BRB No. 99-0412 BLA

WALTER NEWBERRY KIDD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Walter Newberry Kidd, Pikeville, Kentucky, *pro se*.[1]

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

[1] Susie Davis, a benefits counselor with the Kentucky Black Lung Association of Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant,[2] without the assistance of counsel, appeals the Decision and Order Denying Modification (93-BLA-1227) of Administrative Law Judge Richard E. Huddleston 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). In the initial Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the miner with thirteen years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 78.

Claimant timely appealed the administrative law judge's decision denying benefits with the Board. Director's Exhibit 79. While his appeal was pending, however, claimant requested modification pursuant to 20 C.F.R. §725.310 and filed additional evidence on January 17, 1995. Director's Exhibits 84, 90. Accordingly, the Board remanded the case on May 26, 1995 to the district director for further consideration. *Kidd v. National Mines Corp.,* BRB No. 94-4065 BLA (May 26, 1995)(unpub. Order); Director's Exhibit 93. The district director reviewed claimant's petition for modification and the supporting evidence and, on August 27, 1995, denied modification. Director's Exhibit 97. Consequently, on March 26, 1996, claimant filed a second petition for modification accompanied by new evidence with the district director. Director's Exhibit 100. On August 16, 1996, the district director reviewed the evidence of record and determined that claimant again failed to establish modification. Director's Exhibit 107. Although claimant subsequently requested a formal hearing on August 27, 1996, eight months later he requested that a decision be made based on the evidence of record. Claimant's Exhibit 1.

[2] Claimant is Walter Newberry Kidd, who filed his application for benefits on November 6, 1990. Director's Exhibit 1.

On modification,[3] the administrative law judge again credited claimant with thirteen years of qualifying coal mine employment and found that claimant established pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(b), but failed to establish total disability pursuant to Section 718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits on modification.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this appeal, initially arguing that the Board is without jurisdiction to consider this appeal because it is based on claimant's second motion for modification. Alternatively, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not

[3] The administrative law judge acknowledged that claimant filed a petition for modification, but did not determine whether claimant demonstrated either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310, and instead, considered the evidence of record on the merits. The Board has held that an administrative law judge is not required to render a preliminary determination regarding whether claimant has established modification under Section 725.310 inasmuch as this determination is subsumed in the administrative law judge's decision on the merits. *See Motichak v. Director, OWCP*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1993); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

participate in this appeal.[4]

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 (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 applicable 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).

[4] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a)(4) and 718.203(b) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at p.8 [unpaginated].

We initially address employer's contention with respect to the issue of jurisdiction. Employer argues that "a motion for modification is a motion for reconsideration," and that the holding in *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997), deprives the Board of jurisdiction to consider the instant appeal. Employer's Response Brief at 13-14. We disagree. A motion for reconsideration and a petition for modification are two entirely different and distinct pleadings that a party may file to obtain further review of the evidence or an adverse decision. *See* 20 C.F.R. §§725.310, 802.206(b)(2). Furthermore, the holding in *Abner* is not on point with the case at bar. The holding in *Abner* involves whether the filing of successive motions for reconsideration tolls the time limitation on the filing of an appeal with the Sixth Circuit Court of Appeals.[5] In the instant case, claimant has filed two petitions for modification in accordance with Section 725.310. Thus, this case involves neither successive motions for reconsideration, nor an untimely appeal filed by claimant depriving the Board of jurisdiction over the instant appeal. We, therefore, reject employer's jurisdiction argument.

[5] In *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, held that the employer's petition for review which it had filed with the court was untimely inasmuch as the employer had filed it more than sixty days after the Board's order summarily denying the employer's first motion for reconsideration. Rather than filing a timely appeal with the court after the Board denied its first motion for reconsideration, the employer filed a second motion for reconsideration with the Board which was summarily denied. Subsequently, the employer appealed the Board's denial of its second motion for reconsideration and the Sixth Circuit dismissed the appeal, holding that it was untimely. *See* 33 U.S.C. §921(c); *Abner*, *supra*.

Turning to the merits of the appeal, we affirm the administrative law judge's finding that claimant failed to demonstrate total disability pursuant to Section 718.204(c)(1)-(3) inasmuch as this determination is rational and supported by substantial evidence. In finding that total disability was not established under Section 718.204(c)(1), the administrative law judge correctly determined that four of the pulmonary function studies were invalidated by the administering physicians, Director's Exhibits 9-11, 41, 43, 45, 50, and the remaining five pulmonary function studies produced non-qualifying values,[6] Director's Exhibits 50, 66, 73, 104, 111; Claimant's Exhibit 2. We, therefore, affirm the administrative law judge's determination that total disability was not demonstrated pursuant to Section 718.204(c)(1). *See* 20 C.F.R. §718.204(c)(1); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at p.9 [unpaginated].

Likewise, the administrative law judge properly determined that all six of the arterial blood gas studies of record yielded non-qualifying values pursuant to Section 718.204(c)(2). Hence, we affirm the administrative law judge's finding that total

[6] 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 yields values that exceed those values. 20 C.F.R. §718.204(c)(1), (2).

In stating that the pulmonary function studies were invalidated by the administering physicians, the administrative law judge gave the date of one test as April 21, 1991 when it is actually dated April 24, 1991. Decision and Order at p.9 [unpaginated]; Director's Exhibit 50. This error is harmless, however, inasmuch as this test produced non-qualifying results and did not affect the administrative law judge's weighing of the pulmonary function study evidence. *See Larioni v. Director, OWCP*, 6 BLR 1276 (1984).

disability is not demonstrated under Section 718.204(c)(2). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at p.9-10 [unpaginated]; Director's Exhibits 15, 16, 41, 43, 45, 50, 104, 111; Claimant's Exhibit 2. Similarly, because the administrative law judge properly found that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, we affirm his determination that total disability cannot be demonstrated pursuant to Section 718.204(c)(3). 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989); Decision and Order at p.10 [unpaginated].

Relevant to Section 718.204(c)(4), the record contains the medical opinions of eleven physicians. After conducting pulmonary examinations, Drs. Baker, Sundaram, and Guberman each opined that claimant is not physically able, from a pulmonary standpoint, to do his usual coal mine work. Director's Exhibits 50, 66, 111; Claimant's Exhibit 2. However, the pulmonary evaluations of Drs. Dahhan, Broudy, Anderson, and Vuskovich revealed that claimant has the respiratory capacity to return to his usual coal mine work. Director's Exhibits 13, 14, 41, 45, 46, 50, 70, 73, 104. Drs. Branscomb, Lane, and Fino reviewed the medical records and opined that claimant has ample pulmonary functional reserve to engage in coal mine employment. Director's Exhibits 46, 47, 69, 71; Employer's Exhibit 2. Dr. Mettu did not render an opinion on respiratory disability. Director's Exhibit 12. The administrative law judge, within a proper exercise of his discretion, accorded less weight to the opinions of Drs. Baker, Sundaram, and Guberman because their opinions were unsupported by the non-qualifying pulmonary function studies and blood gas studies associated with their examinations. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). Furthermore, the administrative law judge permissibly found the opinions of Drs. Baker, Sundaram, and Guberman inadequately documented based on the physicians' failure to provide an explanation or rationale for their total disability opinions in light of the underlying non-qualifying objective evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at p.10 [unpaginated]. The administrative law judge rationally found the contrary opinions of Drs. Fino, Dahhan, Broudy, Anderson, Vuskovich, Lane, and Branscomb to be better supported by the objective evidence of record, and therefore, entitled to greater weight. *See Trumbo*, *supra*; *King*, *supra*. We affirm the administrative law judge's finding that claimant failed to demonstrate total disability pursuant to Section 718.204(c)(4) inasmuch as the administrative law judge permissibly accorded determinative weight to the opinions of Drs. Fino, Dahhan, Broudy, Anderson, Vuskovich, Lane, and Branscomb that claimant was not totally disabled, because these physicians' opinions were well documented and consistent with the non-qualifying objective test results. *See Fields v. Island Creek*

Coal Co., 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Inasmuch as claimant has failed to satisfy his burden of establishing the existence of total respiratory disability pursuant to Section 718.204(c), a requisite element of entitlement pursuant to Part 718, we affirm the Decision and Order of the administrative law judge denying benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Accordingly, the Decision and Order Denying Modification of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge