BRB No. 01-0587 BLA

WILLIAM CLOUD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WARNER COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

William Cloud, Evarts, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Taurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-0732) of Administrative Law Judge Donald W. Mosser rendered 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] The administrative law judge found nine and one-half years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Considering the newly submitted evidence, in conjunction with the previously submitted evidence, the administrative law judge concluded that the evidence failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, elements previously adjudicated against the claimant, and therefore found that neither a mistake in a determination of fact nor a change in conditions had been shown. The administrative law judge, therefore, found that claimant failed to establish a basis for

[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, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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, *inter alia*, 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 would not affect the outcome of the case. The Board subsequently issued an order requesting supplemental briefing in the instant case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Association v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant filed his first claims for benefits with the Social Security Administration on January 28, 1970 and December 22, 1972, which were denied on October 9, 1970 and June 8, 1979. Director's Exhibit 33. Claimant filed a claim for benefits with the Department of Labor on March 14, 1979, which was denied on January 24, 1979 and March 1, 1985. The claim was subsequently administratively closed. Director's Exhibit 33. Claimant filed his second claim on January 14, 1994, which was denied by the Office of Worker's Compensation Programs on June 23, 1994 and March 15, 1995. Director's Exhibits 1, 13, 14. The administrative law judge's Decision and Order of October 6, 1998 denying benefits was affirmed by the Board on October 18, 1999. Director's Exhibits 34-36, 46, 56. Claimant filed the current claim for benefits on December 17, 1999, as a request for modification. Director's Exhibits 56, 57.

modification. Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. The employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate 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)(*en banc*).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994) 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 (2000), 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); *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); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

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 Decision and Order of the administrative law judge is supported by substantial evidence. The administrative law judge properly found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the evidence submitted

prior to the denial of the claim did not establish the existence of pneumoconiosis[3] and the x-ray readings submitted on modification were all negative. Decision and Order at 9; Director's Exhibits 62; Employer's Exhibits 1, 2, 7; 20 C.F.R. §718.202(a)(1); *see 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). 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 was a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 9; *see* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Pursuant to Section 718.204(a)(4),[4] the administrative law judge considered all the newly submitted medical

[3] The prior administrative law judge found that the existence of pneumoconiosis was not established as the x-ray evidence before him consisted of seventeen negative x-ray readings by highly qualified physicians, and one positive x-ray reading by a physician with no special qualifications. Director's Exhibit 46.

[4] The newly submitted medical opinion evidence of record consists of the opinions of: Dr. Broudy, who found that claimant did not have pneumoconiosis or any impairment arising from his coal mine employment and retained the capacity to perform his usual coal mine employment, Director's Exhibit 62, Employer's Exhibits 3, 7; the opinion of Dr. Branscomb, who found no pneumoconiosis and no disabling impairment due to dust exposure, Employer's Exhibit 5; Dr. Wise, who found no pneumoconiosis and that claimant had the respiratory capacity to perform coal mine work, Employer's Exhibits 6, 7; and Dr. Fino, who found no pneumoconiosis or evidence of respiratory or pulmonary disability, Employer's Exhibit 8.

opinion evidence and permissibly found it insufficient to establish the existence of pneumoconiosis as none of the physicians diagnosed the existence of pneumoconiosis. Decision and Order at 9; Director's Exhibit 62; Employer's Exhibits 4-8; 20 C.F.R. §§718.201, 718.202(a)(4); *Perry, supra*; *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986). Thus, the administrative law judge rationally found that the evidence of record did not support a finding of pneumoconiosis.

Turning to the issue of total disability, the administrative law judge rationally found the evidence insufficient to establish total disability as the two pulmonary function studies and one blood gas study of record produced non-qualifying values[5] and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 10; Director's Exhibits 62; Employer's Exhibit 7. 20 C.F.R. §718.204(c)(1)-(3), now 20 C.F.R. §718.204(b)(2)(i)-(iii). As to the medical opinion evidence, the administrative law judge rationally found it insufficient to establish total disability as none of the physicians of record found claimant totally disabled. Director's Exhibit 62; Employer's Exhibits 4-8; 20 C.F.R. §718.204(c), now 20 C.F.R. §718.204(b)(2)(iv); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) and 13 BLR 1-46 (1986), *aff'd on recon*. 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

The administrative law judge is empowered to weigh the medical evidence of record and 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 if the administrative law judge's findings are supported by substantial evidence. *See 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 and total disability and, therefore, modification pursuant to Section 725.310 as it is supported by substantial evidence and in accordance with law. *Worrell, supra*; *Trent, supra*; *Gee, supra*; *Perry, supra*.

[5] 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, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge