BRB No. 98-1060 BLA

LAWRENCE RIFE	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 10/15/99
SEA "B" MINING 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 On Modification Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lawrence Rife, Richlands, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order On Modification Denying Benefits (97-BLA-0193) of Administrative Law Judge Thomas M. Burke 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). This claim was originally considered by Administrative Law Judge Ben L. O'Brien, and based on the filing date of May 2, 1983, he adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. Judge O'Brien credited claimant with thirty-five years of coal mine employment and found that the evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Judge O'Brien further found that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), but that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, the Board affirmed these findings. *See Rife v. Jewell Ridge Coal Co.*, BRB No. 88-1846 BLA (Dec. 12, 1990)(unpub.). Claimant then timely filed a request for modification pursuant to 20 C.F.R. §725.310. Administrative Law Judge George A. Fath denied the request for modification after finding that claimant failed to establish either a change in conditions or a mistake of fact within the meaning of 20 C.F.R. §725.310. Claimant appealed the administrative law judge's decision to the Board. The Board affirmed the denial of claimant's request for modification. *See Rife v. Jewell Ridge Coal Co.*, BRB No. 93-0804 BLA (Apr. 29,1994)(unpub.). Claimant appealed the Board's Decision and Order to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed the Board's Decision and Order. *Rife v. Director, OWCP*, Civ. No. 94-1742 (4th Cir., Jan. 4, 1995)(unpub.). Thereafter, claimant filed another request for modification. On this request for modification, Administrative Law Judge Thomas M. Burke (hereinafter, the administrative law judge) accepted the previous findings of the presence of pneumoconiosis arising out of coal mine employment made pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4); 718.203(b) and noted that in the previous Decision and Order, claimant failed to establish that he is totally disabled. Decision and Order at 3-4. The administrative law judge held that on modification claimant again failed to establish that he is totally disabled[1], and accordingly denied claimant's request for modification. Claimant filed the instant appeal, and although the appeal was filed

[1] Claimant sought to establish total disability by establishing that he suffers from complicated pneumoconiosis, which, pursuant to 20 C.F.R. §718.304, gives rise to the irrebuttable presumption of total disability. Alternatively, claimant sought to establish total disability pursuant to 20 C.F.R. §718.204(c).

without counsel, claimant submitted a brief. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. Claimant filed a reply brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond 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 the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Id.* Additionally, in determining whether claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, 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 at least one of the elements of entitlement which defeated entitlement in the prior decision. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

In determining that claimant failed to establish total disability, the administrative law judge found that none of the four pulmonary function studies submitted on modification was qualifying, and that therefore, total disability was not established pursuant to 20 C.F.R. §718.204(c)(1). He found that of the six blood gas studies submitted on modification, only two were qualifying and the most recent studies were nonqualifying. Thus, the administrative law judge concluded that total disability was not established pursuant to 20 C.F.R. §718.204(c)(2) because the preponderance of the blood gas study evidence was nonqualifying. Next, the administrative law judge noted that, inasmuch as the record contains no evidence of cor pulmonale, total disability could not be established pursuant to 20 C.F.R. §718.204(c)(3). Decision and Order at 10. In reviewing the medical reports under 20 C.F.R. §718.204(c)(4), the administrative law judge accorded the most weight to the

medical opinions of Drs. Sargent and Fino, finding them more persuasive and credible than the opinions diagnosing total disability by Drs. Boutros and Sutherland. Decision and Order at 11. Finally, the administrative law judge found that claimant failed to establish the presence of complicated pneumoconiosis, and that therefore, the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 was inapplicable. Decision and Order at 10. Thus, the administrative law judge found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 and denied the request for modification.

Initially, we hold that substantial evidence supports the administrative law judge's findings that total disability was not established pursuant to Section 718.204(c)(1) and (c)(2). As the administrative law judge found, the preponderance of the newly submitted objective study evidence, including the most recent evidence, was nonqualifying. Director's Exhibits 135, 136, 149, 155; Claimant's Exhibit 3. Further, inasmuch as the administrative law judge correctly found that the record contains no evidence of cor pulmonale, we affirm his finding that total disability was not established pursuant to Section 718.204(c)(3).

Claimant specifically asserts that the administrative law judge erred in crediting on modification the "completely negative" or "unreadable" x-ray readings, given that the presence of pneumoconiosis had been previously established and affirmed. Although pneumoconiosis was established in the original Decision and Order, and affirmed by the Board and the Fourth Circuit Court of Appeals, the administrative law judge in the instant case correctly noted that the original finding was based on the now invalidated true doubt rule, and was affirmed by the court of appeals prior to the issuance of *Director, OWCP v. Greenwich Collieries* [Ondecko],114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), in which the Supreme Court invalidated the true doubt rule. However, because pneumoconiosis was also found established pursuant to Section 718.202(a)(4), the administrative law judge was not compelled to revisit the issue of the presence of simple pneumoconiosis at Section 718.202(a)(1) on modification.

At 20 C.F.R. §718.304(a), claimant generally assails the administrative law judge's weighing of the x-ray and CT scan evidence. We first address the x-ray evidence. On modification, claimant submitted eight x-ray interpretations of complicated pneumoconiosis. Director's Exhibits 135, 151, 168; Claimant's Exhibit 1, 2, 3, 4. Most of the x-rays were reread on behalf of the employer. None of employer's rereadings diagnosed complicated pneumoconiosis.

The March 22, 1991 x-ray was interpreted as positive for complicated pneumoconiosis by Dr. Spitz, Claimant's Exhibit 3. Although this x-ray was not reread, it

was discounted by the administrative law judge because of Dr. Spitz's inconsistent x-ray interpretations. The administrative law judge noted that Dr. Spitz read films taken in 1983 and 1984 as positive but read subsequent films, taken in 1993 and 1996, as negative for pneumoconiosis. The administrative law judge therefore "accord[ed] little weight to these inconsistent interpretations." Decision and Order at 5. Inasmuch as pneumoconiosis is recognized as a progressive disease, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990), we affirm the administrative law judge's rejection of Dr. Spitz's interpretation as the doctor fails to reconcile the discrepancy in his own x-ray interpretations.

The August 8, 1995 x-ray was interpreted as positive for complicated pneumoconiosis by Drs. Subramaniam and Aycoth, Director's Exhibit 135; Claimant's Exhibit 4, but subsequently read as 1/1, with no large opacities, by Dr. Gaziano. Director's Exhibit 141. It was read as 1/0, with no large opacities, by Dr. Fino, Director's Exhibit 147, and was read as negative by Drs. Scott, Wheeler, Spitz and Wiot. Director's Exhibit 148, 152. The x-ray taken on September 19, 1995 was interpreted by Dr.Aycoth as positive for complicated pneumoconiosis. Director's Exhibit 151. This same x-ray was classified as unreadable by Drs. Scott, Spitz, Wiot and Wheeler, Director's Exhibits 164, 167, and was read as 1/1, with no large opacities, by Dr. Fino. Director's Exhibit 167. The April 4, 1996 x-ray was interpreted as positive for complicated pneumoconiosis by Drs. Aycoth, Bassali, and Alexander. Director's Exhibit 168; Claimant's Exhibit 1, 4. This film was read as negative by Drs. Scott, Spitz, Wheeler, Wiot. Director's Exhibits 152, 153. The x-ray film dated June 13, 1996, was read as positive for complicated pneumoconiosis by Drs. Alexander and Aycoth, and by Dr. Fino as 1/1, with no large opacities. Claimant's Exhibit 1; Employer's Exhibit 11. The administrative law judge found that the CT scan evidence resulted in similarly conflicting interpretations. Decision and Order at 5. The CT scan taken on June 13, 1996 was interpreted by Dr. Alexander as positive for complicated pneumoconiosis, but was subsequently read as negative for pneumoconiosis by Drs. Wheeler and Scott. Claimant's Exhibits 2; Employer's Exhibits 12,13. A second CT scan, obtained on August 2, 1996, was interpreted by Dr. Wheeler as showing no change since the previous CT scan. Employer's Exhibit 12. Dr. Patel also read this latter CT scan but offered no opinion as to whether, or to what extent, pneumoconiosis was present. Employer's Exhibits 14, 16.

In reviewing the x-ray and CT scan evidence for the existence of complicated pneumoconiosis, the administrative law judge found that:

> ...similarly credentialed B-readers and/or Board-certified radiologist reached conflicting opinions regarding whether the Claimant has complicated pneumoconiosis, simple pneumoconiosis, or any

> pneumoconiosis whatsoever. Since the U.S. Supreme Court has invalidated the "true doubt rule," I find that the Claimant has failed to establish complicated pneumoconiosis on the basis of the "new" x-ray and CT scan evidence.

Decision and Order at 10. As a preliminary matter, we note that the administrative law judge improperly weighed the CT scan evidence along with the x-ray evidence. *See Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991)[2]. Substantively, we note, however, that of the physicians who rendered x-ray and CT scan interpretations, Dr. Subramaniam possesses no superior radiological credentials. All of the other physicians are B-readers and/or are dually

[2] In *Melnick v. Consolidation Coal Co.,* 16 BLR 1-31, 1-34 (1991), we held that CT scans are not to be evaluated at 20 C.F.R. §718.304(a). We noted that such evidence falls within the purview of 20 C.F.R. §718.304(c), which covers the "consideration of any acceptable medical means of diagnosis" not otherwise specified in the regulations. *Id.* Thus, the administrative law judge erred in assessing the CT scan evidence in conjunction with the x-ray evidence instead of the medical opinions. However, his conclusion that the presence of complicated pneumoconiosis was not established by x-ray, CT scan or medical opinion evidence properly rests on his finding that the physicians rendering interpretations of this evidence were equally qualified and offered conflicting diagnoses. Decision and Order at 10-11. *See discussion, infra*. Based on this determination, which we herein affirm, we hold that the administrative law judge's failure to assess the CT scan evidence at Section 718.304(c) constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

qualified as B-readers/ Board certified radiologists. Given that the administrative law judge correctly found the x-ray evidence as to complicated pneumoconiosis to be in equipoise, we affirm his finding that claimant failed to carry his burden by a preponderance of the evidence. *See Ondecko, supra; Trent, supra; Perry, supra.*

Next, claimant challenges the administrative law judge's finding at 20 C.F.R. §§718.304(c), 718.204(c) that the medical opinion evidence of record fails to establish the presence of complicated pneumoconiosis or total disability. The administrative law judge reviewed the medical reports of Drs. Boutros, Sutherland, Sargent, Fino, and Wheeler. Director's Exhibits 19, 135, 155; Employer's Exhibit 10.

The administrative law judge found the medical reports of Drs. Sargent and Fino, who did not find complicated pneumoconiosis or total disability, to be more persuasive and credible than the opinions diagnosing total disability by Drs. Boutros and Sutherland. He stated that the opinions of Drs. Sargent and Fino are consistent with the objective medical evidence. Given that the objective studies were, for the most part, negative, the administrative law judge properly accorded greater weight to those opinions finding no total disability. *See Trumbo v. Reading Anthracite Company*, 17 BLR 1-85 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985) *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see also Beavan v. Bethlehem Mines Corp.*, 741 F.2d 689, 6 BLR 2-101 (4th Cir. 1984). The administrative law judge also noted that Drs. Sargent and Fino were more credible because of their "excellent qualifications in the field of pulmonary medicine." Decision and Order at 11. Both Drs. Sargent and Fino are B-readers, who are Board-certified in internal medicine with a subspecialty in pulmonary diseases. Employer's Exhibit 21, 27; Director's Exhibit 147. Dr. Sargent also has a subspecialty in critical care. Employer's Exhibit 21. Dr. Boutros is Board certified in internal medicine, and Dr. Sutherland lists no particular field of expertise, and is an A-reader. Director's Exhibits 135, 58. Inasmuch as Drs. Sargent and Fino possess superior credentials to those of Drs. Boutros and Sutherland, the administrative law judge properly accorded their reports greater weight. *See McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987).
Inasmuch as the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), we affirm the administrative law judge's crediting of the medical opinion evidence.

Inasmuch as we affirm the administrative law judge's findings of no complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and no total disability pursuant to 20 C.F.R. §718.204(c), we further affirm his finding that claimant failed to demonstrate a change in conditions within the meaning of Section 725.310. Although the administrative law judge

made no finding as to whether a mistake in fact had been made in the prior determination, given that entitlement is precluded under the facts of this case by claimant's failure to establish total disability based on both the old and new evidence, we deem this omission harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order of the administrative law judge denying claimant's request for modification is affirmed.

SO ORDERED.

BETTY JEAN HALL. Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge