BRB No. 08-0453 BLA

R.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 02/26/2009
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

R. S., Huntington, West Virginia, *pro se*.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits on modification (2007-BLA-05034) of Administrative Law Judge Adele Higgins Odegard on a living miner's duplicate claim filed on December 4, 2000, 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] Director's Exhibit 3. The

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. However, the revisions to the regulations at 20 C.F.R. §§725.309 and

administrative law judge credited claimant with 1.82 years of coal mine employment. Noting that claimant's previous claims were denied by the district director because claimant failed to establish any element of entitlement, the administrative law judge considered whether claimant established a basis for modifying the previous decision denying benefits on claimant's duplicate claim.[2] The administrative law judge determined that the new evidence submitted with this duplicate claim failed to establish any element of entitlement previously adjudicated against claimant, *i.e.*, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(a), that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b), or that total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Further, on reviewing the entire evidentiary record, the administrative law judge found that no mistake in a determination of fact had been made in the prior decision. Consequently, the administrative law judge found that, as claimant failed to establish a change in conditions or a mistake in a

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725.310 apply only to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2, and thus do not apply to this claim.

[2] This case has a lengthy procedural history. Claimant's first claim, filed on March 31, 1987, was finally denied by the district director on September 25, 1987, for failure to establish any element of entitlement. Claimant's second claim, filed on July 10, 1989, was finally denied by the district director on September 7, 1989, for the same reason. Claimant filed his current claim on December 4, 2000. After several delays, this claim was denied by the district director on December 12, 2003, for failure to establish any element of entitlement and, therefore, a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Pursuant to claimant's request, a hearing before Administrative Law Judge Richard Morgan was set for February 17, 2005. Claimant, however, failed to appear at the hearing. On March 17, 2005, Judge Morgan issued an Order dismissing the claim, because claimant failed to provide an acceptable written explanation as to why he did not attend the hearing. After receiving various letters and documents from claimant, the Board issued an Order on April 12, 2005, stating that it would construe claimant's March 26, 2005 letter as his Notice of Appeal. However, in subsequent letters to the Board, claimant proffered evidence relevant to his failure to attend the hearing. The Board construed these letters as a request for modification, dismissed claimant's appeal, and remanded the case to the district director for modification proceedings. Order of March 23, 2006. The district director forwarded the case to the Office of Administrative Law Judges for adjudication. Noting that Judge Morgan's dismissal of claimant's December 4, 2000 duplicate claim had the same effect as an adverse action on the merits, *see* 20 C.F.R. §725.466(a), Administrative Law Judge Adele Higgins Odegard determined that she must consider the entire case file to determine whether there was a basis for modifying the denial of benefits on claimant's duplicate claim.

determination of fact, claimant failed to establish a basis for modifying the denial of this duplicate claim. *See* 20 C.F.R. §§725.309 (2000), 725.310 (2000). 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.

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 and is in accordance with law.[3] *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must determine whether the newly submitted evidence is sufficient to establish a "material change" in conditions, *i.e.*, whether claimant has established one of the elements of entitlement previously adjudicated against him. 20 C.F.R. §725.309(d)(2000). Claimant's prior claim was denied because he failed to establish any element of entitlement. Consequently, in order to establish a "material change" in conditions, claimant must submit new evidence establishing at least one of the elements previously adjudicated against him. 20 C.F.R. §725.309(d)(2), (3) (2000); *see generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, 2-235-237 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

In determining whether claimant established a basis for modifying the denial of his duplicate claim at Section 725.310 (2000), the administrative law judge must consider whether there has been a change in conditions or whether there was a mistake in a determination of fact in the previous decision. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence 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. *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 (1993). In considering whether a mistake in a determination of fact has been made, the administrative law judge is required to consider the entirety of the evidentiary record. *Nataloni*, 17 BLR at 1-84.

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 denying benefits is rational, supported by substantial evidence, and in accordance with applicable law. It is, therefore, affirmed.

In considering whether claimant established a change in conditions, the administrative law judge properly found that pneumoconiosis was not established at Section 718.202(a)(1) because all of the new x-ray evidence was negative. That finding is, accordingly, affirmed. The administrative law judge also properly found that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) because there was no biopsy evidence in the record and none of the presumptions contained in Section 718.202(a)(3) was available. Turning to Section 718.202(a)(4), the administrative law judge properly found that the only new medical opinion, that of Dr. Walker, could not establish pneumoconiosis because 1) Dr. Walker found that claimant did not have coal workers' pneumoconiosis and 2) because Dr. Walker's opinion that claimant's respiratory impairment was due, in part, to coal mine employment, was unreasoned. Specifically, the administrative law judge properly noted that Dr. Walker's opinion was unreasoned because Dr. Walker did not explain the basis for his finding that claimant's respiratory impairment was due, in part, to coal mine employment and because Dr. Walker relied on a finding that claimant had ten years of coal mine employment instead of the 1.82 years found by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish pneumoconiosis at Section 718.202(a)(4).

In considering whether the new evidence established total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), the administrative law judge properly found that because the new

pulmonary function and blood gas studies were non-qualifying, they failed to establish total disability at Section 718.204(b)(2)(i), (ii). Decision and Order at 23, 24; Director's Exhibits 18, 19, 37. Additionally, the administrative law judge properly found that total disability could not be established at 20 C.F.R. §718.202(b)(2)(iii), because there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 24. Lastly, the administrative law judge properly found that total disability was not established at Section 718.203(b)(2)(iv), because Dr. Walker's opinion was not based on a clear understanding of claimant's usual coal mine employment. *See Clark*, 12 BLR at 1-155; Decision and Order at 24-25; Director's Exhibits 18, 19. Further, on considering the new evidence together at Section 718.204(b)(2)(i)-(iv), the administrative law judge properly concluded that it failed to establish total disability. Consequently, the administrative law judge properly found that a change in conditions was not established pursuant to Section 725.310 in this duplicate claim and that claimant was not, therefore, entitled to modification on this basis.

Further, the administrative law judge properly concluded that claimant failed to establish that a mistake in a determination of fact at Section 725.310 (2000), as the preponderance of the evidence of record failed to establish either the existence of pneumoconiosis at Section 718.202(a) or total disability at Section 718.204(b)(2).[4]

[4] There are three x-rays in the record. An x-ray dated April 14, 1987 was read as positive for pneumoconiosis by Dr. Alasbahi, who was identified only as a "radiologist." X-rays dated July 25, 2001 and November 19, 2003 were respectively read as negative for pneumoconiosis by Dr. McWhorter and Dr. Hayes, B readers and Board-certified radiologists. Further, the administrative law judge properly noted that the sole medical opinion of record, from Dr. Walker, found that claimant did not have coal workers' pneumoconiosis. The administrative law judge properly found that Dr. Walker's opinion attributing claimant's respiratory impairment, in part, to coal mine employment was unreasoned. The administrative law judge also properly noted that records from claimant's hospitalizations in 2000 and 2001 could not establish pneumoconiosis because they did not discuss the etiology of the chronic obstructive pulmonary disease that was diagnosed. The administrative law judge found that total disability was not established as: 1) the administrative law judge properly found that none of the post-bronchodilator pulmonary function studies conducted in 1987, 1989, 1995, 1999, and 2001 resulted in qualifying values (pulmonary function studies conducted in 1995 and 1999 did result in pre-bronchodilator qualifying values); 2) the administrative law judge properly found that blood gas studies conducted in 1987, 1989 and 2003 did not result in qualifying values; and 3) the administrative law judge properly found that Dr. Walker's opinion and the medical treatment notes of record on the issue of total disability were unreasoned.

Consequently, we affirm the administrative law judge's finding that claimant failed to establish a basis for modifying the prior denial of claimant's duplicate claim for benefits, on the ground that no element of entitlement was established. *See* 20 C.F.R. §725.309(d)(2000).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge