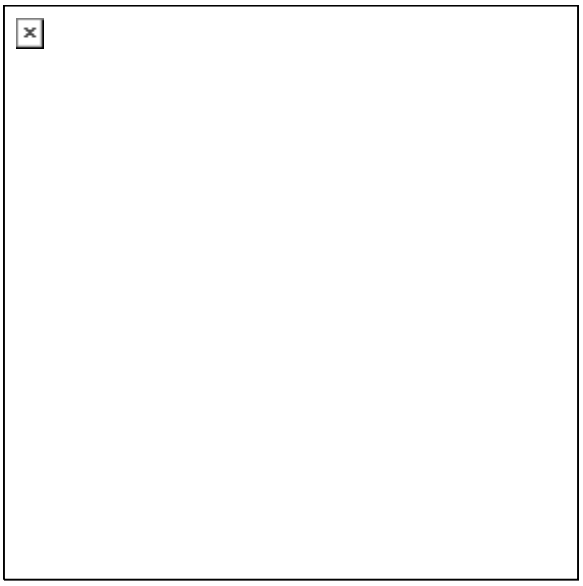
BRB No. 98-1553 BLA



HOMER HARTE

Claimant-Petitioner

v.

CONSOLIDATION COAL COMPANY

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

) DATE ISSUED:

) DECISION and ORDER

Appeal of the Decision and Order on Modification of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Homer Harte, North Tazewell, Virginia, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN,

Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification (96-BLA-1010) of Administrative Law Judge Joan Huddy Rosenzweig 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). Claimant's initial claim for benefits filed on July 8, 1982 was finally denied on June 8, 1983. Director's Exhibit 22. Claimant filed the current claim on April 10, 1986. Director's Exhibit 1. An administrative law judge credited claimant with thirty-nine years of coal mine employment and found that the medical evidence developed since the prior denial established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), thereby demonstrating a material change in conditions as required by 20 C.F.R. §725.309(d). Director's Exhibit 45. The administrative law judge, however, denied benefits because he found that the record did not establish that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). *Id*. Pursuant to claimant's appeal, the Board and the United States Court of Appeals for the Fourth Circuit affirmed the denial of benefits. Director's Exhibits 48, 55.

Within one year of the issuance of the Fourth Circuit court's decision, claimant submitted x-ray readings that were positive for complicated pneumoconiosis, and requested modification of the denial pursuant to 20 C.F.R. §725.310. Director's Exhibit 56. The parties developed additional medical evidence, including chest x-ray readings and CT scan readings relevant to the presence or absence of complicated pneumoconiosis. After the district director denied modification, Director's Exhibit 59, claimant requested a hearing, which was held on October 29, 1996.

In her Decision and Order on Modification, the administrative law judge found that no basis to modify the denial of benefits was established. Specifically, the administrative law judge found that the weight of the new x-ray readings and CT scan readings considered in conjunction with the evidence previously submitted did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.304(a), (c) and therefore did not demonstrate a change in conditions or mistake in fact pursuant to 20 C.F.R. §725.310. Additionally, the administrative law judge found that the weight of the new pulmonary function studies, blood gas studies, and medical opinions, considered in conjunction with those submitted previously, did not establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) and therefore did not demonstrate a change in conditions or mistake in fact. Accordingly, the administrative law judge denied claimant's request for modification.

On appeal, claimant contends that the administrative law judge erred in her analysis of the chest x-ray and CT scan evidence pursuant to Sections 718.304(a), (c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.310 that the administrative law judge has the authority to consider all of the evidence on modification to determine whether there has been a change in conditions or a mistake in a determination of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Claimant's claim was previously denied because he failed to establish total disability pursuant to Section 718.204(c). Director's Exhibit 45. Therefore, the administrative law judge on modification properly considered whether the record demonstrated a change in conditions or mistake in a determination of fact with respect to total disability.

A claimant is considered totally disabled if the irrebuttable presumption in Section 718.304 applies. 20 C.F.R. §718.204(b). Section 411(c)(3)(A)-(C) of the Act, implemented by Section 718.304(a)-(c) of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which when diagnosed by chest x-ray yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; or when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or when diagnosed by

other means, yields results that are similar to an x-ray, biopsy, or autopsy diagnosis. 30 U.S.C. §921(c)(3)(A)-(C); 20 C.F.R. §718.304(a)-(c). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must consider all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993), citing *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Review of the record indicates that none of the x-ray readings previously submitted included a diagnosis of large opacities. Of the twenty readings of three new x-rays submitted on modification, four readings by Board-certified Radiologists and B-readers Drs. Bassali and Alexander bore notations indicating the presence of a Category A large opacity on the October 31, 1994 and April 5, 1996 x-rays. Director's Exhibit 56; Claimant's Exhibit 2. By contrast, sixteen readings by similarly credentialed physicians indicated that large opacities were absent from these two x-rays and from the third x-ray taken on July 11, 1995. Director's Exhibits 57, 58, 61, 62, 63, 64; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 7, 13, 16, 17. These physicians stated that the x-rays instead showed minor changes consistent with old healed tuberculosis or other inflammatory disease.

In determining the weight to be accorded to the readings of the October 13, 1994 and April 5, 1996 x-rays pursuant to Section 718.304(a), the administrative law judge permissibly considered that "the greatest proportion of the most highly qualified physicians found that the chest x-rays were not positive for complicated pneumoconiosis." Decision and Order on Modification at 13; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Additionally, the administrative law judge properly took into account the fact that "[n]o other x-ray film in evidence was read was positive for complicated pneumoconiosis by any physician." *Id.*; *see Lester, supra*; *Melnick, supra*.

The administrative law judge's finding that the existence of complicated pneumoconiosis was not established pursuant to Section 718.304(a) is supported by substantial evidence and is in accordance with the applicable law. The issues raised by claimant in his *pro se* brief lack merit. Claimant's Brief at 3-7. The administrative law judge was permitted to consider x-ray readings that were negative for simple pneumoconiosis despite the prior administrative law judge's finding that the existence of simple pneumoconiosis was established by x-ray, because the administrative law judge was required to consider all relevant evidence, *see Melnick, supra*, and because the administrative law judge on modification was not bound by the prior administrative law judge's findings. *See Jessee, supra*. Additionally, the administrative law judge was not required to reject Dr. Wiot's negative reading of the October 31, 1994 x-ray simply because Dr. Wiot read the later x-ray taken on April 5, 1996 as positive for simple pneumoconiosis. Director's Exhibit 64; Employer's Exhibit 17. Dr. Wiot's positive reading of the later x-ray is consistent with the

progressive nature of pneumoconiosis, and does not necessarily mean that his negative reading of the earlier x-ray is unreliable. *See Adkins, supra*. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.304(a).

Pursuant to Section 718.304(c), the administrative law judge considered the readings of the March 19, 1996 CT scan. Drs. Bassali and Alexander diagnosed the presence of a Category A large opacity, Claimant's Exhibit 2, whereas Drs. Wheeler, Wiot, Scott, and Fino indicated that complicated pneumoconiosis was absent. Employer's Exhibits 13, 16, 17, 20, 22. The administrative law judge properly weighed these readings in light of the readers' radiological credentials, *see Adkins, supra*, and took into account the medical testimony by Drs. Wheeler and Wiot addressing the diagnostic significance of the changes seen on the CT scan.[1] After thoroughly discussing the CT scans and testimony, the administrative law judge found within her discretion that the opinions of the physicians who did not diagnose complicated pneumoconiosis were "more persuasive and supported by the evidence of record." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge considered that claimant's treating physician, Dr. Mitchell, opined that claimant's x-ray and CT scan showed complicated pneumoconiosis, but reasonably accorded his opinion less weight because she found that "physicians with greater qualifications persuasively explained that the x-rays and CT scan showed healed tuberculosis." Decision and Order on Modification at 14; Director's Exhibit 65; Claimant's Exhibit 1; Employer's Exhibit 18; *see Hicks, supra*; *Akers, supra*; *Adkins, supra*. Substantial evidence supports the administrative law judge's finding.

Claimant incorrectly argues that remand is required because the administrative law judge neglected to list Dr. Wiot's reading of the March 19, 1996 CT scan on the chart located at page five of the administrative law judge's Decision and Order on Modification. Despite this oversight, the administrative law judge clearly considered Dr. Wiot's opinion that the CT scan was negative for complicated pneumoconiosis. Decision and Order on Modification at 11, 14. Additionally, because the administrative law judge must consider all relevant evidence regarding the presence or absence of complicated pneumoconiosis, *see Melnick*,

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[1] The administrative law judge cited Dr. Wheeler's testimony that in his opinion Dr. Bassali mistook a calcified granuloma of healed tuberculosis for a category A large opacity. Employer's Exhibit 22 at 13. The administrative law judge also considered the testimony by Drs. Wheeler and Wiot that the opacity seen on the CT scan measured less than one centimeter in diameter. *Id*.; Employer's Exhibit 20 at 30.

supra, the administrative law was not required to determine that the physicians who diagnosed healed tuberculosis on the CT scan reported their findings to local health authorities before she could accept their readings as probative. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.304(c).

Because claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, he must establish by a preponderance of the evidence that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c).

Pursuant to Section 718.204(c)(1), (3), the administrative law judge correctly found that none of the eleven pulmonary function studies of record produced qualifying[2] results and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Therefore, we affirm her findings pursuant to Section 718.204(c)(1), (3).

Pursuant to Section 718.204(c)(2), the administrative law judge permissibly found that the weight of the blood gas studies did not establish total disability, as all but one of the ten studies in the record were non-qualifying. *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11, 1-14 (1991)(administrative law judge must weigh evidence supportive of a finding of total disability against the contrary probative evidence); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(2).

Pursuant to Section 718.204(c)(4), the administrative law judge found that the weight of the new medical opinions considered in conjunction with those previously submitted established that claimant does not suffer from a totally disabling respiratory or pulmonary impairment. The administrative law judge permissibly accorded greatest weight to the opinion of examining physician Dr. Castle that claimant suffers from no respiratory impairment whatsoever because the administrative law judge found his opinion to be well-reasoned, supported by the weight of the objective evidence, and supported by the similar opinions of Drs. Abernathy, Forehand, Morgan, and Fino. Director's Exhibit 62; Employer's Exhibits 8-12, 14, 19, 21; *see Hicks, supra*; *Akers, supra*; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). In so finding, the administrative law judge correctly found that Dr. Mitchell did not diagnose a respiratory or pulmonary impairment. Decision and Order on Modification at 16-17. Substantial evidence supports the administrative law judge's finding pursuant to Section 718.204(c)(4), which we therefore affirm.

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[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Substantial evidence supports the administrative law judge's discretionary determination that the record did not demonstrate a change in conditions or a mistake in a determination of fact. Therefore, we affirm the administrative law judge's findings pursuant to Section 725.310. *See Jessee, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge