BRB No. 99-0437 BLA

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| DARRYEL HURLEY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| SOUTHERN ELKHORN 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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Darryel Hurley, Phyllis, Kentucky, *pro se*.[1]

Michael J. Pollack (Arter & Hadden, LLP), Washington, D.C., for employer.

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

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[1]Susie Davis, President of Kentucky Black Lung Association of Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law judge's decision. In an Order dated April 26, 1999, the Board stated that claimant would be considered to be representing himself on appeal, *Hurley v. Southern Elkhorn Coal Co.*, BRB No. 99-0437 BLA (Order)(Apr. 26, 1999)(unpub.). *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-0953) of Administrative Law Judge Robert L. Hillyard denying benefits on a request for modification of 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).[2] The administrative law judge adjudicated this claim pursuant to the

[2]Claimant filed his initial claim on October 28, 1988. Director's Exhibit 68. This claim was denied by the Department of Labor (DOL) on April 7, 1989 because claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. On May 9, 1989, two potential responsible operators, Four J. Mining Company and BB & T Coal Company, filed a Motion to Dismiss the 1988 claim by reason of abandonment. *Id*. On June 9, 1989, claimant filed a response, urging the DOL to deny the Motion to Dismiss. *Id*. The record does not indicate that the DOL rendered a decision with respect to the Motion to Dismiss. Since claimant continued to pursue his 1988 claim, claimant's 1988 claim remained a viable claim. Hence, claimant's most recent claim, which was filed on July 14, 1992, merged with claimant's 1988 claim. Director's Exhibit 1. On May 30, 1996, Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits based on claimant's failure to establish a "material change in conditions." Director's Exhibit 83. Although Judge Leland mistakenly considered claimant's 1992 claim as a duplicate claim, Judge

regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge concluded that the evidence was insufficient to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and thus, he denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) since the newly submitted x-ray reading of record is negative for pneumoconiosis. Employer's Exhibit 1. Next, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since there is no biopsy or autopsy evidence of record. In addition, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is

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Leland's decision became final because claimant did not file an appeal. On December 4, 1996, claimant filed a letter, Director's Exhibit 84, which the DOL construed as a request for modification of Judge Leland's denial of benefits, Director's Exhibit 86.

no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because the miner filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 68. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Further, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the newly submitted reports of Drs. Broudy and Fino. Drs. Broudy and Fino opined that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibits 1-3. Therefore, since none of the physicians of record opined that claimant suffers from pneumoconiosis or any chronic obstructive lung disease arising out of coal mine employment, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. Since neither the newly submitted pulmonary function study nor the newly submitted arterial blood gas study yielded qualifying[3] values, Employer's Exhibit 1, we hold as a matter of law that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibit 88. Additionally, we hold as a matter of law that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record does not contain evidence of cor pulmonale with right sided congestive heart failure.

Finally, we address the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). The administrative law judge considered the newly submitted opinions of Drs. Broudy and Fino. The administrative law judge observed that "[b]oth Drs. Fino and Broudy stated that the Claimant was not disabled from a pulmonary standpoint." Decision and Order at 5; Employer's Exhibits 1-3. Therefore, since none of the physicians opined that claimant suffers from a disabling

[3]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 exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

respiratory or pulmonary impairment, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since the newly submitted evidence on modification is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310.[4] *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The administrative law judge's finding of "no mistake in a determination of fact" is based on his review of all of the evidence of record. Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order denying modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[4]As previously noted, Judge Leland mistakenly considered claimant's 1992 claim as a duplicate claim. Inasmuch as Judge Leland's error in this regard constitutes a mistake in law rather than a mistake in fact, Judge Leland's error is not a proper basis for modification. *See Donadi v. Director, OWCP*, 12 BLR 1-166 (1989).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge