

BRB No. 02-0350 BLA

CHARLES STEPHENS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LODESTAR ENERGY, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
COSTAIN AMERICA, INCORPORATED)	
)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Charles Stephens, Endicott, Kentucky, *pro se*.

Stanley S. Dawson (Corporate Counsel, Lodestar Energy, Inc.), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-0664) of Administrative Law Judge Joseph E. Kane 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 The parties stipulated to, and the

¹ The Department of Labor has amended the regulations implementing the

administrative law judge found, sixteen years of coal mine employment established, and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.² 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 a totally disabling respiratory impairment, elements previously adjudicated against claimant, and, therefore, found that neither a mistake in a determination of fact nor a change in conditions had been shown. The administrative law judge, therefore, found that claimant failed to establish a basis for modification of the prior denial. Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. The employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would 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

Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant filed his claim for benefits on February 8, 1988, which was denied on March 16, 1999. Director's Exhibits 1, 17. Claimant's appeal of the denial on June 7, 1999, was considered a request for modification, which was denied on July 22, 1999. Director's Exhibits 21, 22, 24, 25. Claimant appealed again on August 9, 1999, and was denied on January 25, 2000. Director's Exhibits 26, 31, 32. Claimant appealed again on January 31, 2000. Director's Exhibits 31-34.

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*).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), 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. Furthermore, in determining whether modification has been established pursuant to Section 725.310 (2000), 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); *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).

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 reasonably determined that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the numerical superiority of the negative readings by physicians with superior qualifications. Decision and Order at 9; Director's Exhibits 8-16; 20 C.F.R. §718.202(a)(1); 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). 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 was a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 9, 10; see 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Although noting that the opinion of Dr. Leslie, claimant's treating physician, was entitled to greater weight than were the opinions of the other physicians, 20 C.F.R. §718.104(d), the administrative law judge permissibly accorded it little weight because it was vague, poorly reasoned, and not documented. This was permissible. 20 C.F.R. §718.104(d)(5); *Jericol Mining, Inc. v. Napier*, F.3d , 2002 WL 1988221 (6th Cir. Aug. 30, 2002); see *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002). Because Dr. Leslie provided the only diagnosis of pneumoconiosis in the record and the administrative law judge properly found his opinion had little probative value, the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) must be upheld.³

Turning to the issue of total disability, the administrative law judge properly found the evidence insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i)-(iii) as all of the pulmonary function studies and blood gas studies of record produced non-qualifying values⁴ and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 12; Director's Exhibits 8, 16; 20 C.F.R. §718.204(b)(2)(i)-(iii). As for the medical opinion evidence, the administrative law judge noted that the opinions of Drs. Lockey, Lane, and Westerfield found that claimant was not totally disabled, while the opinions of Drs. Younes and Leslie found that claimant was totally disabled. See Director's Exhibits 8, 16; Employer's Exhibit 1; Claimant's Exhibit 1. The administrative law judge accorded little probative weight to the opinions supportive of total disability because he found them poorly reasoned. This was rational. See *Napier, supra*; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en*

³ We need not determine whether or not the administrative law judge erred in according greater weight to the negative medical opinion evidence, after finding that three of the opinions were nine years older than Dr. Leslie's and the fourth was poorly reasoned. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

banc); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) and 13 BLR 1-46 (1986), *aff'd on recon.* 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Thus, the administrative law judge rationally found the evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *See Ondecko, 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 was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment and, therefore, a basis for modification of the prior denial of benefits as it is supported by substantial evidence and in accordance with law. *Worrell, supra; Trent, supra; Gee, supra; Perry, supra.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge