BRB No. 96-0958 BLA

PALMER POWERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
ADAMS COAL ENTERPRISES, INCORPORATED	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Palmer Powers, Auxier, Kentucky, *pro se.*

Richard A. Dean (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (95-BLA-0901) of Administrative Law Judge Paul H. Teitler denying 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). This case is before the Board for the second time.

Initially, Administrative Law Judge Robert L. Hillyard found that the evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to

[1] Claimant is Palmer Powers, the miner, who filed this application for benefits on November 13, 1986. Director's Exhibit 1.

20 C.F.R. §§718.202(a), 718.204(c) and denied benefits. Pursuant to claimant's appeal, the Board affirmed as supported by substantial evidence the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and, accordingly, affirmed the denial of benefits. *Powers v. Adams Coal Enterprises, Inc.*, BRB No. 93-0942 BLA (Nov. 12, 1993)(unpub.). Within one year of the Board's decision, claimant filed a request for modification with the district director, which was denied. Director's Exhibits 71, 72. Claimant requested a hearing and the case was assigned to Judge Teitler, who found that the evidence failed to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this 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. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In addition, Section 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority, if not the duty, to reconsider all the evidence to determine whether there is a mistake in a determination of fact or a change in conditions. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Pursuant to Section 725.310, the administrative law judge must independently assess the new evidence in conjunction with the old evidence to determine if the weight of the new evidence is sufficient to establish the element or elements that earlier defeated entitlement. *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

Pursuant to Section 718.202(a)(1), the administrative law judge relied on the readers' credentials and permissibly concluded that the four newly-submitted x-ray

readings were insufficient to establish the existence of pneumoconiosis, or a change in conditions.[2] Director's Exhibits 73, 74; Employer's Exhibit 1; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Substantial evidence supports his additional finding that these four readings, when considered in conjunction with the x-ray readings set forth in Judge Hillyard's Decision and Order[3] "confirm the fact that the x-ray evidence, as a whole, is predominantly negative for the existence of pneumoconiosis." Decision and Order at 5. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 6; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

[2] The administrative law judge permissibly credited Dr. Barrett's negative reading of the May 11, 1990 x-ray based on his superior radiological credentials, and correctly noted that the only additional x-ray submitted on modification was read negative for the existence of pneumoconiosis by Dr. Broudy, a B-reader. Decision and Order at 5; Director's Exhibit 74; Employer's Exhibit 1; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

[3] In the first decision, there were sixteen negative readings, thirteen positive readings, and one unreadable classification of fifteen x-rays. The majority of the negative readings were by Board-certified radiologists and B-readers. Judge Hillyard found the weight of the x-ray evidence to be negative in light of the readers' qualifications. [1993] Decision and Order at 13-14; *see Woodward*, *supra*.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly-submitted evidence relevant to the existence of pneumoconiosis. Dr. Hieronymus completed an affidavit stating that claimant's total disability is "caused by the totality of his work history." Director's Exhibit 71. Dr. Jurich was deposed regarding claimant's arm and shoulder problems. Director's Exhibit 71. During this testimony, Dr. Jurich stated that he had diagnosed pneumoconiosis in the past. Director's Exhibit 71, Jurich Deposition at 18. Dr. Broudy examined claimant and administered objective testing on August 14, 1995. Employer's Exhibit 1. Based on his findings of clear lungs, negative chest x-ray, mild pulmonary obstruction and mild resting arterial hypoxemia, Dr. Broudy diagnosed mild obstructive airways disease due to forty years of cigarette smoking and concluded that claimant does not have pneumoconiosis. *Id.* The administrative law judge permissibly accorded greatest weight to the examination report of Dr. Broudy on the grounds that it was well-supported by the objective evidence, *see Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985), whereas he found Dr. Jurich's testimony to be undocumented and unreasoned, and concluded that Dr. Hieronymus' affidavit was not based on any new information. Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge relied on the conclusions as set forth in Judge Hillyard's decision[4] to permissibly conclude that the better-reasoned and documented medical opinions failed to establish the existence of pneumoconiosis. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c)(1)-(3), the administrative law judge correctly noted that the new pulmonary function and blood gas studies were non-qualifying[5] and that there was no evidence of cor pulmonale with right-sided congestive heart failure. At Section 718.204(c)(4), he permissibly credited as well-reasoned and documented the opinion of Dr. Broudy that claimant retained the respiratory capacity to perform his previous coal mine employment as a dozer operator. *See Clark, supra*; *Fields, supra*. Substantial evidence in the record as a whole supports his additional finding that the medical evidence reviewed by Judge Hillyard failed to establish total respiratory disability and therefore, "the evidence continues to fail to establish total disability." Decision and Order at 8. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c), and his finding that the new evidence, considered in conjunction with the old evidence, fails to establish a change in conditions pursuant to Section 725.310.

In addition to considering whether the evidence established a change in conditions,

[4] Judge Hillyard had permissibly found that the opinions of Drs. Vuskovich, Cooper, Broudy, Myers, and Lane were best supported by the underlying documentation and other clinical evidence of record. [1993] Decision and Order at 14-15.

[5] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

the administrative law judge found that, “after a thorough review of the medical evidence and the prior decisions . . . I do not find that a mistake in fact has been made” pursuant to Section 725.310. Decision and Order at 4. Inasmuch as the administrative law judge considered both the old and new evidence, *see Worrell, supra*; *Nataloni, supra*, and substantial evidence supports his conclusion, we affirm his finding pursuant to Section 725.310.

Accordingly, the administrative law judge’s Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge