BRB No. 97-0500 BLA

ALBERT MARTINKO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order - Denying Request for Modification of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Albert Martinko, Goreville, Illinois, pro se.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denying Request for Modification (95-BLA-0746) of Administrative Law Judge Mollie W. Neal 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). The Director, Office of Workers' Compensation Programs, has not submitted a brief.

[1]By Order dated April 18, 1997, the Board directed claimant to show cause why his appeal should not be dismissed for failure to file a Petition for Review and brief. Upon failure of claimant's counsel to respond to the Board's show cause Order, the Board on October 31, 1997, ordered that the appeal be reviewed under the general standard of review in accordance with the regulations provided at 20 C.F.R. §§802.211(e), 802.220.

The complex procedural history of this case was set out fully in the Board's prior Decision and Order. *See Martinko v. Director, OWCP,* BRB No. 87-3542 BLA (June 29, 1990)(unpub.), Director's Exhibit 32. Originally, Administrative Law Judge Glenn Robert Lawrence issued a Decision and Order on October 30, 1987 in which he credited claimant with six and one-quarter years of coal mine employment. Judge Lawrence found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1) but denied benefits on the grounds that claimant failed to establish that his pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(c) and that he was totally disabled due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 26. Claimant appealed. The Board affirmed Judge Lawrence's length of coal mine employment finding of six and one-quarter years, affirmed his finding that the existence of pneumoconiosis was established at Section 718.202(a)(1), *see Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983), affirmed his finding that claimant failed to establish that his pneumoconiosis arose out of his coal mine employment at Section 718.203(c), and therefore affirmed his denial of benefits. *Martinko*, *supra*.[2]

Claimant subsequently sought modification pursuant to 20 C.F.R. §725.310. Administrative Law Judge Julius A. Johnson on March 31, 1994, considered the newly submitted evidence in conjunction with the other evidence of record, Decision and Order at 2, 4 n.5, and found that claimant failed to establish that the miner's pneumoconiosis arose out of his coal mine employment or that he was totally disabled by his respiratory or pulmonary condition. Judge Johnson thus determined that claimant had not established a change in conditions or a mistake in a determination of fact. Accordingly, he denied benefits. Director's Exhibit 51. Judge Johnson issued his Order Denying Request for Reconsideration on June 28, 1994. Director's Exhibit 53.

Claimant again petitioned for modification pursuant to Section 725.310. He submitted no new evidence but contended through counsel that Judge Johnson had made a mistake in a determination of fact. Administrative Law Judge Mollie E. Neal (the administrative law judge) found that Judge Johnson had made no mistake in a determination of fact and denied benefits. The instant appeal ensued.

In an appeal filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the

[2]The Board further held that the administrative law judge properly considered entitlement under the provisions at 20 C.F.R. Part 718, despite the fact that the miner's claim was filed in 1977. As claimant established less than ten years of coal mine employment, entitlement was precluded under 20 C.F.R. Part 727. Further, as claimant failed to establish that his pneumoconiosis arose from coal mine employment, entitlement was precluded under 20 C.F.R. §410.490. *Martinko v. Director, OWCP,* BRB No. 87-3542 BLA(June 29, 1990)(unpub.), at 3, n.3.

administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, contains no reversible error, and therefore it is affirmed.

The administrative law judge properly found that since claimant had submitted no new evidence on modification before her, the only issue with respect to modification at Section 725.310 was whether Judge Johnson had made a mistake in a determination of fact. *See Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Kovac v. BCNR Mining Corp.,* 16 BLR 1-71 (1992), *modifying* 14 BLR 1-156 (1990). The administrative law judge reviewed the entirety of the evidentiary record, Decision and Order at 6. The administrative law judge, within her discretion, properly discredited Dr. Rosecan's opinion that claimant's pneumoconiosis arose out of coal mine employment at Section 718.203(c) because it was not well-reasoned. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc).* Dr. Rosecan had originally based his diagnosis on an assumption of 12 years of coal mine employment. On deposition, he based his diagnosis on six and one-fourth years of coal mine employment, which was the number of years of coal mine employment which claimant established. The administrative law judge found that Dr. Rosecan failed to discuss the discrepancy regarding the length of coal mine employment or other evidence on which the physician based his opinion that the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c). *See generally Barnes v. Director, OWCP, 18 BLR 1-73 (1995); Fagg v. Amax Coal Co.,* 12 BLR 1-77 (1988); *Hopton v. United States Steel Corp.,* 7 BLR 1-12 (1984); Decision and Order at 3, 7. Inasmuch as the administrative law judge considered all the evidence of record at Section 718.203(c) and properly discredited the opinion of Dr. Rosecan, the only physician to opine that claimant's pneumoconiosis arose from his coal mine employment,[3] we affirm her finding that the evidence is insufficient to establish claimant's affirmative burden to show with competent medical evidence that his pneumoconiosis arose from his coal mine employment. *See generally Barnes, supra; Shoup v. Director, OWCP,* 11 BLR 1-110 (1987); *Stark v. Director, OWCP,* 9 BLR 1-36 (1986).

Similarly, the administrative law judge properly found that there was no mistake in a determination of fact with respect to Judge Johnson's finding that the evidence of record

[3]The opinions of Drs. Long and Cody do not support claimant's burden of proof at Section 718.203(c).

did not demonstrate total respiratory disability at Section 718.204(c). The administrative law judge properly relied on the opinion of Dr. Long over that of Dr. Rosecan, based on Dr. Long's pulmonary experience and her "credible and persuasive analysis" in invalidating the pulmonary function studies at Section 718.204(c)(1). *See generally Peabody Coal Co. v. Brinkley,* 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Siegel v. Director, OWCP,* 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting); *Winchester v. Director, OWCP,* 9 BLR 1-177 (1986). Judge Johnson properly found that the only blood gas study of record was non-qualifying. [1994] Decision and Order at 4 n.5; Director's Exhibit 38. *See* 20 C.F.R. §718.204(c)(2). The record contains no evidence of cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3). Moreover, the administrative law judge properly found that Judge Johnson make no mistake in a determination of fact with respect to Dr. Rosecan's opinion. Judge Johnson properly discounted Dr. Rosecan's opinion at Section 718.204(c)(4) inasmuch as it was not supported by the underlying evidence. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Clark, supra*; [1996] Decision and Order at 7; [1994] Decision and Order at 4. Neither the opinion of Dr. Long or Dr. Cody supports claimant's burden at Section 718.204(c)(4). Inasmuch as the administrative law judge considered all of the evidentiary record in finding that Judge Johnson made no mistake in a determination of fact, her finding that the evidence is insufficient to demonstrate total respiratory disability at Section 718.204(c) is affirmed.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge