BRB No. 99-1196 BLA

LEE ROY WELLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND 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 - Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Lee Roy Wells, Big Stone Gap, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denial of Benefits (98-BLA-1231) of Administrative Law Judge Richard T. Stansell-Gamm 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 case involves a request for

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant but is not representing him in this appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

modification.[2] The administrative law judge considered the record in its entirety and determined that the evidence failed to establish that claimant is totally disabled. Thus, the administrative law judge found that claimant failed to establish a change in conditions or a mistake in fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's findings. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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 under 20 C.F.R. Part 718, claimant must prove that he suffers from 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. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In determining whether claimant established a basis for modification, the administrative law judge considered the new evidence submitted by claimant in conjunction with the previously submitted evidence. Initially, the administrative law judge determined that the x-ray and lung biopsy evidence support a finding of pneumoconiosis at Section

[2] Claimant filed his application for benefits on March 24, 1997. Director's Exhibit 1. The district director denied benefits on September 11, 1997, for failure to establish total disability. Director's Exhibit 25. Claimant submitted additional evidence, which was construed as a request for modification. Director's Exhibits 32, 33, 36. On February 9, 1998, the district director denied modification for failure to establish a change in condition or mistake in fact. Claimant then requested a formal hearing. Director's Exhibits 39, 30, 48.

718.202(a). Decision and Order at 5-9. The administrative law judge also accepted the parties' stipulation of at least twenty-one years of coal mine employment, and found that the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) was not rebutted. Decision and Order at 9. Finally, regarding the issue of total disability, the administrative law judge determined that the probative pulmonary function studies failed to establish that claimant is totally disabled pursuant to Section 718.204(c)(1) and that none of the blood gas studies established total disability pursuant to Section 718.204(c)(2). At Section 718.204(c)(4), the administrative law judge accorded the greatest weight to the opinions of Drs. Iosif and Dahhan, board-certified, examining physicians, that claimant is not totally disabled, as he found their opinions to be the most consistent with the objective data. The administrative law judge further found that these opinions were supported by the well reasoned and documented opinions of Drs. Bush, Kleinerman, Fino and Morgan. Therefore, the administrative law judge concluded that the preponderance of the probative medical opinion evidence demonstrates that claimant is not totally disabled due to a respiratory or pulmonary impairment. Decision and Order 13-22.

After consideration of the administrative law judge's Decision and Order-Denial of Benefits and the evidence of record, we conclude that the administrative law judge's finding that claimant did not satisfy his burden of proving that he is totally disabled by pneumoconiosis is rational and supported by substantial evidence. At Section 718.204(c)(1), the administrative law judge found that the record contains the results of five pulmonary function studies, administered between November 26, 1996 and March 25, 1998. Director's Exhibits 10, 12, 16, 32, 36, 43, 47, 50. The administrative law judge found that the June 1997, January 1998 and March 1998 test results were qualifying,[3] but that all three tests had been invalidated. Decision and Order at 12; Director's Exhibit 11; Employer's Exhibit 2. The administrative law judge found that the January 1998 and March 1998 tests were not only invalidated by reviewing physicians, but were also questioned by the physician administering each test, and that the January 1998 test was non-conforming as it was unaccompanied by tracings. Decision and Order at 12; Director's Exhibits 32, 36, 43, 50. The administrative law judge also found that the June 1997 test was invalid as he found the rationale of the three invalidating physicians to be more convincing than the comments of the administering physician. Decision and Order at 11; Directors Exhibits 10-11; Employer's Exhibit 2. In considering the June 1997, January 1998 and March 1998 tests, the administrative law judge acted within his discretion in relying on the invalidations of the reviewing physicians, as well on the impressions of the administering physicians in the

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

January and March 1998 tests, to determine that the qualifying tests were invalid. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge properly found that the remaining two tests, dated November 1996 and August 1997, did not produce qualifying values. Director's Exhibits 12, 16, 47. We therefore affirm the administrative law judge's conclusion that claimant did not establish total disability at Section 718.204(c)(1).

Next, we affirm the administrative law judge's finding that the two blood gas studies of record were non-qualifying, and therefore, did not establish total disability pursuant to Section 718.204(c)(2). Director's Exhibits 18, 43. The administrative law judge did not make a finding pursuant to Section 718.204(c)(3), however, remand is not required as the record does not contain evidence of cor pulmonale with right sided congestive heart failure. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Lastly, at Section 718.204(c)(4), the administrative law judge properly found that the opinions of Drs. Hansbarger and Caffrey were not probative regarding the issue of total disability since neither physician expressed an opinion on claimant's respiratory impairment. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); Decision and Order at 20; Director's Exhibit 51; Employer's Exhibit 5. The administrative law judge next accorded dimished probative value to the opinion of Dr. Kanwal, that claimant could not return to his coal mine employment, as he rationally found that the physician did not have the benefit of any objective testing and did not have access to the medical documentation developed later in record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 20; Director's Exhibit 17. With regard to the opinion of Dr. Williams, the administrative law judge found that although the physician is claimant's treating physician, his opinion that claimant is totally disabled due to his pulmonary problems is not as well documented or reasoned as other opinions in the record. Decision and Order at 21; Director's Exhibit 36; Claimant's Exhibit 5. The administrative law judge found that inasmuch as Dr. Williams relied in part on a report and an April 1997 pulmonary examination by Dr. McSharry, which were not contained in the record, it was difficult to evaluate whether Dr. Williams's opinion is documented. The administrative law judge additionally found that Dr. Williams partially relied on the invalidated January 1998 pulmonary function study in reaching his conclusion that claimant is totally disabled by pneumoconiosis. Based on the preceding deficiencies and the fact that other physicians in the record had access to more comprehensive medical data than Dr. Williams, the administrative law judge rationally found that the physician's opinion was entitled to diminished probative weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields, supra*.

The administrative law judge, however, gave great probative weight to the opinions of Drs. Iosif and Dahhan, both board-certified pulmonologists, as he determined that their

opinions were well documented and reasoned and most consistent with the objective medical testing. Decision and Order at 22; Director's Exhibits 14, 16, 42, 43; Employer's Exhibits 3, 4, 7. The administrative law judge found that both physicians based their opinions on personal examinations of claimant as well as on a review of the miner's medical record. The administrative law judge found that Dr. Dahhan presented the most comprehensive and probative medical opinion in the record, based on his numerous reviews of the record, through December 1998. The administrative law judge found that the conclusions of these two physicians, as supported by the documented and reasoned opinions of Drs. Bush, Kleinerman, Fino and Morgan, presented the most probative evidence in the record. In so doing, the administrative law judge acted within his discretion in relying on the superior credentials of Drs. Iosif and Dahhan, as well as on their familiarity with claimant's medical condition. *See McMath, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields, supra*. Moreover, the administrative law judge permissibly found the opinions of Drs. Bush, Kleinerman, Fino and Morgan to be reasoned and documented. *Fields, supra*. Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4). Inasmuch as claimant failed to establish total disability, the administrative law judge properly found that claimant did not establish a basis for modification based on either a change in condition or mistake in fact pursuant to Section 725.310.[4] *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); *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

[4] Inasmuch as the administrative law judge permissibly determined that claimant did not establish total disability, a requisite element of entitlement, we need not remand the case for reconsideration of the finding that claimant has established pneumoconiosis pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. May 2, 2000).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge