BRB No. 03-0301 BLA

THURMAN VANOVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLATWOODS COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 12/18/2003
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Thurman Vanover, Jenkins, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (01-BLA-0722) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on

[1]Claimant is Thurman Vanover, the miner, who filed his claim for benefits on November 8, 1991. Director's Exhibit 1. Administrative Law Judge Ainsworth H.

modification in a miner's 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 credited the miner with "not less than twelve years" of coal mine employment pursuant to the parties' stipulation, 2002 Hearing Transcript at 7-8. Decision and Order at 6-7. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 8-13. The administrative law judge found that claimant failed to establish a change in conditions or a mistake in fact pursuant to 20 C.F.R. §725.310 (2000).[3] Accordingly, benefits were denied on modification.

On appeal, claimant generally contends that the administrative law judge erred in denying claimant's request for modification. Employer responds, urging affirmance of

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Brown denied claimant's claim for benefits on June 2, 1995 because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 58. Thereafter, on May 15, 1996, the Benefits Review Board affirmed Judge Brown's denial of benefits. Director's Exhibit 66. Claimant submitted new evidence on March 12, 1997, which was treated as a request for modification. Director's Exhibits 67, 69. On December 28, 1998, Administrative Law Judge Robert L. Hillyard denied claimant's request for modification because claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 87. The Board affirmed Judge Hillyard's denial and summarily denied claimant's motion for reconsideration on November 21, 2000. Director's Exhibits 93, 95. Subsequently, on December 6, 2000, claimant requested modification. Director's Exhibit 98. The district director denied claimant's request for modification, and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 107, 109.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Although the Department of Labor has made substantive revisions to 20 C.F.R. §§725.309 and 725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001. 20 C.F.R. §725.2.

the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

In an appeal filed by a claimant 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 Corp.*, 12 BLR 1-176 (1989). 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 by the Act, 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to 20 C.F.R. §718.202(a)(1), the new x-ray evidence consists of thirteen x-ray readings of four x-rays dated August 5, 1992, May 15, 1997, December 18, 2000, and February 9, 2001. This new evidence contains only one positive x-ray interpretation of the December 18, 2000 x-ray rendered by Dr. Potter, who is neither a B-reader[5] nor a Board-certified radiologist. Director's Exhibit 99. Physicians, who are qualified as B-readers, Board-certified radiologists, or both, interpreted as negative the December 18, 2000 x-ray and the other three newly submitted x-rays. The administrative law judge found that the "more recent interpretations, which were conducted by physicians with impressive credentials, establishes [sic] the absence of pneumoconiosis." Decision and Order at 9. Because the administrative law judge permissibly credited the readings by the physicians with superior radiological qualifications, we affirm his Section 718.202(a)(1) finding that claimant failed to establish the existence of pneumoconiosis and a change in

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[4]We affirm the administrative law judge's finding of at least twelve years of coal mine employment inasmuch as this finding is not adverse to claimant and is unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

conditions based on the new x-ray evidence.[6] *Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

The administrative law judge permissibly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) because the record does not contain any biopsy evidence. Decision and Order at 9. Moreover, since there is no new evidence of complicated pneumoconiosis and the instant case involves a living miner's claim filed after January 1, 1982, the administrative law judge properly determined that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3). *See* 20 C.F.R. §§718.304, 718.305(e), 718.306. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and a change in conditions at Section 718.202(a)(2), (a)(3).

Pursuant to Section 718.202(a)(4) (2000), the administrative law judge concluded that "[t]he record does not contain a reasoned and documented narrative opinion stating that Claimant has pneumoconiosis." Decision and Order at 11. In this regard, the administrative law judge noted that Dr. Sundaram's letter, stating that he had been treating claimant for coal workers' pneumoconiosis and chronic obstructive pulmonary disease, "does not set forth any clinical observations or findings, nor does it provide any objective medical evidence." Decision and Order at 10. Therefore, the administrative law judge permissibly found Dr. Sundaram's opinion to be "entitled to little probative weight" because it does not constitute a well-reasoned and well-documented opinion. *Id.*;

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[6]Employer asserts that the administrative law judge overlooked Dr. Spitz's negative reading of the August 5, 1992 x-ray and Dr. Wiot's negative reading of the February 9, 2001 x-ray. Employer's Brief at 6, n.2. Because we affirm the administrative law judge's 20 C.F.R. §718.202(a)(1) finding that claimant failed to establish pneumoconiosis by the new x-ray evidence, we deem harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), any error the administrative law judge may have made in failing to consider the two negative x-ray readings of Drs. Spitz and Wiot.

Additionally, employer asserts that the administrative law judge overlooked the negative x-ray readings rendered by Dr. Wiot in 1992, 1993, 1994, and 1997 of films taken between August 1991 and May 1996. Employer's Brief at 6 n.2. We also deem harmless any error the administrative law judge may have made in failing to consider these negative readings inasmuch as we affirm the administrative law judge's finding of no pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Larioni*, 6 BLR 1-1276.

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *see also Peabody Coal Co. v. Odom*, 342 F.3d 486, BLR (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003)(there is no rule requiring deference to treating physicians' opinions in black lung claims).

Conversely, the administrative law judge found the newly submitted opinions of Drs. Broudy and Rosenberg, that claimant does not have coal workers' pneumoconiosis, to be entitled to "significant probative weight." Decision and Order at 11. The administrative law judge noted that both Dr. Broudy and Dr. Rosenberg are Board-certified pulmonologists[7] and found these physicians' opinions to be well-reasoned and well-documented because they provided clinical observations and findings and supported their reasoning with objective data. *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Oggero*, 7 BLR 1-860. Accordingly, we hold that the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis and a change in conditions based on the new medical opinion evidence.

The administrative law judge next considered whether claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b).[8] The administrative law judge considered the newly submitted pulmonary function study and blood gas study and properly found that claimant failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii) inasmuch as neither of these tests yielded qualifying[9] values. Decision and Order at 11; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Similarly, the administrative law judge properly found that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iii) inasmuch as the record does

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[7]The record reveals that Dr. Broudy is Board-certified in Pulmonology, Internal Medicine, and Pulmonary Disease, and is a B-reader. Employer's Exhibit 6 at 3-5. Dr. Rosenberg is Board-certified in Internal Medicine, Pulmonary Disease, and Occupational Medicine, and is a B-reader. Employer's Exhibit 5.

[8]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) in the new regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the new regulations.

[9]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

not contain any evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 7. Therefore, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii).

Regarding the newly submitted medical opinions, the administrative law judge noted that Dr. Broudy found that claimant has no significant respiratory impairment and concluded that claimant retains the respiratory capacity to perform his usual coal mine employment, Director's Exhibit 108; Employer's Exhibits 2, 6. Decision and Order at 12. The administrative law judge also noted that Dr. Rosenberg stated that claimant has no significant respiratory impairment and no disability and opined that claimant retains the respiratory capacity to perform his usual coal mine employment, Employer's Exhibit 5. Decision and Order at 12. Because the "newly submitted evidence does not contain a well-reasoned and well-documented opinion stating that Claimant cannot perform his usual coal mine employment," the administrative law judge found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 12-13. In accordance with *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the record reflects that Drs. Broudy and Rosenberg had knowledge of claimant's usual coal mine employment.[10] Specifically, Dr. Broudy and Dr. Rosenberg both referenced claimant's usual coal mine work as a roof bolter in their reports. Director's Exhibit 108; Employer's Exhibit 5. Accordingly, we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability and a change in conditions by the newly submitted medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2)(iv); *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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Additionally, considering the earlier medical evidence, the administrative law judge found "no mistake in determination of any fact in the prior Decision and Order denying benefits." Decision and Order at 8. We affirm the administrative law judge's determination that claimant did not establish a mistake in a determination of fact pursuant to Section 725.310 (2000) as this finding is supported by substantial evidence. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

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[10]Claimant testified that when he was last employed with Flatwoods Coal Company he worked as a roof bolt operator. 2002 Hearing Transcript at 10-11, 24. The administrative law judge noted that while claimant "began his coal mine employment shooting coal,… he spent the remainder of his coal mine employment as a roof bolter." Decision and Order at 3.

Based on the administrative law judge's findings, we affirm his denial of claimant's request for modification pursuant to Section 725.310 (2000) inasmuch as the administrative law judge rationally determined that claimant failed to establish a change in conditions or a mistake in a determination of fact.[11] *See* discussion, *supra*; *Worrell*, 27 F.3d 227, 18 BLR 2-290; *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Accordingly, the administrative law judge's Decision and Order denying claimant's request for modification and claim for benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[11]We reject employer's assertion that "[t]he successive requests for modification of an ALJ's decisions are a denial of employer's constitutional right to finality," because it is without merit. Employer's Brief at 11 n.3; *see Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999); *cf. King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001)(modification proceedings are available to employers).