BRB No. 06-0165 BLA

CARL DOUGLAS MOSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 10/23/2006
JOHNSON ELKHORN 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 Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Carl Douglas Mosely, Hindman, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (2003-BLA-0188) of Administrative Law Judge Thomas F. Phalen, Jr., with respect to a claim filed pursuant to the provisions of the Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.§901 *et seq*. (the Act). The administrative law judge noted that claimant's request for modification was before him and determined that claimant did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[1] Accordingly, the

[1] Claimant filed an application for benefits on August 27, 1979. Director's Exhibit 1. The most recent denial of this claim occurred on October 15, 2001, when

administrative law judge denied the request for modification. Employer has responded to claimant's appeal and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief 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 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).

After reviewing the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that the administrative law judge's finding that the evidence is insufficient to establish a change in conditions or a mistake in a determination of fact under Section 725.310 is rational and supported by substantial evidence. The administrative law judge determined correctly that because the relevant claim was filed on August 27, 1979, he was required to consider whether the newly submitted evidence established a change in conditions pursuant to 20 C.F.R. Part 727 and 20 C.F.R. Part 718.

As an initial matter, the administrative law judge properly determined that the treatment notes and x-ray readings generated by Dr. Potter are not relevant to determining whether claimant has established entitlement in this case, as these documents do not include diagnoses of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Decision and Order at 11 n. 18; Claimant's Exhibit 3. With respect to 20 C.F.R. Part 727, the administrative law judge rationally determined that the newly submitted x-ray evidence did not establish invocation of the interim presumption

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Administrative Law Judge Rudolf L. Jansen issued a Decision and Order in which he determined that claimant failed to establish the existence of pneumoconiosis or that he was totally disabled. Claimant initially filed an appeal with the Board, but because he submitted new evidence with his appeal, the Board remanded the case to the district director for consideration of claimant's filing as a request for modification. *Mosley v. Elkhorn Coal Co.*, BRB No. 02-0209 BLA (May 6, 2002)(unpublished Order). The new version of 20 C.F.R. §725.310, which became effective on January 19, 2001, does not apply in this case, as the claim was pending at the time of the effective date of the amended regulations. Director's Exhibit 1; 20 C.F.R. §725.2(c).

pursuant to 20 C.F.R. §727.203(a)(1), as the preponderance of readings by physicians who are both Board-certified radiologists and B readers was negative for pneumoconiosis. Decision and Order at 15; Director's Exhibit 88; Employer's Exhibit 2; *see Staton v. Norfolk & 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); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also rationally found that the newly submitted biopsy evidence was in equipoise, as Drs. Hornback and Oesterling, the equally credentialed physicians who proffered biopsy reports, reached different conclusions as to whether claimant has pneumoconiosis. Decision and Order at 16; Director's Exhibits 88, 90, 92; *Clark*, 12 BLR at 1-155. Thus, the administrative law judge acted within his discretion in concluding that claimant did not establish invocation of the interim presumption pursuant to Section 727.203(a)(1) by a preponderance of the evidence.

The administrative law judge rationally determined that invocation was not established at Section 727.203(a)(2), as the only qualifying newly submitted pulmonary function study was invalidated by Drs. Burki and Castle, who are Board-certified in Pulmonology. Decision and Order at 16; Director's Exhibit 95; Employer's Exhibits 1, 3; *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). With respect to Section 727.203(a)(3), the administrative law judge correctly found that the record does not contain any newly submitted blood gas studies. Decision and Order at 16.

Pursuant to Section 727.203(a)(4), the administrative law judge found that the newly submitted opinion in which Dr. Castle determined that claimant is not suffering from a totally disabling respiratory impairment is entitled to more weight than the opinion in which Dr. Sundaram stated that claimant cannot perform his usual coal mine employment due to a pulmonary impairment. This finding was within the administrative law judge's discretion as fact-finder based upon his determination that Dr. Castle's opinion was better supported by the objective evidence of record and his qualifications as a Board-certified pulmonologist.[2] Decision and Order at 17; Employer's Exhibits 2, 3; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002).

The administrative law judge also acted rationally in determining that Dr. Potter's July 25, 2003 letter does not support a finding of total disability pursuant to Section 727.203(a)(4), as Dr. Potter did not indicate that claimant is suffering from a totally disabling respiratory or pulmonary impairment. Decision and Order at 16; Claimant's

[2] Dr. Sundaram's qualifications are not in the record.

Exhibit 1. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption under Section 727.203(a).

With regard to the administrative law judge's consideration of the newly submitted evidence under Part 718, the administrative law judge rationally determined, pursuant to Section 718.202(a)(1), that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis, as two of the three readings were negative for pneumoconiosis and were performed by physicians who are both B readers and Board-certified radiologists. Decision and Order at 18; *see Staton*, 65 F.3d 55, 19 BLR 2-271; *Woodward*, 991 F.2d 314, 17 BLR 2-77; *Worhach*, 17 BLR 1-105; *Edmiston*, 14 BLR 1-65; *Clark*, 12 BLR 1-149. The administrative law judge also acted within his discretion in finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as the biopsy evidence is in equipoise. Decision and Order at 18; *Clark*, 12 BLR at 1-155. The administrative law judge correctly determined that none of the presumptions referenced in Section 718.202(a)(3) are applicable in this case. 20 C.F.R. §§718.202(a)(3), 718.304-306.

Under Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions and acted within his discretion in finding that the opinion in which Dr. Castle indicated that claimant is not suffering from pneumoconiosis or any other coal dust related lung disease outweighed the opinion in which Dr. Sundaram diagnosed pneumoconiosis, as Dr. Castle's report was more consistent with the objective evidence and Dr. Castle's credentials as a Board-certified pulmonologist are superior to those of Dr. Sundaram. Decision and Order at 20; *see Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-494; *Groves*, 277 F.3d 829, 22 BLR 2-320. In addition, the administrative law judge rationally determined that Dr. Potter's opinion, as expressed in a letter dated July 25, 2003, was insufficient to establish the existence of pneumoconiosis, as Dr. Potter did not identify the evidence which supported his previous diagnosis of coal workers' pneumoconiosis and merely restated Dr. Hornback's opinion that the newly obtained biopsy evidence demonstrated the presence of anthracosis.[3] Decision and Order at 19; Claimant's Exhibit 1; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003). *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). We

[3] As indicated above, the administrative law judge rationally found that the newly submitted biopsy evidence did not support a finding of pneumoconiosis, as Drs. Hornback and Oesterling, the equally credentialed physicians who proffered biopsy reports, reached different conclusions as to whether claimant has pneumoconiosis. Slip op. at 3, 4.

affirm, therefore, the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

Regarding the issue of total disability, the administrative law judge permissibly determined that the newly submitted pulmonary function studies do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i), as the sole valid pulmonary function study produced values in excess of those set forth in Appendix B to Part 718. Decision and Order at 21. The administrative law judge acted within his discretion in finding that the other studies were not valid based upon the opinions of the Board-certified pulmonologists who reviewed them. *Id.*; *Siegel*, 8 BLR 1-156. With respect to 20 C.F.R. §718.204(b)(2)(ii) and (iii), the administrative law judge correctly noted that the record contains no newly submitted blood gas studies and no evidence that claimant is suffering from cor pulmonale with right-sided congestive heart failure. Regarding the newly submitted medical opinions relevant to the issue of total disability under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge rationally found that Dr. Sundaram's opinion, that claimant has a totally disabling respiratory impairment, is outweighed by the contrary opinion of Dr. Castle, on the grounds that Dr. Castle's opinion is better supported by the objective evidence of record and because Dr. Castle is better qualified. Decision and Order at 22; *see Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-494; *Groves*, 277 F.3d 829, 22 BLR 2-320. Finally, the administrative law judge permissibly omitted Dr. Potter's July 25, 2003 letter from consideration at Section 718.204(b)(2)(iv), as Dr. Potter did not diagnose a totally disabling respiratory or pulmonary impairment.

Thus, we affirm the administrative law judge's determination that the newly submitted evidence is insufficient to establish total disability under Section 718.204(b)(2). In light of our affirmance of the administrative law judge's findings pursuant to Part 727 and Part 718, we also affirm the administrative law judge's finding that claimant did not establish a change in conditions pursuant to Section 725.310 (2000).

The administrative law judge also properly determined that the prior denial does not contain a mistake in a determination of fact. The administrative law judge reviewed the findings rendered by Judge Jansen in the prior denial in conjunction with both the previously submitted and newly submitted evidence and rationally found that no errors had been committed. Decision and Order at 22-23; *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.*, 16 BLR 1-71 (1992), *modifying*, 14 BLR 1-156 (1990). We affirm, therefore, the administrative law judge's finding that claimant did not establish either a change in conditions or mistake of fact under Section 725.310 (2000). Thus, we must also affirm the denial of benefits. *Worrell*, 27 F.3d 227, 18 BLR 2-290; *Nataloni*, 17 BLR 1-82; *Kovac*, 16 BLR 1-71.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge