BRB No. 97-1275 BLA

JAMES H. LESTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 on Modification of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

James H. Lester, Hanover, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel[1], appeals the Decision and Order Denying Benefits on Modification (96-BLA-0928) of Administrative Law Judge Stuart

[1] Claimant was not represented by counsel when this case was before the administrative law judge. Inasmuch as the administrative law judge informed claimant of his right to counsel without cost, and allowed claimant to present evidence, testify, and respond to evidence presented by employer, *see* Hearing Transcript, we hold that the requirements established in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), regarding claimant's appearing without counsel were satisfied.

A. Levin 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).[2] The administrative law judge found that, based on Social Security Administration records, claimant established eleven and one-quarter years of coal mine employment. Decision and Order at 8. The administrative law judge further found that the newly submitted evidence, *i.e.*, that evidence submitted since the previous denial in this case, "if fully credited," supports a finding that claimant established the existence of pneumoconiosis and the presence of a totally disabling respiratory impairment. Decision and Order at 9. In considering the claim on its merits, the administrative law judge then considered the entirety of evidence of record and concluded that such evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 3-12. The administrative law judge further concluded that, even if claimant established the existence of pneumoconiosis, the evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Decison and Order at 12-13. Accordingly, benefits were denied.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176

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[2] Claimant initially filed a claim which was finally denied by the district director on December 8, 1994. Claimant submitted additional evidence on April 21, 1995, which was considered as a request for modification. Director's Exhibit 19. After denial by the district director, Director's Exhibit 32, the administrative law judge, on May 14, 1997, issued the Decision and Order denying benefits from which claimant now appeals.

[3] We affirm, as not adverse to claimant and unchallenged on appeal by other parties, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

(1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (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 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).

In finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the entirety of x-ray readings and concluded that of the twenty-eight x-ray readings of record only one reading, Employer's Exhibit 10, constituted a positive interpretation for the existence of pneumoconiosis. The administrative law judge thus noted that the overwhelming majority of interpretations by physicians with superior credentials were negative for the existence of pneumoconiosis. Decision and Order at 9-11. The administrative law judge permissibly concluded, therefore, that "considered quantitatively and qualitatively," Decision and Order at 11, the x-ray evidence failed to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Accordingly, the admininstrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) is affirmed. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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).

In finding that claimant failed to establish the existence of pneumconiosis pursuant to the biopsy evidence at Section 718.202(a)(2), the administrative law judge considered the opinions of the three physicians who reviewed the biopsy slides. After reviewing the biopsy slides, Drs. Wahi, Hansbarger and Bush all failed to diagnose the presence of pneumoconiosis. Director's Exhibits, 19, 27, 29. Accordingly, the administrative law judge correctly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). *See Ondecko, supra*.

We further affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconisis pursuant to Section 718.202(a)(3) as there is no evidence of complicated pneumoconiosis in this living miner's claim filed in 1995. *See* Director's Exhibit 1; 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

In finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge found that the record contained only one medical opinion diagnosing the existence of pneumoconiosis or a

disease of the lungs arising out of coal dust exposure, the opinion of examining physician Dr. Bellam, Director's Exhibit 11. The administrative law judge found that no other examining physician diagnosed the existence of pneumoconiosis, including the opinion of the physician who conducted the most recent examination, Dr. Crisalli, Employer's Exhibits 1, 5. Decision and Order at 12. The administrative law judge further found that no consulting physician opined that claimant suffered from pneumoconiosis. The administrative law judge thus accorded "less weight to Dr. Bellam's report because it is inconsistent with the vast weight of objective evidence, and because the diagnoses it provides is contrary to the overwhelming weight of the diagnostic opinion evidence in the record." Decision and Order at 12. An administrative law judge may discredit a physician's opinion that varies significantly from the remaining medical opinions of record. *See Snorton v. Ziegler Coal Co.*, 9 BLR 1-106 (1986). Accordingly, the administrative law judge properly concluded that claimant failed to carrry his burden of establishing the existence of pneumoconiosis through the medical opinions of record pursuant to Section 718.202(a)(4). *See Ondecko, supra*.

Inasmuch as the administrative law judge has considered the entirety of relevant evidence and has properly determined that claimant has failed to establish the existence of pneumconiosis, a requisite element of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc),* we must affirm the denial of benefits. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).[4]

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

[4] In view of our affirmance of the administrative law judge's findings regarding the existence of pneumoconiosis, we need not reach his total disability findings as they are moot. *See Trent, supra*; *Perry, supra*; *Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge