35. The administrative law judge permissibly found that Dr. Gopalan's reading "adds little probative value ... since it neither diagnoses nor rules out the existence of pneumoconiosis." Decision and Order at 8. Thus, the administrative law judge permissibly accorded greater weight to the negative readings of Drs. Poulos and Sargent, who are better qualified as they are both B

readers and Board certified radiologists.[2] Employer's Exhibit 5; Director's Exhibit 38; Decision and Order at 8; *Staton v. Norfolk & Western Railway Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995). We therefore affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

In addition, the administrative law judge properly found that the existence of pneumoconiosis could not be established at Section 718.202(a)(2), (3) as the evidence of record does not contain any biopsy or autopsy evidence at Section 718.202(a)(2), and as none of the presumptions at Section 718.202(a)(3) were applicable. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 8-9.

The administrative law judge next considered the medical opinions of record at Section 718.202(a)(4). Decision and Order at 9. The administrative law judge found that Drs. Castle, Fino and Dahhan, who submitted opinions since the date of the prior denial, stated that the medical evidence was insufficient to justify a finding of coal workers' pneumoconiosis, Employer's Exhibits 1, 2, 3, and that Judge McKenna had correctly concluded that earlier physicians' opinions were insufficient to establish the existence of pneumoconiosis as only one of the four opinions diagnosed the existence of pneumoconiosis and it was based on a positive x-ray reading. Decision and Order at 9. The administrative law judge, therefore, properly found that claimant could not establish the existence of pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §718.201; *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We therefore affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

[2] 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 by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 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).

Next, the administrative law judge considered the old and new evidence relevant to total disability. The administrative law judge found that the pulmonary function studies considered by Judge McKenna were non-qualifying, but that the new evidence contained the results of pulmonary function studies which yielded qualifying results.[3] However, the administrative law judge permissibly found that the qualifying pulmonary function study taken on February 5, 1998 by Dr. Craven was subsequently interpreted as invalid due to poor effort by Drs. Dahhan, Fino, and Castle, pulmonary specialists, and the January 22, 1999 test by Dr. Dahhan was subsequently invalidated by Dr. Dahhan due to claimant's poor effort. Decision and Order at 5, n. 4, 5; Employer's Exhibit 3; Claimant's Exhibit 3; *Prater v. Hite Preparation Co.*, 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Likewise, the administrative law judge permissibly found that the remaining qualifying test administered on May 7, 1997 by Dr. Sy was invalidated by him due to poor effort, and as a result, "good spirometry was not met." Decision and Order at 11; Claimant's Exhibit 2; *Prater, supra*. The administrative law judge properly credited the opinions of Drs. Dahhan, Castle and Fino based on their qualifications as pulmonary specialists, over that of Dr. Craven, who is board certified in family practice, in finding that the weight of the pulmonary function studies is insufficient to establish total disability at Section 718.204(c)(1). *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Winchester*, *supra*; *Siegel*, *supra*.

In addition, as none of the new or old blood gas studies of record yielded qualifying results, the administrative law judge properly found that they were insufficient to establish total disability at Section 718.204(c)(2), *Schetroma*, *supra*; Decision and Order at 12, and as the record was devoid of any evidence of cor pulmonale with right sided congestive heart failure, the administrative law judge properly found that total disability could not be established at Section 718.204(c)(3). 20 C.F.R. §718.202(c)(2), (3).

Finally, since none of the medical opinions of record, old or new, found claimant totally disabled from a respiratory impairment, the administrative law judge properly found that they were insufficient to establish total disability at Section 718.204(c)(4). *See Beatty v.*

[3] 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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Danri Corp., 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Thus, the administrative law judge properly determined that as the evidence failed to establish a change in conditions since the prior denial and failed to establish that a mistake in a determination of fact had been made in the prior determination, claimant had failed to establish a basis for modification and denied benefits. *See Worrell, supra*. We therefore affirm the administrative law judge's finding that claimant failed to establish a basis for modification of the denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge