BRB No. 07-0659 BLA

G.L.S., SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT	)	
COMPANY/MARROWBONE	)	
DEVELOPMENT	)	DATE ISSUED: 04/29/2008
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
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 – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

G.L.S., Sr., Williamson, West Virginia, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (2006-BLA-5414) of Administrative Law Judge Richard A. Morgan rendered 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 filed his claim on July 7, 2004, which the district director denied on April 8, 2005. Director's Exhibits 2, 30. Thereafter, claimant requested modification and submitted additional medical evidence. Director's Exhibits 32, 34. The request for modification was denied by the district director on November 10, 2005. Director's Exhibit 37. Claimant requested a hearing and the case was referred to the Office of Administrative Law Judges for a formal hearing. In a Decision and Order issued on April 5, 2007, the administrative law judge credited claimant with "approximately" thirty-two years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. In considering claimant's modification request, the administrative law judge stated that he performed a *de novo* review of all of the evidence of record at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b) and 718.204(b)(2)(i)-(iv), (c). The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), (c). The administrative law judge thus found that the evidence was insufficient to establish a basis for modification pursuant to 20 C.F.R. §725.310. Accordingly, he denied claimant's request for modification and benefits. On appeal, claimant generally challenges the administrative law judge's denial. Employer responds, urging affirmance of the denial of modification and benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are 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).

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 a finding of 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).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310; *see* Decision and

Order at 3. In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an 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 at least one element that defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative law judge has the authority to consider all of the evidence for any mistake of fact, including the ultimate fact of entitlement.[1] *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge noted that the x-ray evidence consisted of eight readings of three x-rays dated September 27, 2004, January 26, 2005 and February 23, 2006, four of which were positive for existence of pneumoconiosis and four of which were negative for the disease. Decision and Order Denying Benefits (Decision and Order) at 5; Director's Exhibits 11-13, 35; Claimant's Exhibits 1-2, Employer's Exhibits 1-2. The September 27, 2004 x-ray was read as positive by Dr. Ranavaya, a B reader, and by Dr. Alexander, dually-qualified as a Board-certified radiologist and B reader, while Dr. Binns, also a dually-qualified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 11-12, 35. Dr. Alexander read the January 26, 2005 x-ray as positive for pneumoconiosis, while Dr. Zaldivar, a B reader, and Dr.Wiot, a dually-qualified radiologist, read that x-ray as negative for pneumoconiosis. Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibit 2. The February 23, 2006 x-ray was read as positive for pneumoconiosis by Dr. Alexander, and negative for pneumoconiosis by Dr. Jarboe, a B reader. Claimant's Exhibit 1; Employer's Exhibit 1. Decision and Order at 5.

The administrative law judge acknowledged that both of the physicians who provided positive x-ray interpretations were B readers, while one was also a dually-qualified radiologist. Decision and Order at 5. The administrative also noted that of the four physicians who provided negative x-ray interpretations, all were B readers and two were dually-qualified radiologists. Decision and Order at 5. In summarizing the x-ray evidence, the administrative law judge indicated that the B reader interpretations were equally split between positive and negative, while a majority of the interpretations done by dually-qualified radiologists was positive. *Id*. The administrative law judge further determined that, in contrast, a majority of the dually-qualified physicians rendered negative interpretations. *Id*. Taking into consideration the number of conflicting interpretations, as well as the qualifications of the physicians, the administrative law

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

judge permissibly found that the x-ray evidence was inconclusive and neither precluded nor established the presence of pneumoconiosis, and thus claimant failed to satisfy his burden of proof by a preponderance of the evidence. *See* 20 C.F.R. §718.202(a)(1);); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5, 10. Because the administrative law judge conducted both a qualitative and quantitative analysis of the x-ray evidence of record in concluding that it was insufficient to establish the existence of pneumoconiosis, we affirm his finding pursuant to 20 C.F.R. §718.202(a)(1), as supported by substantial evidence.[2] *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc on recon.*); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Likewise, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). *See* Decision and Order at 10. A review of the record reveals that there is no biopsy evidence; no evidence establishing that claimant has complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305; and this is a living miner's claim, *see* 20 C.F.R. §718.306. *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed Dr. Ranavaya's report and the reports and deposition testimony of Drs. Zaldivar and Jarboe. Decision and Order at 7-9. Dr. Ranavaya performed an examination of claimant at the request of the Department of Labor on September 27, 2004. Director's Exhibit 11. Dr. Ranavaya diagnosed coal workers' pneumoconiosis due to coal mine employment. *Id*. Dr. Zaldivar examined claimant on January 26, 2005, and opined that claimant had a normal pulmonary examination and did not suffer from pneumoconiosis or any respiratory condition due to coal dust exposure. Director's Exhibit 13; Employer's Exhibit 4. Dr. Jarboe examined claimant on February 23, 2006, and opined that claimant does not have coal workers' pneumoconiosis or a coal mine dust related pulmonary condition. Employer's Exhibits 1, 3.

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[2] The administrative law judge also noted that Dr. Jarboe's negative CT scan interpretation supported the negative x-ray readings and undermined the positive x-ray readings. Decision and Order at 10.

In weighing the medical opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that the reports of Drs. Ranavaya, Zaldivar and Jarboe failed to meet claimant's burden of proof to establish the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order at 10-11. The administrative law judge permissibly credited the opinions of Drs. Zaldivar and Jarboe, that claimant does not suffer from a lung condition attributable to his coal dust exposure, over Dr. Ranavaya's contrary opinion, based upon their superior qualifications and because he found their opinions better reasoned and documented.[3] *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18, 1-22 (1994); *see also Clark*, 12 BLR at 1-151; *McMath*, 12 BLR at 1-8 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); Decision and Order at 10-11. The administrative law judge found that:

> Drs. Zaldivar and Jarboe considered more extensive and recent clinical data. They both found that Claimant does not suffer from clinical or legal pneumoconiosis. Moreover, their opinions regarding the pneumoconiosis issue are more consistent with the credible objective clinical test results, including several negative x-ray interpretations and the only CT scan evidence; the improvement shown on the exercise blood gas tests; and, the essentially normal results obtained on the pulmonary function studies and the more recent arterial blood gas studies.

Decision and Order at 11.

The administrative law judge considered the quality of the evidence in determining whether the opinions of record were supported by the underlying documentation. He adequately explained and rationally found that the opinion of Dr. Ranavaya was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 10-11. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4).

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[3] The administrative law judge accurately noted that Drs. Zaldivar and Jarboe are Board-certified pulmonary specialists, whereas Dr. Ranavaya's qualifications are not in the record. Decision and Order at 7, 9-10; Director's Exhibit 13; Employer's Exhibit 1.

Because the administrative law judge properly weighed all of the x-ray evidence and medical opinion evidence of record and rationally concluded that the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Island Creek Coal Co. v. Compton,* 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

The administrative law judge next considered whether the evidence supported a determination that claimant is now totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 11-12. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge noted that none of the pulmonary function studies was qualifying and permissibly found that total disability was not established thereunder.[4] *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); Decision and Order at 5-6, 12; Director's Exhibits 11, 13; Employer's Exhibit 1. We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

With respect to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge indicated correctly that there were three blood gas studies of record dated September 27, 2004, January 26, 2005 and February 23, 2006, and that while the resting blood gas study values were nonqualifying in all three studies, one of the two exercise blood gas studies produced qualifying values. Decision and Order at 6; Director's Exhibits 11, 13; Employer's Exhibit 1. Dr. Ranavaya obtained qualifying exercise values on the September 27, 2004 blood gas study and Dr. Zaldivar obtained nonqualifying exercise values on the January 26, 2005 blood gas study. Director's Exhibits 11, 13.

The administrative law judge weighed the conflicting evidence and found that the preponderance of the blood gas study evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), as the more recent exercise blood gas study was nonqualifying and all of the resting blood gas studies were nonqualifying. Decision and Order at 6, 12. We affirm the administrative law judge's weighing of the blood gas study evidence, as it is supported by substantial evidence. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right-sided congestive heart failure

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[4] A "qualifying" pulmonary function study or 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 "nonqualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii).

necessary to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon*. (*en banc*) 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); Decision and Order at 12.

The administrative law judge next addressed the medical opinions of record pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Ranavaya determined that claimant suffered from a "moderate" pulmonary impairment based upon the results of his exercise blood gas study and attributed this impairment to coal workers' pneumoconiosis.[5] Director's Exhibit 11. Drs. Zaldivar and Jarboe concluded that claimant does not have any pulmonary disease and, therefore, is not suffering from a totally disabling pulmonary impairment. Director's Exhibit 13; Employer's Exhibits 3.

The administrative law judge determined that:

> [N]one of the physicians of record specifically stated that Claimant suffers from a totally disabling pulmonary or respiratory impairment which would prevent him from performing his last usual coal mine job or comparable work. Dr. Ranavaya's opinion may arguably be characterized as a "total disability" finding, since he stated that Claimant's moderate hypoxemia on exercise meets the regulatory criteria. However, for the reasons outlined above, I accord greater weight to the opinions of Drs. Zaldivar and Jarboe, which clearly establish that Claimant does not suffer from a total (pulmonary or respiratory) impairment. Therefore, Claimant has not established total disability pursuant to §718.204(b)(2)(iv), or by any other means.

Decision and Order at 12.

The administrative law judge acted within his discretion in determining that the opinions of Drs. Zaldivar and Jarboe, that claimant is not totally disabled from a pulmonary standpoint, were entitled to more weight, while Dr. Ranavaya's conclusion

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[5] The administrative law judge noted that:

> When asked the degree of severity of the impairment, in terms of Claimant's ability to perform his last usual coal mine job, Dr. Ranavaya stated: "Moderate impairment as reflected by moderate hypoxemia on exercise which meets federal criteria for Total Disability as contained in 20CFR718 (sic)." (DX 11, Sec. 8a).

Decision and Order at 7.

was less credible because, as he found earlier, Drs. Zaldivar and Jarboe are pulmonary specialists and their opinions are reasoned and supported by documentation. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. We affirm, therefore, the administrative law judge's finding that the evidence is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), as it is supported by substantial evidence.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.,* 10 BLR 1-127 (1987). The administrative law judge weighed all of the newly submitted medical evidence, as well as the previously submitted evidence, and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Therefore, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R.

§725.310, as it is supported by substantial evidence. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28. Since claimant's petition for modification was properly denied, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge