BRB No. 01-0240 BLA

RUFFICE C. ESTEP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PREMIUM ENERGY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS 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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ruffice C. Estep, Hurley, Virginia, *pro se*.

Robert Weinberger (Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (99-BLA-484) of Administrative Law Judge Richard A. Morgan rendered 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that claimant established at least thirty years of coal mine employment. Considering the newly submitted evidence, in conjunction with the previously submitted evidence, the administrative law judge concluded that the evidence failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, and therefore that neither a mistake in a determination of fact had been made nor a change in conditions had been shown sufficient to justify modification of the denial of benefits. Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. Carrier responds urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the denial of benefits.

In order to establish entitlement to benefits in a living miner's claim

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,107 (2000) to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Association v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

[2] Claimant filed his initial claim for benefits on March 6, 1996, which was denied. Claimant filed a letter April 25, 1996, requesting that the claim remain open and submitted additional evidence. Director's Exhibits 26-14, 26-24. The district director informed claimant that the claim was administratively closed on May 1, 1996. Director's Exhibits 26-1, 25-26. Claimant filed the instant claim for benefits March 13, 1998. Director's Exhibit 1. The administrative law judge found that claimant's letter of April 25, 1996, was a request for modification and proceeded to consider all the evidence of record to determine whether a basis for modification of the previous denial was established. Decision and Order at 10.

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 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).

In determining whether modification has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *see Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been made.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the numerical superiority of negative x-ray readings by physicians with superior qualifications. Decision and Order at 13; Director's Exhibits 14-16, 26-11-12; Employer's Exhibits 1-8; Claimant's Exhibit 4; 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see Staton v. Norfolk v. Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 12; *see* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Pursuant to Section 718.204(a)(4), the administrative law judge permissibly accorded little weight to the opinions of Drs. Robinette and Clary for various reasons: the opinions were equivocal; Dr.

Robinette's opinion was not fully supported by the underlying documentation; Dr. Clary failed to explain his diagnosis; and he was board-certified in osteopathic medicine, and, thus, not as well qualified as the other physicians of record. *Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, the administrative law judge permissibly accorded little weight to the opinion of Dr. Ranavaya, because he based his opinions on a positive reading of an x-ray which was subsequently reread numerous times as negative by better qualified physicians, and on a pulmonary function study which produced non-qualifying results. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 382-383 n.4 (1983). Thus, the administrative law judge rationally found that the evidence did not support a finding of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Turning to the issue of total disability, the administrative law judge rationally found the evidence insufficient to establish total disability as the five pulmonary function studies of record produced non-qualifying values; only one of the five blood gas studies of record produced qualifying values and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 16; Director's Exhibits 8,12, 26-8, 26-10, 26-24; Claimant's Exhibits 4, 6. 20 C.F.R. 718.204(b)(2)(i)-(iii); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1983); *Newell v. Freeman United Coal Mining Co.*, 10 BLR 1-19 (1987); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Turning to the

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[3] The medical opinion evidence of record consists of the opinions of four physicians: Dr. Forehand found no pneumoconiosis or respiratory impairment, Director's Exhibit 26-9; Dr. Ranavaya diagnosed pneumoconiosis based on an x-ray and pulmonary function study, Director's Exhibits 9, 11; Dr. Clary found abnormalities consistent with pneumoconiosis based on past x-rays and opined that claimant "may need medications in the future for his lungs"; Claimant's Exhibit 1, and Dr. Robinette diagnosed "probable coal workers' pneumoconiosis" in August 17, 1999. Claimant's Exhibit 4. The evidence also contains a CT scan interpreted as showing minimal increase on interstitial markings which may be due to occupational exposure, Claimant's Exhibit 6.

[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, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

medical opinion evidence the administrative law judge rationally found it insufficient to establish total disability in light of the contrary probative evidence because Dr. Forehand found that claimant did not have a respiratory impairment, Dr. Ranavaya, while diagnosing a moderate impairment with moderate hypoxemia, did not render an opinion as to whether claimant was disabled from his last coal mine employment, Dr. Robinette, who diagnosed chronic pneumoconiosis, did not render an opinion as to whether claimant was totally disabled, and Dr. Clary, while opining that claimant experienced shortness of breath and "may" need medication in the future for lung problems did not render an opinion on disability. Moreover, the administrative law judge rationally found Dr. Clary's opinion to be equivocal. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Justice*, *supra*; *Campbell*, *supra*; *Fields*, *supra*; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon*. 9 BLR 1-104 (1986); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*). Further, the administrative law judge properly found that the opinion of Ms. Jenkins, a vocational consultant, that claimant was unable to return to his former coal mine employment, which required medium to heavy exertional levels, due to his work-related accident and occupational disease was not entitled to much weight because she was not as qualified as a physician, *see Fields*, *supra*, and she did not distinguish between the effects of claimant's respiratory and non-respiratory conditions on his ability to do his usual coal mine employment. *Street*, *supra*.

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis and total disability pursuant to Section 718.202(a) and 718.204(c) and, therefore, modification pursuant to Section 725.310 as it is

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[5] The administrative law judge considered the medical opinions of record: Dr. Forehand found no respiratory impairment, Director's Exhibit 26-9; Dr. Ranavaya found that claimant suffered from a moderate impairment as reflected by moderate hypoxemia at rest which meets the federal criteria for total disability contained in the Part 718 regulations, Director's Exhibits 9, 11; Dr. Robinette diagnosed chronic pneumoconiosis but did not address total disability, Claimant's Exhibit 6; and Dr. Clary did not address total disability, Claimant's Exhibit 1. The evidence also consists of the opinion of Ms. Jenkins, a vocational consultant, who found claimant unable to return to his past work due to his work-related accident and occupational disease. Claimant's Exhibit 3.

supported by substantial evidence and in accordance with law. *Jessee*, *supra*; *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge