BRB No. 01-0591BLA

BILL KING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	
and	)	
	)	
UNDERWRITERS SAFETY AND CLAIMS	)	DATE ISSUED:
	)	
Employer/Carrier - Respondent	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Bill King, Evarts, Kentucky, *pro se*.

W. Stacy Huff (Huff Law Offices), Harlan, Kentucky, for employer.

Dorothy L. Page (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (2000-BLA-635) of Administrative Law Judge Donald W. Mosser 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 involves a request for modification on a duplicate claim.[2] The administrative law judge accepted the

[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, 725, 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently requested supplemental briefing in this case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The Court's decision renders moot those arguments made by the Director regarding the impact of the challenged regulations.

[2]Claimant filed his first application for benefits on October 29, 1984. The claim was denied on January 21, 1985 by the district director. No further action was taken by claimant and the case was administratively closed. Director's Exhibit 38.

Claimant filed a second application on January 18, 1991. The claim was denied by the district director on June 17, 1991. Claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges. However, the claim was remanded for reconsideration of the responsible operator issue. The district director denied the claim again on November 30, 1994. Claimant took no further action on the

parties' stipulation that claimant established eight years and eleven months of coal mine employment. The administrative law judge then found that Eastover Mining Company is properly designated as the responsible operator in this case. The administrative law judge next considered the medical evidence submitted with claimant's modification request and determined that claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) (2000). Therefore, the administrative law judge concluded that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

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claim, and the case was administratively closed. Director's Exhibit 38.

On September 7, 1996, claimant filed his third claim for benefits. Director's Exhibit 1. On January 8, 1997, the district director denied the claim. Director's Exhibit 12. The claim was reconsidered and again denied by the district director on March 18, 1997. Director's Exhibit 13. Claimant then requested a formal hearing, which was held on March 31, 1998. Director's Exhibit 45. On October 21, 1998, the claim was denied by an administrative law judge for failing to establish any element of entitlement. Director's Exhibit 46.

Claimant filed a fourth application for benefits on March 25, 1999, which was construed as a request for modification because it was filed within one year of the previous denial. The claim was denied by a district director on September 28, 1999, and again on February 4, 2000. Claimant requested a formal hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 47, 59, 60, 78, 80.

Claimant appeals, generally contending that the administrative law judge erred in denying benefits. Employer responds urging affirmance of the decision. The Director, Office of Workers' Compensation Programs, 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 raised to be whether the Decision and Order below is supported by substantial evidence. *See 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); *See O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In view of the fact that this case arises within the jurisdiction, of the United States Court of Appeals for the Sixth Circuit 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. Failure to establish any one of these elements precludes entitlement. *SeeTrent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In considering claimant's request for modification of his duplicate claim, the administrative law judge must apply the holding in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) for establishing entitlement in a duplicate claim pursuant to Section 725.309 (2000), in conjunction with the modification provisions contained at Section 725.310 (2000). Accordingly, the administrative law judge must consider the evidence submitted in support of the request for modification along with the evidence submitted in support of the duplicate claim, to determine whether claimant established a required element of proof which could establish a material change in condition. *See Hess v. Director, OWCP*, 21 BLR 1-142 (1998).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal, and the evidence of record, we hold that the administrative law judge's findings are rational and in accordance with law. At Section 718.202(a)(1) (2000), the administrative law judge found that the new x-ray evidence submitted with claimant's request for modification consists of sixteen interpretations of five x-rays. After according diminished weight to a positive interpretation of the June 23, 1999 x-ray by Dr. Tiu, because the physician's credentials are not contained in the record, the administrative law judge found that the remaining interpretations are predominantly

negative for pneumoconiosis and "are performed by highly qualified physicians."[3] Decision and Order at 8; Director's Exhibits 21- 24. Relying on the numerical weight of the negative readings by better qualified physicians, the administrative law judge permissibly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)(2000). *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Relevant to Section 718.202(a)(2)(2000), the administrative law judge properly determined that claimant could not establish the existence of pneumoconiosis as the record did not contain biopsy evidence. *See* 20 C.F.R. § 718.202(a)(2)(2000); Decision and Order at 8. The administrative law judge also properly found that claimant did not establish pneumoconiosis pursuant to Section 718.202(a)(3)(2000) as the presumptions set forth in Sections 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. *See* 20 C.F.R. §§ 718.304, 718.305, 718.306 (2000); Decision and Order at 8.

Next, at Section 718.202(a)(4)(2000), the administrative law judge considered Dr. Miller's opinion that claimant suffers from an occupational disease caused by his coal mine employment. Dr. Miller diagnosed coal worker's pneumoconiosis, based on "symptomatology, lack of other basis for this and on chest x-ray changes." Director's Exhibit 57. The physician also checked the box on the Standard Form Medical Report for

[3]The administrative law judge found that the April 8, 1999 x-ray was interpreted as negative by Drs. Sargent and Barrett, who are both dually qualified as B-readers and board-certified radiologists. The administrative law judge further found that a May 18, 1999 x-ray was interpreted as positive by Dr. Baker, a B-reader, and negative by Drs. Sargent and Barrett. Finally, the administrative law judge found that the December 13, 1999 x-ray was interpreted as negative by nine readers, of which eight are dually qualified as B-readers and board-certified radiologists. Decision and Order at 8.

Occupational Disease for the Workers' Compensation Board for the State of Kentucky, indicating that "[t]he miner does have an occupational lung disease caused by his coal mine employment based upon x-ray." Finding that Dr. Miller's opinion is based solely on x-ray and not on the complete objective results from the physician's examination, the administrative law judge rationally found that the medical opinion is insufficient to establish pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) (2000).

Next, we consider the administrative law judge's findings at Section 718.204(c) (2000).[4] We affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c)(1) and (c)(2)(2000) inasmuch as the pulmonary function and blood gas studies referred to by Dr. Miller in his medical opinion are not supported by documentation in the record, and therefore, do not comply with the quality standards. *See* 20 C.F.R. §§ 718.103, 718.105 (2000); 20 C.F.R. Part 718, Appendices B and C (2000). Moreover, the administrative law judge properly determined that even if the values reported by Dr. Miller were considered, the results were non-qualifying[5], and thus, insufficient to establish total disability. 20 C.F.R. §718.204(c)(1), (2) (2000). We also affirm the administrative law judge's finding that total disability cannot be demonstrated under Section 718.204(c)(3)(2000) as the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3) (2000); *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989).

Lastly, at Section 718.204(c)(4)(2000), the administrative law judge found that Dr. Miller opined that claimant would be unable to perform his usual coal mine employment based on claimant's subjective complaints of three block dyspnea. Decision and Order at 10. As this statement was not supported by objective data or any other rationale, the administrative law judge permissibly found Dr. Miller's opinion to be unreasoned and, therefore, the medical opinion was insufficient to establish that claimant was " totally disabled from a respiratory standpoint." Decision and Order at 10; *see Clark v. Karst-*

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[4]The administrative law judge applied the total disability regulation set forth at 20 C.F.R. §718.204(c)(2000). After revision of the regulations, the total disability regulation is now set forth at Section 718.204(b)(2)(2001).

[5]A "qualifying" pulmonary function study or arterial 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 yields values that exceed the table values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

Robbins Coal Co., 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Therefore, as the administrative law judge's findings are supported by substantial evidence, we affirm his determination that claimant failed to establish total disability pursuant to Section 718.204(c) (2000).

The administrative law judge is empowered to weigh the medical evidence and to 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. *See Clark, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions as the evidence submitted on modification does not support a finding of pneumoconiosis or total disability. *See* 20 C.F.R. §§725.309, 725.310 (2000); *Hess, supra*. We also affirm the administrative law judge's finding, based upon his review of the record, that the prior denial of benefits does not contain a mistake in a determination of fact, as it is rational and supported by substantial evidence. Decision and Order at 5; 20 C.F.R. §725.310 (2000). As claimant has failed to establish a basis for modification, we affirm the denial of benefits. *See Hess, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL

Administrative Appeals Judge