BRB No. 98-0365 BLA

PEERLESS E. BAKER	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
BLACK BEAR COAL COMPANY, INC.	)	DATE ISSUED:
	)	
and	)	
	)	
UNITED AFFILIATES 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 on Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Peerless E. Baker, Wolford, Virginia, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See* 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Modification (97-BLA-677) of Administrative Law Judge Jeffrey Tureck 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). Claimant originally filed for benefits on February 23, 1995, and the claim was administratively denied on the basis that claimant failed to establish the presence of totally disabling pneumoconiosis arising out of coal mine employment. Director's Exhibit 16. The claim was not pursued further. Subsequently, claimant filed a request for modification of the denial of benefits. Director's Exhibit 17. This request was administratively denied, and the case was transferred to the Office of Administrative Law Judges for hearing. Director's Exhibit 23. Following the hearing, the administrative law judge, in the instant case, found that the evidence of record was insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or to establish that claimant is now totally disabled pursuant to 20 C.F.R. §718.204(c). Thus, the administrative law judge concluded that claimant failed to establish a material change in conditions or a mistake in a determination of fact and denied the request for modification. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to 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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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 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. 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*).

After consideration of the administrative law judge's Decision and Order on Modification, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The record contains thirty interpretations of nine x-rays rendered by thirteen physicians. The administrative law judge

found that of the thirty x-ray interpretations, only one was rendered as positive and that all of the other interpretations of record were negative for the presence of pneumoconiosis. The administrative law judge noted that the one positive reading was rendered by Dr. Alexander, a B-reader. Director's Exhibit 17; Decision and Order on Modification at 3. The administrative law judge noted that while Dr. Alexander is a B-reader, the majority of the physicians rendering x-ray interpretations possess superior radiological qualifications.[2] *Id*. Thus, the administrative law judge concluded that the one positive interpretation of record was insufficient to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(1). Inasmuch as the administrative law judge properly relied upon the numerical superiority of the negative readings and the qualifications of the physicians, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), we affirm his finding that the x-ray evidence failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[3]

[2] With the exception of Dr. Shahan, all of the physicians interpreting x-rays are B-readers and eight of the physicians are also board certified radiologists. Director's Exhibits 14, 15, 17, 21, 22, 28, 29, 33, 34; Employer's Exhibits 3, 4, 7, 8.

[3] The administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) as there is no biopsy of record. Moreover, although not addressed by the administrative law judge, claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) as he is not entitled to the presumptions contained therein as this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Director's Exhibit 1.

In considering the entirety of the medical opinion evidence of record, the administrative law judge rationally found that of the two medical opinions, none diagnosed the presence of pneumoconiosis. Director's Exhibits 10, 29; Decision and Order on Modification at 3. Both Drs. Forehand and Castle opined that claimant does not suffer from pneumoconiosis or any other condition arising out of coal mine employment. Director's Exhibits 10, 29. Therefore, the administrative law judge's determination that the medical opinion evidence failed to establish the existence of pneumoconiosis is affirmed as it is supported by substantial evidence.

With respect to total disability, the administrative law judge properly determined that all of the pulmonary function and blood gas studies of record were non-qualifying.[4] 20 C.F.R. §718.204(c)(1), (2); Director's Exhibits 9, 11, 29. Further, the administrative law judge rationally concluded that all of the physicians of record opined that claimant has no impairment related to his lungs and that from a pulmonary perspective, claimant could perform his usual coal mine employment.[5] 20 C.F.R. §718.204(c)(4); Decision and Order on Modification at 3. 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). Consequently, as the administrative law judge properly reviewed the newly submitted evidence and the prior evidence of record, we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions or a

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

[5] The record in the instant case is devoid of any evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. Thus, total disability can not be established pursuant to 20 C.F.R. §718.204(c)(3). *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

mistake in a determination of fact and thus, insufficient to establish modification. Decision and Order on Modification at 2-3; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Jessee*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Modification denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge