BRB No. 04-0327 BLA

JACK E. LIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 10/26/2004
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 Modification and Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Jack E. Light, Gate City, Virginia, *pro se*.

Natalie D. Brown (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order Denying Modification and Benefits (02-BLA-0149) of Administrative Law Judge Pamela Lakes Wood 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).[1] 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, the element previously adjudicated against the claimant. Thus, the administrative law judge found that neither a mistake in a determination of fact nor a change in conditions had been shown pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied.

On appeal, claimant argues that although the x-ray evidence failed to establish the existence of pneumoconiosis, the medical opinions of his treating physicians, Drs. Smiddy and Reed, are sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) and are more credible than the opinions of the non-treating physicians. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of 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 Corp.*, 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).

In order to establish entitlement to benefits in a living miner's claim 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)(*en banc*).

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[1] Upon claimant's request, the claim filed on August 14, 1995 was withdrawn by an order issued on January 31, 1997 by Administrative Law Judge Jeffrey Tureck. Director's Exhibit 39. A subsequent claim filed on February 18, 1998 was denied on July 24, 2000 by Administrative Law Judge Thomas Burke. Director's Exhibit 54. Claimant's request for modification of the prior denial was timely filed on July 23, 2001. Director's Exhibit 57.

After considering the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the denial of benefits is supported by substantial evidence. The administrative law judge noted that of the four newly submitted x-rays of record, the March 6, 2002 and June 11, 2002 x-rays were uniformly interpreted as negative for pneumoconiosis by qualified readers. Decision and Order Denying Modification and Benefits at 7. The administrative law judge found that the remaining two x-rays, taken on March 13, 2001 and June 14, 2002, had conflicting interpretations, and that as qualified readers disagree, the x-rays were at best in equipoise.[2] *Id.* Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge reasonably exercised her discretion in finding that the weight of the newly submitted radiographic evidence does not establish the existence of pneumoconiosis. *Id.*

With respect to the previously submitted thirteen x-rays taken between 1972 and 2000, the administrative law judge noted that eleven were uniformly interpreted as negative for the existence of pneumoconiosis, while the two taken on January 26, 2000 and May 2, 1997 had conflicting interpretations by qualified readers.[3] The administrative law judge permissibly found that even if the weight of the evidence regarding the January 26, 2000 x-ray was positive for pneumoconiosis, and the evidence regarding the May 2, 1997 x-ray was in equipoise, claimant would still fail to meet his burden to establish the existence of pneumoconiosis by a preponderance of the evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order Denying Modification and Benefits at 8. Accordingly,

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[2] The administrative law judge found that the March 13, 2001 x-ray was read by five dually qualified physicians, and only Dr. Ahmed read the x-ray as positive for pneumoconiosis. Decision and Order Denying Modification and Benefits at 7; Director's Exhibits 55, 60; Claimant's Exhibits 5, 6; Employer's Exhibits 19, 20, 25, 27. The administrative law judge further found that the June 14, 2002 x-ray was read as positive by B reader Dr. Westerfield and as negative by dually qualified reader Dr. Wiot and B reader Dr. Jarboe. Decision and Order Denying Modification and Benefits at 7; Claimant's Exhibit 7; Employer's Exhibits, 27, 28.

[3] The administrative law judge found that the January 26, 2000 x-ray was interpreted by dually qualified reader Dr. Alexander and B reader Dr. Westerfield as 1/1, but Dr. Wiot, a dually qualified physician, interpreted the x-ray as negative. *Id.;* Director's Exhibit 55; Employer's Exhibit 27. The administrative law judge found that the May 2, 1997 x-ray was read as positive by Drs. Cappiello, Mathur and Pathack and negative by Drs. Scott, Wheeler and Wiot all dually qualified physicians, as negative by Dr. Fino, a B reader, and unreadable by Dr. Cooper, also a B reader. Director's Exhibit 49.

we affirm the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) as there was no biopsy of record, and no evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Under Section 718.202(a)(4), claimant argues that the opinions of Drs. Reed and Smiddy are sufficient to establish pneumoconiosis and should be accorded greater weight because of the doctors' status as claimant's treating physicians. The administrative law judge acknowledged that Dr. Reed has been claimant's treating physician since 1994 and Dr. Smiddy since 1998, and for that reason their opinions had "increased probative value." *See* 20 C.F.R. §718.104(d)(5); Decision and Order Denying Modification and Benefits at 12. On the other hand, the administrative law judge also observed that Dr. Reed's credentials are unknown and that Dr. Smiddy's credentials are inferior to those of Drs. Castle, Fino, Hippensteel, Dahhan and Jarboe, whose opinions are entitled to greater weight as pulmonary specialists. Decision and Order at 12. The administrative law judge, however, permissibly accorded both the opinions of Drs. Reed and Smiddy diminished weight because she found they were conclusory, and relied in part upon a positive x-ray, contrary to the weight of the x-ray evidence.[4] *Id.; Adkins*, 958 F.2d 49, 16 BLR 2-61; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Claimant's assertion that the opinions of Drs. Castle, Dahhan, Fino, Hippensteel and Jarboe are hostile to the Act because "they believe that a Claimant must show coalworker's pneumoconiosis radiographically," Claimant's Brief at 11, is unfounded. Drs. Castle, Dahhan, Fino, Hippensteel and Jarboe opined that regardless of the absence of radiographic evidence to diagnose pneumoconiosis, there is no evidence of an occupational pulmonary condition based on the physiological findings, and normal pulmonary function and blood gas studies. Director's Exhibit 49; Employer's Exhibits 9, 14, 18, 26.

Claimant further argues that their opinions are not documented because they considered "valid" pulmonary functions studies as "invalid." Claimant's Brief at 11.

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[4] Dr. Smiddy also relied on a pulmonary function study that was invalidated by the Drs. Castle, Fino, Dahhan, and Jarboe. Decision and Order Denying Modification and Benefits at 12; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director's Exhibits 15, 29, 39, 48, 49, 55; Claimant's Exhibits 3, 4, 7; Employer's Exhibit 18.

Claimant specifically alleges that Dr. Dahhan and Fino did not consider the June 11, 2002 study administered by Dr. Hippensteel, and that Dr. Hippensteel did not consider the post-bronchodilator part of the study that was recorded by the administering technician as acceptable and reproducible. *Id.* at 6, 7. Claimant's assertions lack merit. Of the nineteen pulmonary function studies of record from 1995 through 2002, eight yielded non-qualifying results and eleven were found invalid due to poor effort by Drs. Dahhan, Castle, Jarboe, Fino, Michos, Paranthaman, and Hippensteel. Drs. Dahhan considered at least seven pulmonary functions studies and Dr. Fino considered at least nine studies before concluding that claimant does not have an occupationally acquired respiratory disease. Director's Exhibits 10, 12, 14, 29, 39, 47-49, 55; Employer's Exhibit 18. It is not determinative that they did not consider the June 11, 2002 pulmonary function study because Dr. Hippensteel, who administered the study and noted the technician's comments, found it invalid. Employer's Exhibit 9.

Moreover, the administrative law judge acted within her discretion in according greater weight to the contrary opinions of Drs. Castle, Fino, Hippensteel, Dahhan and Jarboe because in addition to their "superior credentials" as Board-certified pulmonologists, they explained the bases for their opinions in accordance with the preponderance of negative interpretations and the most recent valid pulmonary function study that yielded non-qualifying results.[5] Decision and Order Denying Modification and Benefits at 13; *Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 33, 49; Employer's Exhibits 6-10, 12, 14, 16-18, 26, 28.

The administrative law judge further found that with respect to the previously submitted medical opinion evidence, of the eight physicians who submitted medical opinions, only Drs. Smiddy and Reed diagnosed pneumoconiosis. The administrative law judge reasonably found that Dr. Reed's half page letter was "conclusory" and that it did not constitute a reasoned medical opinion and Dr. Smiddy's diagnosis of "severe" pneumoconiosis was not documented. Decision and Order at 13; *see Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark*, 12 BLR 1-149 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Thus, the administrative law judge rationally found that the medical opinion evidence of record failed to establish the existence of pneumoconiosis. Further, on weighing all the old and new evidence, together, *i.e.*, x-rays and medical opinions, the administrative law judge reasonably found that it failed to establish the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). We, therefore, affirm the

[5] Contrary to claimant's assertion, Dr. Castle's diagnosis of chronic bronchitis is not inconsistent with his conclusion that at claimant does not have a totally disabling respiratory impairment.

administrative law judge's finding that the evidence of record as a whole is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

The administrative law judge is empowered to weigh the evidence and to draw her own inferences there from, *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, *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, an essential element of entitlement, as it is supported by substantial evidence and is in accordance with law. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge