BRB No. 00-1087 BLA

LAWRENCE O'QUINN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG TRACK COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
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 J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Lawrence O'Quinn, Birchleaf, Virginia, *pro se*.

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

Before: SMITH and DOLDER, Administrative Appeals Judges, 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 that the Board review the administrative law

BLA-01080) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a request for modification of a 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] Pursuant to claimant's timely request for modification and following a hearing, the administrative law judge found that because claimant's prior claim was finally denied in 1991, the claim before him, which was filed in 1994, constituted a duplicate claim.[3] The

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judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[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 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] Claimant filed his initial application for benefits with the Social Security Administration (SSA) on February 26, 1973, which SSA denied on May 25, 1973 and November 8, 1973 because claimant was still working and there was no evidence of complicated pneumoconiosis. This claim was also denied by an administrative law judge on August 7, 1975. *See* Director's Exhibit 28 and marked as prior Director's Exhibit 35.

Claimant filed his second application for benefits with the Department of Labor (DOL) on February 2, 1977 and requested DOL review of his previously denied SSA claim on April 14, 1978. *Id*. DOL denied these claims on February 21, 1980. *See* Director's Exhibit 28 and marked as prior Director's Exhibit 37.

Claimant filed his third application for benefits with DOL on February 3, 1983 which the district director denied on July 12, 1984. *See* Director's Exhibit 28 and marked as Director's Exhibits 1, 23. Following a hearing on the merits, Administrative Law Judge Robert L. Hillyard issued a Decision and Order on June 27, 1991. Judge Hillyard determined that claimant established the existence of pneumoconiosis in his previous claim and that employer stipulated to the existence of pneumoconiosis arising out of coal mine employment at the hearing. Thus, Judge Hillyard found that claimant established the existence of pneumoconiosis based on the x-ray and medical opinion evidence of record. *See* Director's Exhibit 28. Judge Hillyard, however, found the evidence of record insufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis and denied benefits. *Id*. Claimant took no further action.

Claimant filed the present, fourth claim on December 12, 1994. *See* Director's Exhibit 1. In a Decision and Order issued on February 13, 1997, Administrative Law Judge

administrative law judge further concluded, however, that since the prior claim was denied because claimant failed to show a material change in conditions by establishing a totally disabling respiratory impairment, he must review the new evidence submitted on modification, along with the evidence submitted in support of the previous claim, to determine whether it was sufficient to demonstrate the presence of a totally disabling respiratory impairment. Considering the evidence, the administrative law judge concluded that because claimant did not establish the presence of a totally disabling respiratory impairment, modification was not established. Accordingly, benefits were denied.

On appeal, claimant generally challenges the findings of the administrative law judge regarding the presence of a totally disabling respiratory impairment. 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.

Pamela Lakes Wood determined that, although employer stipulated to the existence of pneumoconiosis arising out of coal mine employment, the newly submitted evidence was insufficient to demonstrate the presence of a totally disabling respiratory impairment. Judge Wood, therefore, concluded, under the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997), that claimant has not established a material change in conditions. Accordingly, benefits were denied. On appeal, the Board affirmed Judge Wood's finding that claimant failed to establish the presence of a totally disabling respiratory impairment and had not, therefore, shown a material change in conditions. Accordingly, the Board affirmed the administrative law judge's denial of benefits. *See O'Quinn v. Big Track Coal Co.*, BRB No. 97-0842 BLA (Feb. 9, 1998)(unpub.).

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 claims, 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 May 18, 2001, to which employer and the Director responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[4] Based on the briefs submitted by employer and the Director, and our review of the record, 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*).

[4] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 18, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

In reviewing the newly submitted evidence, the administrative law judge properly concluded that the x-rays submitted by claimant would not assist claimant in his request for modification since claimant had already established the existence of pneumoconiosis, and x-rays are not indicative of the presence of a totally disabling respiratory impairment.[5] *See generally Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Concerning the presence of a totally disabling respiratory impairment, the administrative law judge properly found that claimant failed to meet his burden of proof on this issue based on the new pulmonary function study and the new blood gas study evidence, as he correctly concluded that the new pulmonary function study and blood gas study evidence produced values above the qualifying values for a totally disabling respiratory impairment set forth by the regulatory criteria. *See* Decision and Order at 8-9; 20 C.F.R. §718.204(b)(2)(i), (ii); *Milburn Colliery Company v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). Likewise, the administrative law judge correctly found that the new evidence did not contain any medical report which diagnosed the presence of cor pulmonale with right-sided congestive heart failure, and hence, claimant did not establish a totally disabling respiratory impairment on this basis. *See* Decision and Order at 9; 20 C.F.R. §718.204(b)(2)(iii). Further, the administrative law judge properly concluded that as none of the new medical reports diagnosed the presence of any respiratory or pulmonary impairment, claimant had not established the presence of a totally disabling respiratory impairment. *See* Decision and Order at 7-9; 20 C.F.R. §718.204(b)(2)(iv); *Hicks*, *supra*; *Beatty*, *supra*. Finally, the administrative law judge properly found that the newly submitted medical evidence, as well as his review of the evidence in the record, did not reflect a mistake in a determination of fact by the previous administrative law judge. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). We, therefore, affirm the finding of the administrative law judge that claimant failed to demonstrate the presence of a totally disabling respiratory impairment, and thus, a change in conditions or a mistake in a determination of fact, as it is supported by substantial evidence. Therefore, we affirm the denial of benefits on modification.

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

SO ORDERED.

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[5] The administrative law judge correctly noted that while x-rays which showed complicated pneumoconiosis would help claimant, the new x-rays were not interpreted for complicated pneumoconiosis. *See* Director's Exhibit 41; Employer's Exhibits 2, 8, 13-16.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge