BRB No. 98-1125 BLA
and 00-1081 BLA

ROBERT E. LESTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SPOTLESS COAL COMPANY	)	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 - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Robert E. Lester, Steele, Kentucky, *pro se*.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Dorothy L. Page (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (99-BLA-1109) of Administrative Law Judge Joseph E. Kane 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).[1] Based on the filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and credited the claimant with ten years of qualifying coal mine employment. Pursuant to claimant's request for modification, the administrative law judge, noting the history of this case, considered the newly submitted evidence along with the evidence from the prior claims, and found it insufficient to establish either the existence of pneumoconiosis or total disability, and thus insufficient to establish a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §§718.202(a)(1)-(4); 718.204(c)(1)-(4); 725.310. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits.[2] 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.

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.

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

[2] This case encompasses claimant's present appeal, BRB No. 00-1081 BLA, and claimant's prior appeal, BRB No. 98-1125 BLA, which was reinstated by Board Order dated October 26, 2000.

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. Claimant, without the assistance of counsel, has submitted a letter, not addressing the impact of the new regulations, but asserting that he is entitled to benefits. Based on the briefs submitted by employer and the Director, claimant's letter, 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*).

Claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits. *See Worrell, supra; Jessee v. Director, OWCP*, 5 F.3d 723, BLR 2-26 (4th Cir. 1993).[3]

In determining whether claimant has established modification, the administrative law

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish an element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992); *Wojtowicz v. Dusquesne Light Co.*, 12 BLR 1-162 (1989); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the negative interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader and noted the prior negative x-rays were verified by the negative readings of these highly qualified readers. This was rational. Decision and Order at 10; 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), *see Perry, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis. Further, inasmuch as there were no biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis based on that evidence. 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis by the use of presumptions covering complicated pneumoconiosis, claims filed prior to January 1, 1982, or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Turning to the new medical opinion evidence, the administrative law judge accorded additional weight to the opinions of Drs. Dahhan, Branscomb and Fino, who found that claimant does not suffer from pneumoconiosis, as he found that these physicians' reports were better documented and reasoned than the report of Dr. Younes. Thus, the administrative law judge accorded them determinative weight. This was rational. Director's Exhibit 151; Employer's Exhibits 2, 3, 4; *see Clark, supra*. The administrative law judge found no reason to give Dr. Younes's opinion special weight. *See Clark, supra*; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Further, considering these opinions, in light of the previously submitted medical opinion evidence, the administrative law judge rationally found that the existence of pneumoconiosis was not established. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Clark, supra*; *Winters, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis.

Turning to the issue of total disability, the administrative law judge correctly found that all of the blood gas studies were non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibits 15, 36, 49, 78, 103, 148; Employer's Exhibit 2. Likewise, the administrative law judge correctly found that inasmuch as the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(2)(iii).

Regarding the pulmonary function studies, the administrative law judge gave less weight to the qualifying August 21, 1999 pre-bronchodilator pulmonary function test and accorded more weight to the post bronchodilator non-qualifying test of the same date, and the non-qualifying February 24, 1999 and February 10, 2000 pulmonary function studies, because claimant "was able to perform at a level which yielded non-qualifying values during a post-bronchodilator study conducted the same day and during a study conducted approximately five months later." Decision and Order at 22. Further, the administrative law judge permissibly reasoned that, since "the technicians administering the non-qualifying February 24, 1999 and February 10, 2000 pulmonary function studies noted that claimant exhibited poor cooperation and comprehension during those tests[,]... had [claimant] given a greater effort, his pulmonary function values may have been even further outside the realm of qualifying values." Decision and Order at 22; Claimant's Exhibit 5; Employer's Exhibits 2; Claimant's Exhibit 1; *see Winchester v. Director, OWCP*, 9 BLA 1-177 (1986); *Houchin v. Old Ben Coal Company*, 6 BLR 1-1141 (1984); *Crapp v. United States Steel Corp.*, 6 BLR 1-476 (1983); *see also Clark, supra*. Thus, considering these tests along with the previously submitted pulmonary function study evidence, the administrative law judge reasonably found that they weighed against a finding of total disability. *Id*. Further, considering all the pulmonary function study and blood gas study evidence of record, the administrative law judge properly found that it did not establish total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987).

Turning to the new medical opinions, the administrative law judge correctly noted that the opinions of Drs. Dahhan, Branscomb and Fino support a finding that claimant is not totally disabled. Decision and Order at 23; Employer's Exhibits 2, 3, 4. The administrative law judge further found that these were the only medical opinions which addressed the issue of total disability. Thus, the administrative law judge found, considering these opinions in conjunction with previously submitted opinions, that claimant failed to establish total disability. This was rational. *See Griffith, supra*; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Clark, supra*. We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish total disability, and, therefore, failed to establish either a change in conditions or a mistake in a determination of

fact on that basis. *See Nataloni*, *supra*; *Shedlock*, *supra*.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge