

BRB No. 01-0206 BLA

CHARLES G. WISEMAN)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
RANGER FUEL CORPORATION)	DATE	ISSUED:
)		
Employer-Respondent)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order and Decision on Motion for Reconsideration of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Charles G. Wiseman, Whitesville, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order and Decision on Motion for Reconsideration (99-BLA-1294) of Administrative Law Judge Robert J. Lesnick denying benefits on a request for modification 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 20.5

¹ 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20

years of coal mine employment and found that his last coal mine employment as a foreman, required extensive walking, including walking over mountainous areas, to visit crews in all different areas of the mine and doing paperwork for one hour a day. Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge found it insufficient to establish the existence of pneumoconiosis or the presence of a totally disabling respiratory impairment. Thus, the administrative law judge found that claimant had not established a change in conditions or a mistake in a determination of fact sufficient to establish a basis for modification. Accordingly, benefits were denied. On reconsideration, the administrative law judge reaffirmed his findings that claimant had not established a change in conditions or a mistake in a determination of fact, and denied benefits.²

C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 6, 2001, the Board issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). In light of the District Court's decision, the Board by Order dated August 10, 2001 rescinded its Order of August 6, 2001.

² Claimant filed his claim on June 6, 1994. *See* Director's Exhibits 1, 26. Following a hearing on the merits, Administrative Law Judge Frederick D. Neusner denied benefits after finding the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4)(2000). *See* Director's Exhibit 45. Pursuant to claimant's appeal, the Board affirmed Judge Neusner's findings at 20 C.F.R. §718.202(a)(1)-(3)(2000) as unchallenged on appeal, but vacated Judge Neusner's finding at 20 C.F.R. §718.202(a)(4) (2000), and remanded this case for further consideration of the medical opinion evidence on the issue of the existence of pneumoconiosis. *Wiseman v. Ranger Fuel Corporation*, BRB No. 96-0786 BLA, June 30, 1997 (unpub.); Director's Exhibit 59. On remand, Judge Neusner weighed the medical opinion evidence of record, and again, found it insufficient to establish the existence of pneumoconiosis. Accordingly, benefits were denied. *See* Director's Exhibit 62. Pursuant to claimant's second appeal, the Board affirmed Judge Neusner's weighing of the medical opinion evidence and the denial of benefits. *Wiseman v.*

Ranger Fuel Corporation, BRB No. 98-0301 BLA, Nov. 18, 1998 (unpub.); Director's Exhibit 70. Subsequently, claimant filed a request for modification, the denial of which is now before us on appeal.

On appeal, claimant generally challenges the findings of the administrative law judge denying modification and entitlement to benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.³

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order denying benefits must be affirmed as it is rational, supported by substantial evidence and in accordance with law. The administrative law judge correctly concluded that the newly submitted x-ray evidence, which included two positive readings and twelve negative readings, was insufficient to establish the existence of pneumoconiosis. The administrative law judge noted that the two positive readings were by B-readers and that the negative readings included readings by six Board-certified Radiologists who were also B-readers. *See* Decision and Order at 4; Claimant's Exhibit 1; Employer's Exhibits 1-3, 5, 9-11. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly relied on the negative readings of the better qualified readers who were both Board-certified and B-readers. 20 C.F.R. §718.202(a)(1); *Adkins v.*

³ We affirm the administrative law judge's findings on claimant's last usual coal mine employment and the exertional requirements of that employment as supported by substantial evidence. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Director, OWCP, 958 F.3d 49, 16 BLR 2-61 (4th Cir. 1992); *see Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Employer's Exhibits 2, 3, 5, 10, 11. Furthermore, the administrative law judge did not err when he concluded, on reconsideration, that he did not improperly determine the significance of the x-ray interpretations by the various physicians, and reaffirmed his conclusion that the x-ray evidence was insufficient to support a finding of pneumoconiosis. *Perry, supra*. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and a basis for modification with the x-ray evidence as it is supported by substantial evidence. 20 C.F.R. §718.202(a)(1).

Likewise, the administrative law judge correctly found that the existence of pneumoconiosis and a basis for modification were not established at Sections 718.202(a)(2) and (3) because the record contained no biopsy evidence, 20 C.F.R. §718.202(a)(2), and claimant was not entitled to the presumptions contained at Sections 718.304, 718.305 and 718.306 as this living miner's claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306. We, therefore, affirm the administrative law judge's findings relevant to Sections 718.202(a)(2)-(3) as supported by substantial evidence.

Finally, relevant to Section 718.202(a)(4), the administrative law judge was correct when he found the medical opinions of Drs. Cohen and Koenig, which diagnosed the existence of pneumoconiosis as defined at 20 C.F.R. §718.201, thorough and well-documented, and the medical opinions of Drs. Zaldivar, Morgan, Dahhan, Castle, and Jarboe, which conclude that claimant did not have pneumoconiosis or a respiratory impairment caused by, substantially related to, or aggravated by his coal mine employment, well-reasoned. *See Carson v. Westmoreland Coal Co.*, 18 BLR 1-18 (1994), *modif. on recon.* 20 BLR 1-64 (1996); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also properly concluded that Drs. Cohen and Koenig were highly qualified pulmonary specialists and that Drs. Zaldivar, Morgan, Dahhan, Castle, and Jarboe were similarly qualified. *See Church, supra; Clark, supra*; Claimant's Exhibits 1, 2; Employer's Exhibits 4, 6, 7, 8, 13. In finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis, however, the administrative law judge permissibly accorded greater weight to Dr. Zaldivar's opinion because Dr. Zaldivar had had the opportunity to examine claimant on at least two occasions as well as to review the medical evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Thus, the administrative law judge rationally concluded that not only was Dr. Zaldivar's opinion well supported by his own review of the medical evidence, but it was also supported by his review of the reports of Drs. Morgan, Dahhan, Jarboe and Castle. *See Carson, supra; Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge acted within his discretion when he credited Dr. Morgan's analysis of the medical literature he authored and which the physicians in this case relied on, over the

analysis of this literature by Drs. Cohen and Koenig. *Carson, supra; Fields, supra*. In so doing, the administrative law judge reasonably credited Dr. Morgan's interpretation of the meaning of the study results discussed in the report he authored. *Id.* Finally, as we conclude that the administrative law judge provided proper reasons for his weighing of the medical opinion evidence, the administrative law judge did not err when, on reconsideration, he reaffirmed his rationale for crediting the reports of Drs. Zaldivar and Morgan over the reports of Drs. Cohen and Koenig. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by the medical opinion evidence and therefore a basis for modification. Because the administrative law judge considered all the evidence of record relevant to the existence of pneumoconiosis and found that it was insufficient to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider the administrative law judge's findings regarding total disability. *See Trent, supra; Perry, supra; see also Jessee v. Director, OWCP, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993)*.

Accordingly, the Decision and Order and Decision on Motion for Reconsideration of the administrative law judge denying benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge