BRB No. 99-1176 BLA

KELLY R. MATNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
PITTSTON COMPANY	)	
	)	
Employer/Carrier-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 Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Kelly R. Matney, Lick Creek, Kentucky, *pro se*.[1]

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

[1] Susie Davis, President of the Kentucky Black Lung Association of Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant,[2] without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (98-BLA-1269) of Administrative Law Judge Robert L. Hillyard on a duplicate 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). In the original Decision and Order, Administrative Law Judge Edith Barnett adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 and credited claimant with at least twenty-five years of qualifying coal mine employment. Judge Barnett further found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), total respiratory disability pursuant to 20 C.F.R. §718.204(c), and a material change in conditions pursuant to 20 C.F.R. §725.309(d). Benefits were, accordingly, denied. Director's Exhibit 58. Claimant appealed and the Board affirmed the denial of benefits. *Matney v. Eastern Coal Corp.*, BRB No. 95-2196 BLA (Oct. 15, 1996)(unpub.); Director's Exhibit 70. On October 6, 1997, claimant requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 71. Because claimant requested that a decision be made on the record and employer did not object, the scheduled formal hearing was cancelled by Administrative Law Judge Robert L. Hillyard (the administrative law judge) in an order dated March 30, 1999. The administrative law judge, therefore, rendered a decision on the record. The administrative law judge found that there was no newly submitted evidence on the length of coal mine employment and that there was no mistake in Administrative Law Judge Barnett's length of coal mine employment determination of at least twenty-five years. Next, the administrative law judge determined that because the evidence submitted since the prior denial failed to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), claimant had failed to establish a change in conditions under Section 725.310. The administrative law judge also determined that, after a review of the record in its entirety, no mistake in a determination of fact had been made in the previous decision under Section 725.310. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of

[2] Claimant is Kelly R. Matney, who filed his first application for benefits on April 4, 1988. Director's Exhibit 32. The district director administratively closed this claim on November 14, 1990 based on claimant's acceptance of the denial of benefits. Director's Exhibit 32. Subsequently, claimant filed a duplicate application for benefits on January 12, 1993, which is presently pending. Director's Exhibit 1.

benefits. Employer responds to this *pro se* appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will 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. *McFall v. Jewell Ridge Coal Co.*, 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 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 submitted since the prior denial consists of seven negative x-ray interpretations. Employer's Exhibits 2, 3, 5. The administrative law judge found, within a proper exercise of his discretion, that the newly submitted x-ray evidence was negative for the existence of pneumoconiosis, and, therefore, insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Langerud v. Director, OWCP*, 9 BLR 1-101, 1-103 (1986); Decision and Order at 7.[3] We affirm, therefore, the administrative law judge's determination pursuant to Section 718.202(a)(1) inasmuch as it is rational and supported by substantial evidence. *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 findings under Section 718.202(a)(2) and (3), 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 claimant cannot establish the existence of pneumoconiosis pursuant to these subsections. There is no biopsy evidence of record, and therefore, the existence of pneumoconiosis cannot be established under Section 718.202(a)(2). Similarly, a review of the record reveals that

[3] Although the administrative law judge did not list the four negative x-ray interpretations provided by Dr. Branscomb in the summary of the newly submitted x-ray evidence, the administrative law judge addressed these readings in his analysis of whether a mistake in a determination of fact was demonstrated. *See* Decision and Order at 5, 8; Employer's Exhibit 3.

none of the presumptions set forth in Section 718.202(a)(3) are applicable to the case at bar inasmuch as there is no evidence of record establishing the existence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, the instant claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305, and this is a living miner's claim, *see* 20 C.F.R. §718.306. *See* 20 C.F.R. §§718.202(a)(2), (3), 718.304-718.306. Hence, the record is devoid of evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(2) and (3).

With respect to Section 718.202(a)(4), a review of the newly submitted medical opinion evidence reveals that Drs. Broudy, Fino, and Branscomb opined that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibits 2-4, 6. The administrative law judge properly found that none of these newly submitted medical opinions diagnosed the existence of clinical pneumoconiosis or a pulmonary or respiratory impairment arising out of claimant's coal mine employment. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See* 20 C.F.R. §718.201; *Handy v. Director, OWCP*, 16 BLR 1-73, 1-76 (1990); Decision and Order at 7-8.

Relevant to Section 718.204(c)(1), there is one newly submitted pulmonary function study taken on November 23, 1998, which yielded non-qualifying values.[4] Employer's Exhibit 2. The administrative law judge properly found that this pulmonary function study produced non-qualifying values, and therefore, failed to demonstrate total disability pursuant Section 718.204(c)(1). *See* 20 C.F.R. §718.204(c)(1); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 8. Likewise, the administrative law judge properly determined that the one newly submitted arterial blood gas study dated November 23, 1998

[4] 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 yields values that exceed those values. 20 C.F.R. §718.204(c)(1), (2).

produced non-qualifying values. Employer's Exhibit 2. Hence, we affirm the administrative law judge's finding that total disability was not demonstrated under Section 718.204(c)(2). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 8.[5]

Relevant to Section 718.204(c)(4), the newly submitted medical opinion evidence consists of three reports by Drs. Broudy, Fino, and Branscomb, who all opined that claimant has no respiratory or pulmonary impairment and retains the respiratory capacity to perform his usual coal mine employment. Employer's Exhibits 2-4, 6. The administrative law judge rationally determined that the newly submitted medical opinion evidence failed to demonstrate that claimant is totally disabled due to a respiratory or pulmonary impairment and that this newly submitted evidence considered in conjunction with the prior evidence of record failed to show that claimant's condition has worsened since the previous denial in August 1995. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); Decision and Order at 8. Consequently, we affirm the administrative law judge's finding that claimant failed to demonstrate total disability pursuant to Section 718.204(c)(4) inasmuch as his determination is rational and supported by substantial evidence.

Next, we turn to the administrative law judge's mistake in a determination of fact analysis. Noting the negative x-ray interpretations contained in Dr. Branscomb's consulting report, the administrative law judge permissibly determined that the positive x-ray interpretations of record are insufficient to outweigh the numerous negative x-ray readings rendered by physicians with superior radiological expertise, and that the negative x-ray evidence supported Judge Barnett's prior finding of no pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 8. Similarly, the administrative law judge properly considered all of

[5] Although the administrative law judge did not render a specific finding under Section 718.204(c)(3), we deem this omission harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as a review of the evidence reveals that it does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated pursuant to Section 718.204(c)(3). *See* 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989).

the evidence of record, comparing the previously submitted evidence to that submitted subsequent to the prior denial of August 21, 1995, and, within a proper exercise of his discretion, found that the persuasive and probative evidence failed to establish the presence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory or pulmonary impairment. *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 8. Specifically, the administrative law judge permissibly determined that the newly submitted pulmonary function study, blood gas study, and medical opinion evidence not only supported a finding of the absence of pneumoconiosis or total disability, but also "strongly supported" the previous determinations of Judge Barnett that pneumoconiosis and total disability were not established, findings which were based on evidence submitted prior to August 1995. *Ibid*. Inasmuch as the administrative law judge's finding is rational and supported by substantial evidence, we affirm the administrative law judge's determination that claimant failed to demonstrate a mistake in a determination of fact pursuant to Section 725.310. *See Worrell, supra*; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); Decision and Order at 8.

Inasmuch as the administrative law judge properly found that claimant failed to satisfy his 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 establish modification pursuant to Section 725.310. *See Worrell, supra*; *Kingery, supra*; *Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge