BRB No. 00-0646 BLA

EARL S. HESS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS SERVICES CORPORATION	)	
	)	
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 of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Earl S. Hess, Honaker, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abington, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (99-

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, review of the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19

BLA-1031) of Administrative Law Judge Daniel A. Sarno, Jr. (the administrative law judge) denying the third request for modification in 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).[2] This case is on appeal to the Board for a second time.[3] The administrative law judge found that claimant's prior request for modification was denied by Administrative Law Judge Ainsworth H. Brown in a Decision and Order dated July 14, 1998 on the grounds that claimant failed to establish a change in conditions. *See* 20 C.F.R. §725.310 (2000); Decision and Order at 2; Director's Exhibit 74. The administrative law judge concluded that claimant's current application for benefits, which was filed on January 20, 1999, was a request for modification. The administrative law judge found the newly submitted evidence insufficient to establish a change in conditions and that there was no mistake in a determination of fact. *See* 20 C.F.R. §725.310 (2000). Accordingly, modification was denied. On appeal, claimant generally challenges the findings of the administrative law judge at 20 C.F.R. §725.310 (2000). 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.

BLR 1-88 (1995)(Order).

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine 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 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The Board previously affirmed the finding of Administrative Law Judge Quentin P. McColgin that the evidence before him was insufficient to establish the existence of pneumoconiosis. Director's Exhibits 47, 40.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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 claim, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the responses of the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of 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. *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*).

In determining whether claimant established a change in conditions or a mistake in a determination of fact at Section 725.310 (2000), the administrative law judge properly conducted an independent assessment of the newly submitted evidence in conjunction with the previous evidence and the prior finding that claimant failed to show the existence of pneumoconiosis under the Act. *See* 20 C.F.R. §725.310 (2000); *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); Decision and Order at 4-5. Claimant bears the burden of proving that a change in condition has occurred since the previous denial of modification by Judge Brown. *Id*. In the instant case, claimant failed to demonstrate the existence of pneumoconiosis in his prior modification request. *See* Director's Exhibit 74. Thus, pursuant to Section 725.310 (2000), claimant must establish the existence of pneumoconiosis to show a change in conditions or that a mistake in a determination of fact had been made in the prior decision. 20 C.F.R. §725.310 (2000).

In the instant case, the administrative law judge properly reviewed the medical evidence submitted after July 14, 1998, the date of Judge Brown's denial of claimant's second request for modification. *See* Decision and Order at 2-4; *Nataloni*, *supra*; *Kovac*, *supra*. In finding the newly submitted evidence insufficient to meet claimant's burden of proving the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge identified fifteen new x-ray interpretations of four x-rays. *See* Director's Exhibit 75; Employer's Exhibits 4-17; Decision and Order at 2-3. In reviewing this evidence, the administrative law judge properly found that all of the newly submitted x-ray interpretations were negative for pneumoconiosis, and thus, did not demonstrate a change in conditions or a mistake in a determination of fact. In so doing, the administrative law judge correctly noted that these negative x-ray interpretations supported Judge Brown's finding that the x-rays were negative for pneumoconiosis. *See* 20 C.F.R. §§725.310 (2000), 718.202(a)(1); *Nataloni*, *supra*; *Kovac*, *supra*; Decision and Order at 5.

The administrative law judge also correctly determined that since the record contained no biopsy or autopsy evidence, the existence of pneumoconiosis could not be established on that basis and that claimant, a living miner, could not establish the existence of pneumoconiosis as this 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.

In determining whether claimant met his burden of proving the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge correctly concluded that neither Dr. Modi nor Dr. McSharry diagnosed clinical coal workers' pneumoconiosis or a respiratory impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Director's Exhibit 77; Employer's Exhibits 11, 19. Moreover, the administrative law judge noted that Dr. McSharry's opinion corroborated earlier opinions considered by the previous administrative law judge that claimant did not have pneumoconiosis as defined by the Act. Decision and Order at 5. Consequently, the administrative law judge, considering the new medical opinions in conjunction with the previously submitted opinions, properly found that claimant failed to meet his burden of proving the existence of pneumoconiosis by medical opinion evidence, and that, therefore, claimant had not established a change in conditions or a mistake in a determination of fact. Decision and Order at 4; Director's Exhibit 77; Employer's Exhibits 11, 19; *see* 20 C.F.R. §§718.202(a)(4), 718.201; 725.310 (2000).

As the record contains no affirmative evidence supportive of claimant's burden of proof on an essential element of entitlement, we affirm the finding of the administrative law judge that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4). *Trent*, *supra*; *Perry*, *supra*. We, therefore, affirm the administrative law judge's denial of modification as it is supported by substantial evidence.

Accordingly, the Decision and Order of the administrative law judge denying modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge