BRB Nos. 05-1025 BLA
and 05-1025 BLA-A

JARRELL D. COCHRAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 07/25/2006
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

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

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Denial of Benefits (04-BLA-0109) of Administrative Law Judge Michael P. Lesniak 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 application for benefits on February 23, 1995. Director's Exhibit 1. Administrative Law Judge Gerald M. Tierney denied benefits based on a finding that claimant did not establish the existence of pneumoconiosis. Director's Exhibit 143. Upon review of claimant's appeal, the Board affirmed the denial of benefits. *Cochran v. Westmoreland Coal Co.*, BRB Nos. 02-0614 BLA, 02-0614 BLA-A (May 16, 2003)(unpub.); Director's Exhibit 156.

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 (2000) and submitted new chest x-ray readings positive for pneumoconiosis. Director's Exhibit 158. Employer responded with new, negative chest x-ray readings and with medical opinions stating that claimant does not have pneumoconiosis. Director's Exhibits 157, 160, 163, 164, 166; Employer's Exhibits 1-12.

The administrative law judge found that employer is the responsible operator, and he concluded that the medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and thus did not demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that the existence of pneumoconiosis was not established. Employer responds, urging affirmance of the denial of benefits, and has filed a cross-appeal challenging the administrative law judge's finding that employer is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), has declined to address claimant's appeal but responds to employer's cross-appeal, urging affirmance of the finding that employer is the responsible operator.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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).

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 entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

The administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a) (2000). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).[1]

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that there was no mistake in the prior determination that the originally submitted x-ray readings by the most highly qualified physicians were negative for the existence of pneumoconiosis. Reviewing the new x-rays submitted on modification, the administrative law judge noted that Drs. Aycoth and Cappiello, both of whom are Board-certified radiologists and B-readers, read claimant's May 23, 2003 x-ray as positive for pneumoconiosis. However, the administrative law judge also considered that their readings were countered by negative readings of the same x-ray from six Board-certified radiologists and B-readers, and from two B-readers. Finding the May 23, 2003 x-ray "equivocal as to the presence of pneumoconiosis," the administrative law judge noted further that claimant's July 21, 2003 x-ray received only negative readings by "highly qualified physicians." Decision and Order at 7. The administrative law judge therefore found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence.

Claimant contends that the administrative law judge merely relied on the number of negative readings to find that claimant did not establish the existence of pneumoconiosis. This contention lacks merit. Review of the administrative law judge's Decision and Order reflects that he properly weighed the x-ray readings in light of the physicians' radiological qualifications to find that a preponderance of the x-ray evidence did not establish the existence of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), which we therefore affirm.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found no mistake in the previous determination that the originally submitted medical opinion

[1] The record indicates that claimant's coal mine employment occurred in West Virginia. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evidence did not establish the existence of pneumoconiosis. On modification, medical opinions by Drs. Crisalli, Castle, Daniel, Fino, Jarboe, Spagnolo, and Zaldivar were submitted. All of these doctors concluded that claimant does not have pneumoconiosis but suffers from severe asthma that is unrelated to his coal mine employment. The administrative law judge found these opinions "supported by the objective medical evidence" and "well explained," and he noted that the record contained no "recent medical opinions that support the Claimant's position." Decision and Order at 7. The administrative law judge therefore found that claimant did not establish a change in conditions or mistake of fact with respect to the existence of pneumoconiosis via the medical opinion evidence.

Claimant contends that the administrative law judge erred in crediting the opinions of employer's medical experts because their opinions that claimant does not have pneumoconiosis are based solely on negative x-ray readings. We disagree. The record reflects that the physicians whose opinions were credited by the administrative law judge based their opinions not only on x-ray readings but also on medical, coal mine employment, and smoking histories, physical examination findings, pulmonary function studies, blood gas studies, and diffusion capacity tests. Director's Exhibits 23, 47, 61, 63, 64, 68, 113, 133, 166; Employer's Exhibits 1, 3-5, 11, 12. In weighing the medical opinions, the administrative law judge permissibly analyzed the physicians' reasoning and explanation, and considered the physicians' credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Because the administrative law judge properly weighed the medical opinions and substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).[2]

Claimant contends further that the administrative law judge erred in finding that the existence of pneumoconiosis was not established because he did not weigh the x-ray and medical opinion evidence together. We reject claimant's contention. The United States Court of Appeals for the Fourth Circuit has held that the different categories of medical evidence must be weighed together to determine whether a preponderance of the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000). In this case, however, the administrative law judge found that no individual category of evidence supported a finding of pneumoconiosis under any subsection of 20

[2] Consequently, we also reject as meritless claimant's contention that his claim was denied solely on the basis of a negative x-ray reading, in violation of 20 C.F.R. §718.202(b).

C.F.R. §718.202(a).[3] Therefore, there was no contrary evidence for him to weigh pursuant to 20 C.F.R. §718.202(a) under *Compton*.

Because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112. Therefore, we need not address employer's cross-appeal challenging its designation as the responsible operator.

[3] The administrative law judge correctly found that there was no biopsy or autopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that none of the presumptions by which the existence of pneumoconiosis may be established pursuant to 20 C.F.R. §718.202(a)(3) were applicable in this case.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge