BRB No. 99-0408 BLA

THURMAN VANOVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLATWOODS COAL COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
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 On Modification - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Gregory S. Feder (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order On Modification - Denial of Benefits (97-BLA-1783) of Administrative Law Judge Robert L. Hillyard denying claimant's request for modification and 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). The administrative law judge noted that the June 2, 1995 prior denial issued by Administrative Law Judge Ainsworth H. Brown, Director's Exhibit 58, was affirmed by the Board based on claimant's failure to establish the existence of pneumoconiosis, *see Vanover v. Flatwoods Coal Co.,* BRB No. 95-1720 BLA (May 15, 1996)(unpub.). On modification, the administrative law judge weighed the newly submitted evidence and considered it in conjunction with the import of the old evidence. He found that the evidence failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. Specifically, the administrative law judge determined that the evidence failed to establish the existence of pneumoconiosis or total disability under 20 C.F.R. Part 718. 20 C.F.R. §§718.202(a), 718.204(c). The administrative law judge also found that the prior denial contains no mistake in a determination of fact under Section 725.310. Accordingly, the administrative law judge denied claimant's request for modification and the claim.

Employer responds to claimant's *pro* se appeal, and urges the Board to affirm the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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, 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will result in the denial of benefits.

We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, and thus affirm his denial of the claim on its merits. Considering the newly submitted x-ray evidence with regard to the existence of pneumoconiosis under Part 718, the administrative law judge properly accorded greater weight to the numerous negative readings rendered by the highly

qualified physicians of record. *Staton v. Norfolk & Western Ry Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). He also correctly noted that the x-ray evidence reviewed by Administrative Law Judge Brown in the prior denial was overwhelmingly negative, and that the negative interpretation by Dr. Barrett, a B reader and Board-certified radiologist, of the November 16, 1993 x-ray supports that finding. Decision and Order at 11. Inasmuch as substantial evidence supports the administrative law judge's determination that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding. 20 C.F.R. §718.202(a)(1).

The administrative law judge also correctly noted that the record contains no autopsy or biopsy evidence. 20 C.F.R. §718.202(a)(2). Further, since there is no evidence of complicated pneumoconiosis and the instant claim is a living miner's claim filed after January 1, 1982, the administrative law judge properly determined that claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) because none of the presumptions referred to therein is applicable, *see* 20 C.F.R. §§718.304, 718.305, 718.306. The administrative law judge also weighed the newly submitted medical opinions. Within his discretion, he found Dr. Broudy's opinion that claimant does not have pneumoconiosis to be the most documented and reasoned, and, therefore, entitled to more weight than the contrary opinions of Drs. Guberman and Sundaram. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*). With regard to these latter opinions the administrative law judge found,

> [Dr. Guberman's] opinion is based partially upon a positive x-ray interpretation. I have found the x-ray evidence negative for the presence of pneumoconiosis. Moreover, his examination of the Claimant was normal and the pulmonary function and arterial blood gas studies administered by Dr. Guberman resulted in nonqualifying values. Dr. Sundaram, in a Security Prescription Form, stated, "[t]he above veteran [the Claimant] has COPD/CWP and getting medicated for the above." He did not provide any rationale for his statement that the Claimant has coal workers' pneumoconiosis. I find his statement cursory and unsupported by the objective medical evidence of record.

Decision and Order at 10. The administrative law judge could properly accord less weight to Dr. Guberman's opinion based on his determination that it was inconsistent with a normal physical examination, *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985), and with the objective evidence of record, *Fuller v.*

Gibraltar Coal Co., 6 BLR 1-1291 (1984). The administrative law judge also acted within the purview of his discretion in according less weight to Dr. Sundaram's opinion that claimant has pneumoconiosis because the physician failed to provide any supporting rationale. *Clark, supra.* The administrative law judge further indicated that the medical opinions of Drs. Mettu, Broudy, Anderson, Lane and Fino, reviewed by Administrative Law Judge Brown, were "overwhelmingly in favor of a finding of no pneumoconiosis." Decision and Order at 11. The record shows that Drs. Mettu, Broudy, and Fino found that claimant did not have pneumoconiosis, Director's Exhibits 14, 15, 79, Employer's Exhibits 1, 11, while Drs. Lane and Anderson ultimately reached the same conclusion, Employer's Exhibits 10, 12, *compare* Director's Exhibit 42. Substantial evidence thus supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the medical opinion evidence. 20 C.F.R. §718.202(a)(4); *Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 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). Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis under Part 718. 20 C.F.R. §718.202(a).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Part 718, an essential element of entitlement, we affirm the administrative law judge's denial of benefits as a finding of entitlement is precluded. *See Trent, supra; Perry, supra*.[1]

[1]Given our affirmance of the administrative law judge's denial of benefits on the merits of the claim, we need not address the administrative law judge's findings that claimant also failed to establish total disability under 20 C.F.R. Part 718 and modification under 20 C.F.R. §725.310. Any error therein cannot affect the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order On Modification - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge