BRB No. 04-0597 BLA

JEFFERSON TAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/23/2005
	)	
NORFOLK & WESTERN RAILWAY COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jefferson Taylor, South Williamson, Kentucky, *pro se*.

Ashley N. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (1995-BLA-1494) of Administrative Law Judge Daniel J. Roketenetz denying modification and 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 filed his original and only claim on April 14, 1978. Director's Exhibit 1. Administrative Law Judge Thomas M. Burke issued a Decision and Order denying benefits on April 16, 1985. Director's Exhibit 32. Claimant appealed and in *Taylor v. Director, OWCP*, BRB No. 85-2044 BLA (Mar. 14, 1988)(unpub.), the Board affirmed the denial of benefits.

Claimant filed his second application for benefits on June 13, 1988, which the district director treated as a modification request since it was filed within one year of the Board's decision, and denied modification on March 24, 1989. Director's Exhibits 40, 50. Administrative Law Judge Michael P. Lesniak issued a Decision and Order denying benefits on September 13, 1996. Director's Exhibit 85. Claimant appealed the denial of benefits to the Board and in *Taylor v. Norfolk & Western Railway Co.*, BRB No. 97-0148 BLA (Sep. 12, 1997)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 90.

On January 10, 1998, within a year of the Board's decision, claimant notified the district director that he wished to pursue his claim. Director's Exhibit 93. The district director treated claimant's communication as a modification request and denied modification on February 18, 2000. Director's Exhibit 113. On February 22, 2000, claimant again notified the district director that he wished to pursue his claim, and the district director again denied modification. Director's Exhibits 114, 118. The case was then referred to the Office of Administrative Law Judges for a hearing. Director's Exhibit 119.

In a Decision and Order issued on January 31, 2003, which is the subject of this appeal, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) credited claimant with "approximately seven to eight years of coal mine employment,"[1] Decision and Order at 6, and considered the newly submitted evidence in conjunction with the previous evidence of record, to determine whether claimant established either the existence of pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge found that neither element was established. The administrative law judge concluded that the record established neither a change in conditions nor a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, he denied modification and benefits. On appeal, claimant generally challenges the administrative law judge's denial of modification and benefits. Employer responds, urging affirmance of the denial of modification and benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). 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

[1] The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000).[2] In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an 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 at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative law judge has the authority to consider all the evidence for any mistake of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

After consideration of the administrative law judge's Decision and Order 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 administrative law judge found that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 718, mistakenly stating that this claim was filed after March 31, 1980. Decision and Order at 4. In this case involving a miner with less than ten years of coal mine employment, the administrative law judge should have considered this claim filed prior to March 31, 1980 under the provisions of Section 410.490 and the permanent criteria of 20 C.F.R. Part 410, Subpart D. *See Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988); *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991) (*en banc*); *Muncy v. Wolfe Creek Collieries Coal Company, Inc.*, 3 BLR 1-627 (1981). The Board, however, has held that where the administrative law judge has made the necessary findings of fact after discussing all of the relevant evidence of record, the Board will review the case by applying those findings to the proper regulations. *Hamric v. Director, OWCP*, 6 BLR 1-1091, 1-1092 (1984). We will do so here.

In his consideration of the x-ray evidence, the administrative law judge discussed the readings of the single new x-ray taken on April 6, 2002 as well as the qualifications of the readers. Decision and Order at 8. The administrative law judge correctly found that all of the x-ray readings were negative for the presence of pneumoconiosis. *Id.* Although the administrative law judge accorded less weight to the readings marked as poor film quality, he

[2] The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, which were pending on January 19, 2001. 20 C.F.R. §725.2(c).

correctly found that the credible x-ray interpretation of the April 6, 2002 x-ray by Dr. Dahhan was negative. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 8-9. The administrative law judge additionally found that there was no mistake in a determination of fact in the prior finding that the overall x-ray evidence of record does not establish the existence of pneumoconiosis. We therefore affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, as it is supported by substantial evidence.

Thus, claimant is precluded from establishing invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 410.490(b)(1)(i), since the administrative law judge determined that the x-ray readings were negative. Furthermore, the administrative law judge's findings that claimant established only seven to eight years of coal mine employment and that the pulmonary function study evidence was nonqualifying, Decision and Order at 12-13, preclude a finding of invocation pursuant to Section 410.490(b)(1)(ii). 20 C.F.R. §410.490(b)(1)(ii)(requiring fifteen years of coal mine employment); Decision and Order at 12-13. Therefore, on this record as weighed by the administrative law judge, claimant cannot establish invocation of the interim presumption pursuant to Section 410.490(b)(1).

Under 20 C.F.R. Part 410, Subpart D, claimant has the burden of establishing that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§410.414, 410.416, 410.422, 410.426. Failure to establish any of these requisite elements precludes entitlement. *Saunders v. Director, OWCP*, 7 BLR 1-186 (1984); *Migalich v. Director, OWCP*, 2 BLR 1-27 (1979).

The administrative law judge weighed all of the x-ray and medical opinion evidence of record and properly found that this evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 2-3, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also weighed the pulmonary function studies, blood gas studies, and medical opinions and rationally determined that this evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment arising out of coal mine employment. The objective evidence produced nonqualifying results, and thus supports the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 11-13. Consequently, we hold that the evidence of record, as weighed by the administrative law judge, fails to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§410.414, 410.416, 410.422, 410.426, and that claimant is therefore precluded from entitlement under the

permanent criteria of 20 C.F.R. Part 410, Subpart D. *Migalich*, 2 BLR at 1-30.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences. *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge properly reviewed the entire record and reasonably concluded that there was no mistake in a determination of fact in the prior denial pursuant to 20 C.F.R. §725.310 (2000). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000), as it is supported by substantial evidence. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28. Since claimant's petition for modification was properly denied, we affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge