BRB No. 00-0515 BLA

JOHN W. ROBERTS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

John W. Roberts, Sr., Danville, Virginia, *pro se*.

Dorothy L. Page (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification Denying Benefits (99-BLA-0284) of Administrative Law Judge Pamela Lakes Wood 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). Considering the newly submitted evidence in conjunction with the previously submitted evidence and considering the Decision and Order of the prior administrative law judge, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and thus neither a mistake in a determination of fact nor a change in conditions sufficient to justify modification of the denial of benefits was established pursuant to 20 C.F.R. §725.310. Accordingly, benefits

were denied. On appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits. Employer is not participating 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 Corp.*, 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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been made. Furthermore, in determining whether modification has been established pursuant to Section 725.310, the administrative law 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 the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *see Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In the instant case, the administrative law judge rationally determined that the evidence of record was insufficient to establish the existence of pneumoconiosis and, therefore, insufficient to establish modification. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge reviewed the prior Decision and Order of Administrative Law Judge Barnett and properly concluded that a mistake in a determination of fact had not been made since Judge Edith Barnett had properly found that claimant had

failed to establish the existence of pneumoconiosis on the basis of the evidence before her. Decision and Order at 11; *Jessee, supra*.

Considering the newly submitted evidence in conjunction with the prior evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Piccin, supra*. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the negative readings of the new x-ray taken on February 12, 1999, Decision and Order at 4, 7, and "the fact that the preponderance of the x-ray evidence (old and new) is negative for pneumoconiosis[.]" Decision and Order at 9. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 7; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Further, the administrative law judge also properly considered all of the medical opinion evidence of record and permissibly found it insufficient to establish the existence of pneumoconiosis. The new medical opinions of record consist of: the report of Dr. Vasudevan diagnosing chronic obstructive lung disease and attributing it to smoking and arteriosclerotic heart disease, Director's Exhibits 68, 73, the report of Dr. Henderson diagnosing cardiac and pulmonary disease and concluding that, "[a]lthough [claimant] does have definite history of cigarette smoking, his lung function tests do suggest a combination of both COPD, as well as possible occupational lung disease or pneumoconiosis." Director's Exhibit 57, and the report of Dr. Tapson finding that claimant had cardiac and pulmonary disease, and noting that pulmonary function tests "would suggest that black lung is a possible contributing factor to his lung disease." Director's Exhibit 61. The administrative law judge permissibly found that the opinions of both Drs. Tapson and Henderson, which only "suggest" the existence of pneumoconiosis, were equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, the administrative law judge rationally found that these new medical opinions considered in conjunction with the previously submitted reports were insufficient to establish the existence of pneumoconiosis pursuant Section 718.202 (a)(4). *Perry, supra*. Further, the administrative law judge properly concluded that looking at the newly submitted evidence as a whole, "when...considered alone or in the context of the evidence previously of record[,]" it

[1] In the prior Decision and Order, Judge Barnett considered the superior qualifications of the readers who rendered negative interpretations in finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1).

failed to establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, BLR (4th Cir. 2000).

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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and, therefore, modification pursuant to Section 725.310 as it is supported by substantial evidence and in accordance with law. *See Jessee*, *supra*; *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on 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