BRB Nos. 97-1780 BLA
and 94-2807 BLA

DOCK OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
IVY BRANCH COAL COMPANY	)	DATE ISSUED:
	)	
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 of Charles P. Rippey and the Decision and Order of Edward Terhune Miller, Administrative Law Judges, United States Department of Labor.

Dock Owens, Haysi, Virginia, *pro se*.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order of June 29, 1994 (93-BLA-503) of Charles P. Rippey denying benefits on an initial claim and the Decision and Order of August 25, 1997 (96-BLA-1704) of Administrative Law Judge Edward Terhune Miller denying benefits on a request for modification of that claim filed

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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). Claimant originally filed for benefits on February 13, 1992. Director's Exhibit 1. In his Decision and Order dated June 29, 1994, Administrative Law Judge Charles P. Rippey noted that claimant stipulated to ten years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 82. Benefits were accordingly denied and claimant appealed to the Board, but also submitted additional evidence and requested modification. By Order dated March 23, 1995, the Board dismissed the appeal and remanded the case to the district director for modification proceedings.[2] Director's Exhibit 86. The district director denied modification and the case was forwarded to the Office of Administrative Law Judges. In his August 25, 1997 Decision and Order, Administrative Law Judge Miller found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus found that since the previous denial, the evidence was insufficient to establish a change in conditions. The administrative law judge also considered the evidence considered by Judge Rippey in the previous denial and concluded that there was no mistake in a determination of fact therein. Thus, the administrative law judge concluded that claimant was not entitled to modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. In the instant appeal,

[2] By its Order dated March 23, 1995, the Board advised claimant that it was dismissing claimant's appeal without prejudice in BRB No. 94-2807 BLA as claimant had requested modification of the administrative law judge's Decision and Order while the appeal was pending before the Board. The Board advised claimant that should the administrative law judge deny modification, the appeal could be reinstated upon claimant's request. Since claimant is proceeding without the assistance of counsel in the instant case, we hereby accept claimant's appeal of the administrative law judge's Decision and Order denying modification as a request to reinstate the original appeal in BRB No. 94-2807 BLA as well as a request to review the administrative law judge's denial of modification and consolidate the appeals.

claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated 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. *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, are supported by substantial evidence, and are 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 of claimant 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).

After consideration of the administrative law judges' Decisions and Orders, the arguments raised on appeal and the evidence of record, we conclude that the Decisions and Orders of the administrative law judges are supported by substantial evidence and that there are no reversible errors contained therein. With respect to Administrative Law Judge Rippey's Decision and Order, he noted that there were forty-six interpretations of fifteen x-rays with thirty-five negative and only eleven positive readings and that almost all of the negative readings were by Board-certified radiologists and/or B-readers. Decision and Order at 3-4. The administrative law judge thus found that the preponderance of the x-ray evidence was negative. Decision and Order at 4. As a result, the administrative law judge properly weighed the x-ray evidence and rationally accorded greater weight to the preponderance of x-ray interpretations by the readers with superior qualifications. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Further, the administrative law judge properly concluded that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) as there was no biopsy or autopsy evidence in the record. *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 5. In addition, the administrative law judge properly found that the presumptions enumerated at Section 718.202(a)(3) are inapplicable to this claim as the record contains no

evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; claimant filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305; and this is not a survivor's claim. *See* 20 C.F.R. §718.306; Decision and Order at 5. Consequently, we affirm the administrative law judge's finding that claimant was precluded from establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3).

In weighing the medical opinions of record, the administrative law judge also rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Perry*, *supra*. In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion of Dr. Forehand, who opined that claimant suffered from pneumoconiosis, was entitled to less weight as his diagnosis was not supported by the objective evidence of record and the physician failed to explain how the objective data supported his findings. *Clark*; *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); Decision and Order at 8. In addition, the administrative law judge permissibly concluded that Dr. Forehand's opinion was outweighed by the medical opinions of Drs. Dahhan, Castle and Fino, who found that claimant's condition was unrelated to coal mine employment, after noting their superior qualifications and finding that their opinions were well-documented and reasoned and consistent with the objective medical evidence. *Clark*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 5-8; Director's Exhibits 14, 17, 30, 55-57, 64, 66. Inasmuch as the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as it is supported by substantial evidence. *Clark, supra*; *Perry, supra*; *Lucostic, supra*; *Oggero*; *supra*. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement under 20 C.F.R. Part 718, precludes an award of benefits thereunder. *Anderson*, *supra*; *Trent*, *supra*. Consequently, we affirm Administrative Law Judge Rippey's denial of benefits as it is supported by substantial evidence and in accordance with law.

With respect to Administrative Law Judge Miller's consideration of claimant's modification request, he properly found that the newly submitted evidence as well as the evidence submitted in connection with the original file failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a). The administrative law judge rationally concluded that the weight of the new x-ray evidence was negative for the existence of pneumoconiosis. Decision and Order at 4-6, 10; Director's Exhibits 80, 83, 88; Employer's Exhibits 1, 3, 7. The administrative law judge also permissibly relied upon the qualifications of the readers in his consideration of the evidence.

The administrative law judge therefore rationally found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Edmiston, supra*; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Additionally, as the record still contains no biopsy or autopsy evidence and as the presumptions found at 20 C.F.R. §§718.304, 718.305 and 718.306 are still inapplicable,[3] the administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3). *See* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 6. Finally, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as the weight of the more comprehensive and more credible medical opinions did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry, supra*. The administrative law judge permissibly found Dr. Clarke's diagnosis of pneumoconiosis outweighed by the opinions of Drs. Castle, Fino and Dahhan, who found that claimant's condition was not related to coal mine employment, since Dr. Clarke did not explain his diagnosis in light of the objective evidence. *Lafferty, supra; Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Kuchwara, supra*; Decision and Order at 10; Director's Exhibit 83; Employer's Exhibits 1, 9, 11. We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus failed to establish a change in conditions pursuant to Section 725.310, as it is supported by substantial evidence.

[3] The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305 applies to claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

In considering whether total disability was established under Section 718.204(c)(1)-(2), the administrative law judge properly found that inasmuch as the pulmonary function study and blood gas study evidence of record was non-qualifying, total disability was not established pursuant to Section 718.204(c)(1)-(2).[4] *See* Decision and Order at 4-5; Director's Exhibits 80, 83; Employer's Exhibit 1. In addition, the record does not contain evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3), and establishing total disability by this method is precluded.

In considering whether total disability was demonstrated pursuant to Section 718.204(c)(4), the administrative law judge permissibly accorded less weight to the medical opinion of Dr. Clarke as his diagnosis was not supported by the objective evidence of record and as the physician failed to explain how the objective data supported his findings in light of the non-qualifying pulmonary function studies and the non-qualifying blood gas studies of record. *Clark*; *supra*; *Tackett*, *supra*; *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); Decision and Order at 10. In addition, the administrative law judge reasonably determined that the medical opinions of Drs. Fino, Dahhan and Castle, that claimant did not have a totally disabling respiratory impairment, were entitled to the greatest weight since the physicians possessed superior qualifications to Dr. Clarke and provided credible opinions. *Clark, supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1291 (1984); Decision and Order at 10. Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields, supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Consequently, the administrative law judge properly found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) and were thus insufficient to establish a change in conditions pursuant to Section 725.310. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Clark*, *supra*; *Lucostic*, *supra*. Finally, the administrative law judge properly considered the evidence submitted in connection with claimant's original claim and rationally concluded that there was no mistake in fact in the

[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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

original denial of benefits. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Nataloni, supra*; Decision and Order at 8. Consequently, we affirm the administrative law judge's denial of claimant's petition for modification as it is supported by substantial evidence and is in accordance with law.

Accordingly, the Decisions and Orders of the administrative law judges denying benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge