BRB No. 01-0394 BLA

CHARLES E. VANDIVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED:
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Charles Vandiver, Cottondale, Alabama, *pro se*.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (1999-BLA-299) of Administrative Law Judge Gerald M. Tierney denying benefits 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] This case has a lengthy procedural history. Claimant's initial claim, filed on October 26, 1977, was finally denied in 1982, based upon the district director's determination that claimant failed to establish any element of entitlement. Director's Exhibits 1, 33-35. Claimant filed a duplicate claim on May 7, 1984, Director's Exhibit 2, which was denied by Administrative Law Judge Richard Avery in a Decision and Order issued on October 30, 1987. Director's Exhibit 68. On appeal, the administrative law judge's Decision and Order was affirmed by the Board, Director's Exhibit 82, and subsequently upheld by the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises. Director's Exhibit 86. Claimant's third claim, filed on March 31, 1994, Director's Exhibit 89, was considered a request for modification pursuant to 20 C.F.R. §725.310 (2000), and was denied in a Decision and Order issued by Administrative Law Judge Thomas M. Burke on June 30, 1997. Director's Exhibit 139. Claimant submitted new medical evidence to the Board while the case was pending on appeal, Director's Exhibit 157, and consequently the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings. Following a hearing, Administrative Law Judge Gerald M. Tierney denied modification, finding no mistake in a prior determination of fact and no change in conditions pursuant to Section 725.310 (2000). Accordingly, benefits were denied.

In the present appeal, claimant generally challenges the administrative law judge's denial of modification. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to 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 by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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

[1]The Department of Labor has amended the regulations implementing the 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 (2001).

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).

Initially, based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented by an attorney, *see* 20 C.F.R. §725.362(b) (2000), and that the administrative law judge provided claimant with a full and fair hearing. *See Shappell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 3-5; Director's Exhibit 126 at 4-7.

Turning to the merits, after consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In adjudicating claimant's request for modification pursuant to Section 725.310 (2000), Judge Tierney determined that Judge Burke's prior denial of modification was premised on his finding that the evidence of record was insufficient to establish any element of entitlement. Judge Tierney then properly reviewed the new evidence submitted subsequent to Judge Burke's denial of modification to determine whether it was sufficient to establish any of the elements of entitlement and thus sufficient to establish a change in conditions pursuant to Section 725.310 (2000). Decision and Order at 2-6; *see Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

In order to establish entitlement to benefits in a living miner's claim pursuant to 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In the present case, Judge Tierney accurately determined that none of the new x-ray evidence was interpreted as positive for pneumoconiosis pursuant to 20 C.F.R. §718.102 (2000), thus claimant could not establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000). Decision and Order at 3. The administrative law judge also properly found the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2), as the newly-submitted biopsy report merely identified malignant cells but did not mention pneumoconiosis. Decision and Order at 3; Employer's Exhibit 16. The regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 (2000) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis, thus claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). The administrative law judge then accurately reviewed the new medical opinions of record at Section 718.202(a)(4) in order to determine whether they were sufficiently reasoned and documented to establish that claimant

suffers from a chronic pulmonary disease or respiratory impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment pursuant to 20 C.F.R. §718.201 (2000). Decision and Order at 3-5.

While Dr. Alldredge diagnosed black lung and opined that claimant suffers severe lung disease in large part because of his history of exposure to coal dust, the administrative law judge acted within his discretion as trier of fact in according little weight to the opinion, as he found that it was brief, conclusory and unaccompanied by supporting documentation.[2] Decision and Order at 4-5; Director's Exhibit 157; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983). The administrative law judge determined that Dr. Sullivan's report dated December 4, 1997, was documented, as the physician discussed his current and prior evaluations of claimant; his treatment notes were contained in the record; and claimant's hospital records included Dr. Sullivan's pulmonary consultations. Decision and Order at 4; Director's Exhibits 157, 160, 161; Employer's Exhibits 10, 16; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge concurred with Judges Burke and Avery, however, that Dr. Sullivan's 1984 conclusion that claimant had "evidence of continuing bronchitis which could well be on an industrial basis....[t]here are some nodules seen in the right lower lobe of his lung which are also possibly on an industrial basis," Director's Exhibit 129, Claimant's Exhibit 1, was too equivocal to establish the existence of pneumoconiosis. Decision and Order at 4; *see Justice v. Island Creek Coal Co.*, 11 BLR -191 (1988). Further, the administrative law judge reasonably found that Dr. Sullivan's 1997 report, which indicated that claimant "continues to have evidence of bronchitis, although he no longer has active industrial exposure," Director's Exhibit 157, as well as the physician's treatment notes and hospital consultation records, did not satisfy claimant's affirmative burden of establishing a causal nexus between claimant's bronchitis and coal dust exposure. 20 C.F.R. §718.201; Decision and Order at 4. The administrative law judge also properly gave little weight to Dr. Hill's letters, treatment notes and hospital consultation records, which focused on claimant's heart condition. While Dr. Hill's records included an entry under claimant's "past medical

[2]The administrative law judge additionally determined that claimant's hospital and treatment records identified Dr. Alldredge as a referring physician, but did not include a documented diagnosis by Dr. Alldredge of a coal mine dust induced disease. Further, the administrative law judge found that although claimant's hospital records generally included a history or diagnosis of chronic obstructive pulmonary disease, they did not affirmatively document a causal nexus between that condition and claimant's coal dust exposure; and that claimant's recent CT chest scan and lung biopsy diagnosed a malignancy but did not identify any coal dust induced disease. Decision and Order at 4; Director's Exhibits 160, 161; Claimant's Exhibit 1; Employer's Exhibits 10, 16.

history" of chronic obstructive pulmonary disease secondary to cigarette smoking and exposure to coal dust, the administrative law judge determined that there was no basis in Dr. Hill's records to support this entry as an independent documented diagnosis. Decision and Order at 4; Director's Exhibits 157, 161; Employer's Exhibit 10; *see Lucostic, supra; Kendrick, supra*. The administrative law judge permissibly accorded greater weight to the opinions of Drs. Renn and Tuteur, that claimant did not suffer from pneumoconiosis or any other coal dust induced disease, based on these physicians' superior qualifications as pulmonary specialists and their comprehensive review of the medical evidence of record, wherein they addressed claimant's symptoms, physical examination findings, x-rays, objective test results, and the diagnosis of bronchitis. Decision and Order at 4-5; Employer's Exhibits 1, 3, 9, 11, 13, 14; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic, supra*.

After finding the weight of the new evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4) (2000), the administrative law judge reviewed the new evidence submitted in support of modification on the issue of total respiratory disability.[3] The administrative law judge properly found that the results of the two new pulmonary function studies reported by Dr. Sullivan were insufficient to establish total respiratory disability at Section 718.204(c)(1) (2000) because the requisite tracings were not contained in the record. Decision and Order at 5; *see* 20 C.F.R. §718.103 (2000). Moreover, the administrative law judge determined that claimant's effort was reported as "poor" on the November 18, 1997 study, thereby rendering the results unreliable; and that Dr. Sullivan did not indicate claimant's effort on the July 19, 1999 study, but merely reported the results of the test in terms of percentages of the predicted normal rather than listing the actual values as utilized in Appendix B to 20 C.F.R. §718.204(c)(1) (2000). Decision and Order at 5; *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). At Section 718.204(c)(2) (2000), the administrative law judge acted within his discretion in finding that the preponderance of the newly submitted blood gas studies of record was insufficient to establish a totally disabling chronic respiratory or pulmonary condition, as the multiple studies obtained on August 3, 1999, the date of claimant's heart surgery, produced both qualifying and non-qualifying results;[4] the tests obtained on August 7 and 8, 1999, produced qualifying results, but the tests

[3]The provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) (2001), while the provision pertaining to disability causation previously set forth at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) (2001).

[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(c)(1), (2) (2000).

obtained on August 4, 5 and 9, 1999, produced non-qualifying results; and the most recent study, dated January 10, 2000, produced non-qualifying results. Decision and Order at 5; Employer's Exhibits 10, 16; *see generally Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). At Section 718.204(c)(3) (2000), the administrative law judge found no evidence of cor pulmonale with right sided congestive heart failure, Decision and Order at 5; and at Section 718.204(c)(4) (2000), the administrative law judge reasonably determined that the hospital records and the opinions of Drs. Sullivan, Hill and Alldredge were insufficient to establish total respiratory disability,[5] and permissibly accorded determinative weight to the opinions of Drs. Renn and Tuteur, that claimant did not suffer a totally disabling respiratory impairment but was disabled by his multiple non-respiratory conditions, based on the administrative law judge's rationale at Section 718.202(a)(4), *i.e.*, Drs. Renn and Tuteur possessed superior qualifications and their opinions were well explained and supported by the objective evidence of record. Decision and Order at 4-6; *Dillon, supra; Wetzel, supra; see also Beatty v. Danri Corp.*, 16 BLR 1-11 (1991).

The administrative law judge then reviewed the previous denial decision of Judge

[5]The administrative law judge accurately found that Dr. Sullivan's opinion, that claimant "is unable to work due to his lung problems and other health problems," Director's Exhibits 157, 160, and Dr. Hill's statement that claimant "cannot work in the coal mines," Director's Exhibit 157, did not establish that claimant suffered a totally disabling respiratory impairment. Decision and Order at 5-6; *see Beatty v. Danri Corp.*, 16 BLR 1-11 (1991). The administrative law judge further found that the hospital records did not address the issue, Director's Exhibit 161, Employer's Exhibits 10, 16, and that Dr. Alldredge's opinion, that claimant suffers a severe occupational lung disease, was conclusory and insufficiently reasoned and documented to support a finding of total respiratory disability. Decision and Order at 6; Director's Exhibit 157; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983).

Burke and acted within his discretion in finding no mistake in a determination of fact contained therein. Decision and Order at 6. Judge Burke had found no mistake in Judge Avery's prior determinations of fact, and further found that the new evidence submitted in support of modification was insufficient to establish a change in conditions pursuant to Section 725.310. Judge Burke had determined that none of the x-ray interpretations of record was positive for pneumoconiosis, thus claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000); and that the requirements of Section 718.202(a)(2)-(3) (2000) were not met, since there was no biopsy evidence of record before him and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 (2000) were inapplicable in this living miner's claim filed after January 1, 1982, in which there was no evidence of complicated pneumoconiosis. Director's Exhibit 139 at 7-8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). At Section 718.202(a)(4) (2000), Judge Burke had agreed with Judge Avery's prior analysis of the evidence, and Judge Burke had found that the new evidence submitted in support of modification failed to establish the existence of pneumoconiosis because Drs. Goldstein, Tuteur, Wiot and Renn did not diagnose pneumoconiosis; Dr. McGhee did not render an opinion on the issue; and Dr. Sullivan's conclusions were equivocal. Director's Exhibits 97, 101, 102, 103, 127, 129, 135, 137, 139 at 5-7, 9; *see Justice, supra*. Judge Burke had also found that the evidence of record was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4) (2000), as the pulmonary function study and blood gas study results of record were non-qualifying; there was no evidence of cor pulmonale with right sided congestive heart failure; and no physician concluded that claimant suffered a totally disabling respiratory impairment. Director's Exhibit 139 at 9.

Inasmuch as the findings of Judges Avery, Burke and Tierney are supported by substantial evidence and in accordance with law, we affirm Judge Tierney's denial of modification pursuant to Section 725.310 (2000), and his denial of benefits.

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

BETTY JEAN HALL
Administrative Appeals Judge