

BRB No. 00-0111 BLA

JAMES EDWARD FARLEY)

Claimant-Petitioner)

v.)

CANADA COAL COMPANY,)
INCORPORATED)

and)

OLD REPUBLIC INSURANCE)
COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,))
UNITED STATES DEPARTMENT)
OF LABOR)

Party-in-Interest)

DATE ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

James Edward Farley, Catlettsburg, Kentucky, *pro se*.

Laura Metkoff Klaus (Arter & Hadden), Washington, D.C., 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 - Denial
of Benefits (98-BLA-0186) of Administrative Law Judge Robert L. Hillyard (the

administrative law judge) 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 August 15, 1995 prior denial issued by Administrative Law Judge Edith Barnett (Judge Barnett), Director's Exhibit 80, was affirmed by the Board based on claimant's failure to establish the existence of pneumoconiosis, *see Farley v. Hardin & Mapes Coal Corporation, et. al*, BRB No. 95-2101 BLA (Feb. 27, 1996)(unpub.). Director's Exhibit 88. Judge Barnett denied benefits based on claimant's failure to establish the existence of pneumoconiosis and total disability under 20 C.F.R. Part 718. 20 C.F.R. § §718.202(a), 718.204(c).

On modification, the administrative law judge weighed the evidence submitted subsequent to the prior denial, and considered it in conjunction with the old evidence. He found that the evidence failed to establish a change in conditions or mistake in a determination of fact 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 further denied the claim.

Employer responds to claimant's appeal, filed without the assistance of counsel, and urges that the Board should 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'Keefe 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. 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 only positive x-ray reading contained in the newly submitted evidence, Dr. Rubenstein's reading of the May 1, 1996 x-ray, was reread as negative by five equally qualified physicians. *Id.*; Director's Exhibits 91, 92, Employer's Exhibit 1. The administrative law judge also found that the x-ray evidence reviewed by Judge Barnett in the prior denial was overwhelmingly negative. Decision and Order at 10. 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 correctly noted that there is no autopsy evidence in the record. He also determined that Dr. Caffrey's findings on biopsy, namely "moderate amount of anthracotic pigment identified on three slides with birefringent spicules," as well as "fibrosing pleuritis," Director's Exhibit 114, did not equate to a finding of pneumoconiosis and thus, the biopsy evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). In this regard, the administrative law judge noted that the record contained no autopsy or biopsy evidence when the case was reviewed by Judge Barnett.

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 under 20 C.F.R. §718.202(a)(4). Within his discretion, he found that the opinions of Drs. Fino and Branscomb, whom he determined to be "highly qualified in their field," Decision and Order at 10, were entitled to substantial weight. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *see also Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Both Drs. Fino and Branscomb determined that claimant does not have pneumoconiosis and that claimant is able to perform his previous coal mine employment. Employer's Exhibits 2, 3. The administrative law judge further found that the opinions of Drs. Branscomb and Fino outweigh Dr. Guberman's contrary opinion diagnosing chronic obstructive pulmonary disease and chronic bronchitis related to claimant's coal mine employment, as well as a history of pneumoconiosis. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Moreover, the administrative law judge noted that the pulmonary function study underlying Dr. Guberman's report was non-qualifying,

Director's Exhibit 89, and also noted that the underlying May 1, 1996 x-ray had been reread as negative by five physicians holding equal qualifications to Dr. Rubenstein, who read the x-ray as positive. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 91, 92, Employer's Exhibit 1. In this regard, the administrative law judge referenced the fact that he found the x-ray evidence to be overwhelmingly negative for pneumoconiosis. *Id.*; Decision and Order at 10-11.

Further, the administrative law judge noted, with regard to the medical opinions considered by Judge Barrett in the prior denial, that only Dr. Sundaram had diagnosed pneumoconiosis, Director's Exhibit 42, and that the Board had affirmed Judge Barnett's determination that the physician failed to explain adequately his conclusions. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Board's Decision and Order at 3. 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 on modification. 20 C.F.R. §718.202(a).

The administrative law judge next properly determined that the evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c). The administrative law judge correctly noted that each of the four newly submitted pulmonary function studies, as well as the sole newly submitted blood gas study, produced non-qualifying values, and thus, total disability was not established at 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibit 89; Claimant's Exhibit 1; Employer's Exhibit 2. The administrative law judge noted that likewise, all of the pulmonary function studies and blood gas studies considered by Judge Barnett resulted in non-qualifying values. Decision and Order at 13; Director's Exhibits 11, 12, 42, 44, 53.

Further, there is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure and thus, claimant cannot establish total disability under 20 C.F.R. §718.204(c)(3).

Considering the newly submitted medical opinions pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge noted Dr. Fino's finding of no respiratory impairment or disability, Employer's Exhibits 2, 4 as well as Dr. Branscomb's opinion that, from a pulmonary standpoint, claimant is capable of continuing his previous coal mine employment. Employer's Exhibit 3. The administrative law judge also properly found that

Dr. Guberman's opinion that claimant is disabled from performing his former coal mine employment since "he has significant chronic obstructive pulmonary disease and further exposure to coal dust would worsen his condition," Director's Exhibit 89, does not equate to a finding that claimant has a totally disabling respiratory or pulmonary impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); Decision and Order at 12. The administrative law judge further referred to the fact that the pulmonary function study underlying Dr. Guberman's opinion resulted in non-qualifying values. *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11, 12; Director's Exhibit 89.

With regard to the medical opinions considered by Judge Barnett, the administrative law judge noted, "The other credible evidence fails to show that the Claimant is disabled from his regular coal mine employment due to a respiratory or pulmonary impairment." Decision and Order at 13.¹

Inasmuch as the administrative law judge properly found that the evidence fails to establish that claimant is totally disabled due to a respiratory or pulmonary impairment under Section 718.204(c), we affirm the administrative law judge's finding.

Based on the foregoing, we hold that substantial evidence supports the administrative law judge's finding that claimant failed to establish, on modification pursuant to Section 725.310, a change in conditions or a mistake in a determination of fact contained in the prior denial. *Worrell, supra*. We, therefore, affirm the administrative law judge's denial of benefits in the instant case.

¹Judge Barnett found that only Dr. Sundaram concluded that claimant was totally disabled. Judge Barnett determined that Dr. Sundaram failed to provide a reasoned opinion inasmuch as he failed to explain his diagnosis in light of the non-qualifying objective evidence underlying his report. Judge Barnett's Decision and Order Denying Benefits, Director's Exhibit 80 at 7; Director's Exhibit 42.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge