BRB No. 99-0150 BLA

VERLON BREEDING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
L & V COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED:
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Verlon Breeding, Isom, Kentucky, *pro se*.

W. William Prochot (Arter and Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order

[1]Claimant is Verlon Breeding, the miner, who filed a claim for benefits on March 28, 1980. Director's Exhibit 1.

(96-BLA-1864) of Administrative Law Judge Daniel J. Roketenetz 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). This case is on appeal before the Board for the fourth time.[2] In the last appeal, the Board affirmed Administrative Law Judge Paul H. Teitler's finding that the evidence of record was insufficient to establish either invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4) or entitlement pursuant to 20 C.F.R. Part 718, and thus affirmed the denial of benefits. *Breeding v. L & V Coal Co.*, BRB No. 95-1271 BLA (Decision and Order. 12, 1995)(unpub.). Claimant subsequently filed a petition for modification pursuant to 20 C.F.R. §725.310 on March 25, 1996.

On modification, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) credited claimant with fifteen years of qualifying coal mine employment and found that the weight of the new evidence, considered in conjunction with the previously submitted evidence, was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4) or entitlement pursuant to 20 C.F.R. Part 718. The administrative law judge thus found the evidence insufficient to establish either a mistake in a determination of fact or a change in conditions pursuant to Section 725.310, and consequently denied benefits. In the present appeal, claimant generally contends that the administrative law judge erred in finding that claimant is not entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on 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. *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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In considering whether a claimant has established a change in conditions pursuant to Section 725.310, an administrative law judge is obligated to perform an

[2]The full procedural history of this case is set forth in *Breeding v. L & V Coal Co.*, BRB No. 95-1271 BLA (Decision and Order. 12, 1995)(unpub.).

independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), modifying 14 BLR 1-156 (1990). As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge properly reviewed the entirety of the record to determine whether the evidence established either a change in conditions or a mistake in a determination of fact in Judge Teitler's prior denial, which was affirmed by the Board. Decision and Order at 6-13; *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

In evaluating the evidence relevant to invocation at Section 727.203(a)(1), the administrative law judge accurately determined that neither the prior evidence of record nor the newly submitted evidence included the results of a biopsy or autopsy. Decision and Order at 6. The administrative law judge reasonably found that the prior x-ray evidence of record, consisting of five negative and five positive interpretations, was insufficient to establish invocation, as only one A-reader provided a positive interpretation whereas two dually-qualified Board-certified radiologists and B-readers provided negative interpretations, and the remaining physicians possessed no special radiological qualifications. Decision and Order at 7. The administrative law judge then performed a qualitative evaluation of the newly-submitted x-rays and similarly found this evidence insufficient to establish invocation, based on the preponderance of negative interpretations by physicians with superior qualifications.[3] Decision and Order at 7; *see Woodward v. Director,* OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). The administrative law judge's findings pursuant to Section 727.203(a)(1) are supported by substantial evidence and thus are affirmed.

[3]The administrative law judge determined that the newly-submitted x-ray evidence consisted of twenty interpretations of three films, fifteen of which were provided by physicians who were Board-certified radiologists and/or B-readers; of these, only three interpretations were positive for pneumoconiosis. Decision and Order at 7.

Pursuant to Section 727.203(a)(2), as the various physicians recorded different heights for claimant, the administrative law judge permissibly found claimant's height to be 67 inches for the purpose of evaluating the pulmonary function studies of record. Decision and Order at 8; *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). In weighing the prior seven pulmonary function studies, the administrative law judge properly discounted four nonconforming studies which lacked the requisite tracings, *see Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Estes v. Director, OWCP*, 7 BLR 1-414 (1984); *Clay v. Director, OWCP*, 7 BLR 1-82 (1984), and found that the single conforming study which produced qualifying values was outweighed by two more recent non-qualifying and conforming studies. Decision and Order at 7; *see generally Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Baker v. North American Coal Corp*. 7 BLR 1-79 (1984). The administrative law judge then reasonably found that the three newly-submitted pulmonary function studies were insufficient to establish invocation at Section 727.203(a)(2), as Dr. Broudy's study was non-qualifying and the administrative law judge found that the qualifying studies obtained by Drs. Baker and Sundaram were unreliable based on multiple invalidations by reviewing physicians. Decision and Order at 8; *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).[4] The administrative law judge's finding that the pulmonary function study evidence of record was insufficient to establish invocation at Section 727.203(a)(2), and thus insufficient to establish either a mistake in a determination of fact or a change in conditions pursuant to Section 725.310, is affirmed as supported by substantial evidence.

Pursuant to Section 727.203(a)(3), the administrative law judge accurately

[4]The administrative law judge determined that Dr. Younes deemed Dr. Sundaram's pulmonary function study results invalid due to evidence of inconsistent effort; Drs. Fino and Tuteur invalidated the results of both Dr. Sundaram's and Dr. Baker's studies; and Dr. Baker questioned the reliability of his own test by noting claimant's inconsistent effort. Decision and Order at 8. Additionally, a review of the record reflects that Dr. Sundaram did not record claimant's cooperation or effort, thus his study is nonconforming. Director's Exhibit 75.

determined that the two newly-submitted blood gas studies as well as five out of six of the prior blood gas studies of record produced non-qualifying values, and reasonably concluded that this evidence was insufficient to establish invocation at Section 727.203(a)(3). Decision and Order at 8; *Casella, supra*. The administrative law judge's findings pursuant to Section 727.203(a)(3), and his conclusion that this evidence was insufficient to establish either a mistake in a determination of fact or a change in conditions pursuant to Section 725.310, are supported by substantial evidence and therefore are affirmed.

Pursuant to Section 727.203(a)(4), the administrative law judge determined that the previously submitted medical opinions of Drs. Martin, Penman and Wright were insufficient to support invocation,[5] *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988), and reasonably found that the opinions of Drs. Anderson, Cornish, Caizzi, and Long, that claimant is not disabled from a respiratory standpoint, were entitled to determinative weight over the contrary opinions of Drs. Myers and Clarke, on the grounds that Drs. Anderson, Cornish, Caizzi and Long provided well reasoned opinions and possessed superior qualifications. Decision and Order at 8-9; *Dillon, supra*; *Martinez, supra*; *Wetzel, supra*. Turning to the newly submitted medical opinions of record, the administrative law judge acted within his discretion in assigning little probative value to the opinion of Dr. Sundaram, because he found that the physician's pulmonary function study results were invalid and Dr. Sundaram did not indicate the specific documentation he relied upon in concluding that claimant was totally disabled. Decision and Order at 10; Director's Exhibit 73; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.). The administrative law judge determined that Dr. Baker was unable to render an opinion concerning the presence of a disability due to the invalid pulmonary function study that he administered, but opined that "it is possible that [claimant] may have difficulty performing his usual coal mine work or comparable and gainful work" and that further dust exposure would be likely to result in worsening of his condition. Director's Exhibit 77. The administrative law judge properly found that Dr. Baker's conclusion that claimant should avoid further dust exposure was insufficient to support invocation pursuant to Section 727.203(a)(4), *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), and reasonably gave little weight to Dr. Baker's statement that claimant may have difficulty performing his

[5] Drs. Martin, Penman and Wright did not render an opinion regarding whether claimant suffered a functional respiratory disability. Director's Exhibits 23, 24.

usual coal mine work, on that ground that it was equivocal. Decision and Order at 11; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge then acted within his discretion as trier-of-fact in finding that the opinions of Drs. Broudy, Fino and Tuteur, that claimant was not suffering from a totally disabling respiratory impairment, were the most persuasive because the physicians possessed superior credentials and explained how the objective and subjective documentation supported their conclusions. Decision and Order at 11; Employer's Exhibits 1-4; *Clark, supra; Dillon, supra; Martinez, supra; Wetzel, supra*. Consequently, the administrative law judge rationally concluded that neither the newly submitted medical opinion evidence, nor the medical opinion evidence taken as a whole, was sufficient to invoke the presumption pursuant to Section 727.203(a)(4), or to establish a mistake in a determination of fact or change in conditions at Section 725.310, and his findings thereunder are affirmed as supported by substantial evidence.

Lastly, the administrative law judge considered the claim pursuant to the provisions at 20 C.F.R Part 718. In order to be entitled to benefits pursuant to Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Turning to the issue of total respiratory disability pursuant to Section 718.204(c)(1)-(4), in the present case the administrative law judge adopted his analysis regarding the prior and new evidence of record pursuant to Section 727.203(a)(2)-(4) and, applying the appropriate regulatory tables, permissibly found that a preponderance of valid pulmonary function study and blood gas study results was non-qualifying and insufficient to establish total disability pursuant to Section 718.204(c)(1), (2); that the record contained no evidence of cor pulmonale with right sided congestive heart failure pursuant to Section 718.204(c)(3); and that the preponderance of reasoned medical opinions was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4), thus invocation of the presumption at 20 C.F.R. §718.305 was precluded. Decision and Order at 12-13; *see Trent, supra*. The administrative law judge's findings pursuant to Section 718.204(c)(1)-(4) are supported by substantial evidence and are affirmed. Inasmuch as claimant has failed to establish total respiratory disability, a requisite element of entitlement pursuant to Part 718, we affirm his finding that claimant is not entitled to benefits and that modification pursuant to Section 725.310 is not appropriate. Consequently, we need not reach the remaining issues of the existence of pneumoconiosis, its etiology, and disability causation. *Trent, supra*.

Accordingly, the administrative law judge's Decision and Order denying

benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge