BRB No. 05-0647 BLA

WILLIAM PARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/APOGEE COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 03/28/2006
ARCH COAL INCORPORATED	)	
	)	
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 - Denying Request for Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William Parker, Beckley, West Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order – Denying Request for Modification (04-BLA-0103) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a miner's 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).[2] Initially, the administrative law judge credited claimant with twenty-three years of coal mine employment pursuant to the parties' stipulation, 2004 Hearing Transcript at 9. Decision and Order at 7. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.* at 10-11. The administrative law judge, therefore, found that claimant failed to establish a change in conditions and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] *Id.* at 19. Accordingly, the administrative law judge denied benefits.

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[1]Claimant is William Parker, the miner, who filed his first claim for benefits on April 2, 1973 with the Social Security Administration. Director's Exhibit 1. Following transfer of this claim to the Department of Labor, the district director found claimant entitled to benefits in decisions issued on December 10, 1979 and September 20, 1982. *Id.* However, the district director further found that claimant was still employed and that in order to be entitled to benefits, claimant must terminate his employment within one year. *Id.* Claimant continued to work and, therefore, in an order dated December 12, 1983, the district director denied benefits pursuant to 20 C.F.R. §725.503A(b) (2000). *Id.* No further action was taken on this claim. Claimant's present claim for benefits, filed on March 25, 1999, was finally denied by the Board on November 20, 2001. Director's Exhibits 2, 30. On December 14, 2001, claimant requested modification, which the district director denied, and claimant requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibits 31, 39, 40.

[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. §725.310 in the amended regulations, these revisions only apply to claims filed after January 19, 2001.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case involves a request for modification on the denial of a duplicate claim. Administrative Law Judge Robert J. Lesnick denied claimant's second claim for benefits on November 3, 2000 because claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000) or the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Director's Exhibit 24. Claimant appealed, and the Board affirmed Judge Lesnick's denial on November 20, 2001 by holding that Judge Lesnick properly concluded that claimant did not establish total respiratory disability or the existence of complicated pneumoconiosis based on the evidence of record. Director's Exhibits 25, 30. Claimant, subsequently, filed a timely request for modification and submitted new evidence.

The relevant issue before the administrative law judge in this case is whether the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Lesnick's denial of claimant's 1999 duplicate claim) was sufficient to establish a change in conditions or a mistake in fact pursuant to 20 C.F.R. §725.310 (2000). *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *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). In order to establish a change in conditions, the newly submitted evidence must support a finding of total respiratory disability or the existence of complicated pneumoconiosis, which were the bases of Judge Lesnick's denial of claimant's duplicate claim.

Regarding total respiratory disability, the administrative law judge considered the new pulmonary function study and the new blood gas study in the record and properly found that claimant failed to demonstrate total respiratory disability pursuant to Section

718.204(b)(2)(i) and (b)(2)(ii) because neither of these tests yielded qualifying[4] values. Decision and Order at 10; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Moreover, the administrative law judge permissibly found that the new medical opinion of Dr. Crisalli could not demonstrate total respiratory disability because this physician found that claimant retains the pulmonary functional capacity to perform very heavy manual labor. Decision and Order at 10; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Therefore, we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability and a change in conditions pursuant to Section 718.204(b)(2)(i)-(b)(2)(ii), (b)(2)(iv).[5]

The administrative law judge next considered whether the new evidence establishes the existence of complicated pneumoconiosis to determine if claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. First, the administrative law judge considered the new x-ray evidence consisting of nine readings of two x-rays, taken on December 3, 2001 and September 13, 2004. Decision and Order at 10. The administrative law judge credited the seven x-ray interpretations rendered by those readers with dual qualifications over the two readings by physicians who were only B readers.[6] *Id.* The seven x-rays by dually qualified readers consisted of one interpretation

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

The regulations only provide table values for miners up to seventy-one years of age, and claimant was seventy-two at the time he performed the newly submitted pulmonary function study. Appendix B to 20 C.F.R. Part 718. However, the administrative law judge reasonably assumed that the values indicated on the new pulmonary function study would be non-qualifying, given that these values were non-qualifying under the table values indicated for a miner who is seventy-one, because qualifying values decrease with age.

[5]We deem harmless error the administrative law judge's failure to render a finding pursuant to 20 C.F.R. §718.204(b)(2)(iii). Because the new evidence does not contain any evidence of cor pulmonale with right-sided congestive heart failure, claimant cannot demonstrate total respiratory disability or a change in conditions at Section 718.204(b)(2)(iii). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6]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 established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R.

read as positive for the existence of complicated pneumoconiosis by Dr. Binns and six interpretations read as negative for the existence of complicated pneumoconiosis by Drs. Scott, Wheeler, and Scatarige.[7] After noting that he found Dr. Wheeler's deposition testimony criticizing Dr. Binns' finding of complicated pneumoconiosis by x-ray "to be compelling and persuasive," the administrative law judge concluded that "the more credible chest x-ray interpretations are negative for the existence of complicated pneumoconiosis." *Id.* Because the administrative law judge properly weighed the x-ray evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis or a change in conditions pursuant to Section 718.304(a). *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345-46 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Second, the administrative law judge properly found that claimant cannot establish the existence of complicated pneumoconiosis or a change in conditions pursuant to Section 718.304(b) because the record contains no biopsy evidence. Decision and Order at 10. The administrative law judge next considered the medical opinion evidence pursuant to Section 718.304(c). The administrative law judge properly found that the new medical opinion evidence consisting of Dr. Crisalli's testimony is insufficient to establish the existence of complicated pneumoconiosis because this physician found no evidence of complicated pneumoconiosis. Employer's Exhibit 5 at 27, 29. Accordingly, we affirm the administrative law judge's findings at Section 718.304(b) and (c) because his findings that claimant failed to establish the existence of complicated pneumoconiosis pursuant to these subsections are supported by substantial evidence. *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *see Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-248-49 (2003).

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§718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. 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).

[7]Although Drs. Wheeler, Scatarige, and Scott noted opacities greater than one centimeter in diameter on their x-ray interpretations, these physicians' readings are insufficient to establish the presence of complicated pneumoconiosis because they did not also find a large opacity classified in Category A, B, or C as required by 20 C.F.R. §718.304(a). 20 C.F.R. §718.304(a); *see Gollie v. Elkay Mining Co.*, 22 BLR 1-306 (2003).

In light of the foregoing, we affirm the administrative law judge's finding that claimant failed to establish the presence of complicated pneumoconiosis and a change in conditions pursuant to Section 718.304. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*).

Additionally, considering the entire evidentiary record, the administrative law judge found "that Judge Lesnick did not make a mistake in fact in rendering his previous decision." Decision and Order at 11. We affirm the administrative law judge's determination that claimant did not establish that a mistake in fact exists pursuant to Section 725.310 (2000), as this finding is supported by substantial evidence. *Jessee*, 5 F.3d at 724-25, 18 BLR at 2-28.

Based on the administrative law judge's findings, we affirm the denial of modification pursuant to Section 725.310(a) (2000) because the administrative law judge rationally determined that claimant failed to establish a change in conditions or a mistake in fact. *See* discussion, *supra*; *Jessee*, 5 F.3d at 724-25, 18 BLR at 2-28; *Nataloni*, 17 BLR at 1-84.

Accordingly, the administrative law judge's Decision and Order – Denying Request for Modification is affirmed.

SO ORDERED.

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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