BRB No. 98-0178 BLA

LARRY BOWMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD 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 Denying Benefits of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Larry Bowman, Clintwood, Virginia, *pro se*.[1]

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

[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).

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (96-BLA-1386) of Administrative Law Judge Edith Barnett 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 is before the Board for the third time. In the initial Decision and Order, Administrative Law Judge Giles J. McCarthy properly adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited claimant with fifteen years of qualifying coal mine employment.[2] Administrative Law Judge McCarthy then determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(c), and accordingly, denied benefits. Director's Exhibit 57. Claimant appealed and the Board affirmed Administrative Law Judge McCarthy's findings under 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3), but vacated his determinations under 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4), and remanded the case for further consideration. *Bowman v. Clinchfield Coal Co.*, 15 BLR 1-22 (1991); Director's Exhibit 85.

On remand, the case was reassigned without objection to Administrative Law Judge Edward J. Murty, Jr., who found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4), and accordingly, denied benefits. Director's Exhibit 90. Claimant subsequently appealed and the Board affirmed the denial of benefits on appeal, *Bowman v. Clinchfield Coal Co.*, BRB. No. 92-2715 BLA (May 18, 1994)(unpub.); Director's Exhibit 105, and on reconsideration, *Bowman v. Clinchfield Coal Co.*, BRB. No. 92-2715 BLA (May 12, 1995)(unpub. Order); Director's Exhibit 107. Thereafter, claimant filed a petition for modification on April 19, 1996 and submitted supporting medical evidence. Director's Exhibit 109.

On modification, Administrative Law Judge Barnett (the administrative law judge) found that claimant failed to demonstrate either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 based on claimant's failure to establish either the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this *pro se* appeal, urging affirmance of the denial. The Director, Office

[2] Claimant, Larry Bowman, filed his application for benefits on May 5, 1980. Director's Exhibit 1.

of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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).

Relevant to Section 718.202(a)(1), the administrative law judge properly concluded that the x-ray evidence is overwhelmingly negative, and therefore, insufficient to establish the existence of pneumoconiosis. Decision and Order at 6. Consistent with the administrative law judge's finding, the newly submitted x-ray evidence consists of twenty-five negative readings rendered by Board-certified radiologists and/or B-readers and one positive interpretation provided by a physician who has neither radiological qualification. Claimant's Exhibit 1; Employer's Exhibits 1-6, 8-13, 18, 21, 23, 24-32. Although the administrative law judge erroneously stated that Dr. Sargent provided the one positive interpretation rather than Dr. Robinette, Claimant's Exhibit 1, the administrative law judge correctly noted that this same x-ray had been read as negative by Dr. Mullens, Dr. Robinette's own radiologist. Decision and Order at 6. Because this error does not impact the administrative law judge's determination that the x-ray evidence is overwhelmingly negative for the existence of pneumoconiosis, we deem this error harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Inasmuch as it is within the discretion of the administrative law judge to determine whether claimant satisfied his burden of establishing the existence of pneumoconiosis, we affirm the administrative law judge's Section 718.202(a)(1) finding as supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Relevant to Section 718.202(a)(2), the administrative law judge properly determined that pneumoconiosis was not established inasmuch as the newly submitted evidence does not contain any biopsy evidence. *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 6. Similarly, the administrative law judge determined that pneumoconiosis was not established at Section 718.202(a)(3) as the administrative law judge properly found that the presumptions set forth in Sections 718.304 and 718.306 are inapplicable because the newly submitted evidence does not reveal evidence of complicated pneumoconiosis and this is a

living miner's claim. *See* 20 C.F.R. §§718.304; 718.306; Decision and Order at 6. Moreover, the administrative law judge properly found that the presumption at Section 718.305 was not available as claimant failed to establish a totally disabling respiratory impairment at Section 718.204(c). Accordingly, we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2), (3), 718.304, 718.305 and 718.306.

With respect to Section 718.202(a)(4), the newly submitted medical opinions consist of the reports of Dr. Robinette, who diagnosed simple coal workers' pneumoconiosis, Claimant's Exhibit 1, and Dr. Sargent, who opined that the miner does not suffer from pneumoconiosis, Employer's Exhibit 8. The administrative law judge, within a proper exercise of her discretion, accorded determinative weight to Dr. Sargent's opinion inasmuch as she found Dr. Sargent's opinion to be well reasoned and more consistent with the negative x-ray interpretations and objective evidence indicating normal lung function. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Hence, we affirm the administrative law judge's Section 718.202(a)(4) finding.

Relevant to Section 718.204(c)(1), the administrative law judge properly found that all three newly submitted pulmonary function studies produced non-qualifying values,[3] therefore, we affirm her finding that total disability is not demonstrated pursuant to Section 718.204(c)(1). Decision and Order at 7; Claimant's Exhibit 1; Employer's Exhibit 8. Relevant to Section 718.204(c)(2), there are nine newly submitted blood gas studies, all of which yielded non-qualifying values. Claimant's Exhibit 1; Employer's Exhibits 8, 14-17, 19, 20, 22. The administrative law judge failed to mention four of the newly submitted blood gas studies, which were administered on September 13, 1994, July 31, 1994, December 2, 1996, and January 20, 1997; nevertheless, all of these tests yielded non-qualifying values. Employer's Exhibits 8, 19, 20, 22. Because these blood gas studies corroborate the administrative law judge's finding that the blood gas study evidence is non-qualifying, and therefore, insufficient to demonstrate total disability, we deem this error harmless, *see Larioni, supra*, and affirm her Section 718.204(c)(2) determination as supported by substantial evidence. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986); Decision and Order at 7. Similarly, we affirm the administrative law judge's finding that total disability cannot be demonstrated under

[3] 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. 20 C.F.R. §718.204(c)(1), (c)(2).

Section 718.204(c)(3) inasmuch as the record is devoid of evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3); Decision and Order at 7.

Relevant to Section 718.204(c)(4) are the opinions of Drs. Robinette and Sargent. Dr. Robinette stated, "there has been no evidence of recurrent hospitalization for respiratory insufficiency," and opined that claimant's pulmonary disease is stable and has not progressed since 1986, Claimant's Exhibit 1, whereas, Dr. Sargent found that claimant has the respiratory capacity to perform his last coal mine employment. Employer's Exhibit 8. The administrative law judge rationally found that neither opinion is sufficient to affirmatively demonstrate total disability pursuant to Section 718.204(c)(4) because Dr. Robinette failed to term claimant as totally disabled, or provide sufficient information upon which to infer a finding of total disability, *see Gee, supra*, and Dr. Sargent opined that claimant is not totally disabled from a respiratory or pulmonary standpoint. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); Decision and Order at 7. Thus, based on claimant's failure to establish total disability pursuant to Section 718.204(c), the administrative law judge properly found that claimant failed to demonstrate a change in conditions under Section 725.310. The administrative law judge additionally determined that the newly submitted objective tests and medical opinions are consistent with the evidence which was previously submitted pursuant to Section 718.204(c)(1)-(4), and thus, there is no basis for a finding that a mistake in a determination of fact was rendered in the prior decision. Decision and Order at 7. We affirm this determination inasmuch as it is rational and supported by substantial evidence.

Because the administrative law judge properly found that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and total disability at Section 718.204(c), we affirm her finding that claimant failed to demonstrate a change in conditions pursuant to Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 14-15 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); Decision and Order at 7. Similarly, the administrative law judge permissibly found that there is no mistake in a determination of fact in the prior decisions inasmuch as the newly submitted x-ray and the medical opinion evidence relevant to the existence of pneumoconiosis and total disability is consistent with the evidence which was previously submitted. *Ibid*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge