BRB No. 99-0231 BLA

MATT G. SLONE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENDURO COAL COMPANY	)	DATE ISSUED:
IKE COAL COMPANY/BRANSON	)	
COLEMAN ENERGY,	)	
LEE WEST COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS	)	
SELF-INSURANCE FUND	)	
	)	
Employers/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.

Matt G. Slone, Shelbiana, Kentucky, *pro se*.

John T. Chafin (Kazee, Kinner & Chafin), Prestonsburg, Kentucky, for employers (hereinafter, “employer”), Enduro Coal Company and Branson Coleman Energy.

Richard Davis (Arter & Hadden, LLP), Washington, D.C., for Lee West Coal Company.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1962) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on a request for modification of a duplicate 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).[1] The administrative law judge credited claimant with at least nineteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.203(b). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309, and thus, he found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits. Claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. Lee West Coal Company also responds, urging affirmance of the administrative law judge's Decision and Order and contending that it should be dismissed as a potentially responsible operator. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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[1]Claimant filed his initial claim on August 31, 1987. Director's Exhibit 29. This claim was denied by a Department of Labor (DOL) claims examiner on February 10, 1988 because claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed another claim on July 6, 1993. Director's Exhibit 1. On June 9, 1995, Administrative Law Judge Robert L. Hillyard issued a Decision and Order denying benefits because claimant failed to establish a material change in conditions, Director's Exhibit 32, which the Board affirmed, *Slone v. Enduro Coal Co.*, BRB No. 95-1695 BLA (Aug. 29, 1995)(unpub.). On June 20, 1996, claimant requested an appeal of the Board's decision, Director's Exhibit 38, which the DOL construed as a request for modification, Director's Exhibit 44.

[2]Inasmuch as the administrative law judge's length of coal mine employment finding, which is not adverse to this claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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, 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).

After considering the newly submitted evidence on modification, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. Claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 29. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

In finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence of record which consists of eight interpretations of four x-rays.[3] The administrative law judge correctly stated that "[o]nly one of the eight new x-ray interpretations was read as positive for

[3]The administrative law judge stated that "[t]here are five new chest x-rays included in the record dated October 6, 1995, March 17, 1996, January 7, 1997, September 16, 1997, and December 30, 1997." Decision and Order at 11. However, the record does not contain an x-ray dated December 30, 1997. To the contrary, the record reveals that Dr. Scott wrote a letter dated December 30, 1997 which indicates that he read an x-ray dated March 17, 1996 as negative for pneumoconiosis. Lee West Coal Company Exhibit 5. Nonetheless, inasmuch as the administrative law judge considered Dr. Scott's negative x-ray reading, which supports the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis, in his weighing of the newly submitted x-ray evidence at 20 C.F.R. §718.202(a)(1), any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

pneumoconiosis." Decision and Order at 11. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge stated, "Dr. Sundaram, the only physician who does not have superior qualifications for interpreting chest x-rays, found the [March 17, 1996] x-ray positive for pneumoconiosis." Decision and Order at 11. The administrative law judge also stated that "the numerous readings of no pneumoconiosis by several 'B' readers and Board-certified radiologists substantially outweighs Dr. Sundaram's reading." *Id*. Thus, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Next, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since there is no biopsy evidence of record. In addition, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Further, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the newly submitted opinions of Drs. Broudy, Casey, Dahhan, Fannin, Fino, Hippensteel, Smith and Sundaram.[4] The

[4]The administrative law judge did not consider the newly submitted opinions of Drs. Fannin and Smith with regard to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Dr. Fannin diagnosed asthmatic bronchitis, Director's Exhibits 39, 59, and Dr. Smith diagnosed labyrinthitis, Lee West Coal Company's Exhibit 1. Inasmuch as neither Dr. Fannin nor Dr. Smith specifically opined that claimant suffers from a pulmonary condition related to coal dust exposure, any error

administrative law judge stated, "I give less weight to the opinions of Drs. Dahhan, Hippensteel, and Fino because they did not personally examine Claimant." Decision and Order at 13. Further, after noting that "[t]he analysis boils down to the opinions of Drs. Casey, Sundaram, and Broudy," the administrative law judge found that "Drs. Casey and Broudy did not make findings consistent with legal or medical pneumoconiosis,[5] while Dr. Sundaram make[s] a finding of medical pneumoconiosis."[6] *Id*. Inasmuch as the administrative law judge rationally found that "Claimant has not established by a preponderance of the newly submitted medical evidence that he suffers from pneumoconiosis," *id*., we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[7] *See Ondecko, supra*. Although the administrative law judge's sole

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by the administrative law judge in this regard is harmless. *See Larioni, supra*.

[5]Dr. Broudy opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibit 53; Lee Coal Company's Exhibits 3, 6. Dr. Casey diagnosed chronic obstructive lung disease exacerbation with acute asthmatic bronchitis. Director's Exhibits 39, 59; Lee Coal Company's Exhibit 1.

[6]Dr. Sundaram opined that claimant suffers from coal workers' pneumoconiosis. Director's Exhibit 62. Although the administrative law judge did not indicate that he considered whether the newly submitted opinion of Dr. Sundaram is entitled to greater weight than the contrary newly submitted opinions because of Dr. Sundaram's status as claimant's treating physician, the administrative law judge, based on claimant's testimony at the hearing, stated that "Claimant visits his family doctor, Dr. King, about once every six months...[and] sees Dr. Sundaram at the Black Lung Association about once every month." Decision and Order at 4; Hearing Transcript at 20. However, Dr. Sundaram's report indicates that Dr. Sundaram was claimant's evaluating physician rather than claimant's treating physician. Director's Exhibit 62. Thus, since the record does not indicate that Dr. Sundaram is claimant's treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), any error by the administrative law judge in this regard is harmless, *see Larioni, supra*.

[7]Inasmuch as the administrative law judge rationally found that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b).

basis for discrediting the opinions of Drs. Dahhan, Fino and Hippensteel is the fact that they did not examine claimant, *see Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984), any error by the administrative law judge in this regard is harmless since Drs. Dahhan, Fino and Hippensteel opined that claimant does not suffer from coal workers' pneumoconiosis, Director's Exhibits 53, 56; Employer's Exhibits 1-3; Lee Coal Company's Exhibits 3, 6; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. Since none of the newly submitted pulmonary function study evidence or arterial blood gas study evidence of record yielded qualifying[8] values, Director's Exhibits 22, 53, 59; Lee Coal Company's Exhibits 1, 6, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Further, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record does not contain evidence of cor pulmonale with right sided congestive heart failure.

We will next address the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Whereas Drs. Broudy, Dahhan, Fino and Hippensteel opined that claimant does not suffer from a disabling respiratory impairment, Director's Exhibits 53, 56; Employer's Exhibits 1-3; Lee Coal Company's Exhibits 3, 6, Dr. Sundaram opined that claimant suffers from a disabling respiratory impairment,[9] Director's Exhibit 62. Drs. Casey, Fannin and Smith did not render opinions with regard to the issue of total disability. Director's Exhibits 39, 59; Lee Coal Company's Exhibit 1. Inasmuch as the administrative law judge rationally found that the opinions of Drs. Broudy, Dahhan, Fino and Hippensteel outweigh the contrary opinion of Dr. Sundaram, Decision and Order at 14, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Ondecko, supra*.

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[8]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 "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[9]Dr. Sundaram responded "No" to the question, "Is the miner physically able, from a pulmonary standpoint, to do his usual coal mine employment?" Director's Exhibit 62.

Since the newly submitted evidence on modification is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions in claimant's duplicate claim at 20 C.F.R. §725.310. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Finally, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The administrative law judge's finding that "[t]here is no mistake in a determination of fact" is based on his review of all of the evidence of record. Decision and Order at 14.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge