BRB No. 01-0391 BLA

BILL B. DOTSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
KENTUCKY CARBON CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Bill B. Dotson, Paw Paw, Kentucky, *pro se*.

Mark E. Solomons (Greenberg Taurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (99-BLA-0889) 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).[2] The

[1] Ron Carson, 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. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995)(Order).

[2] 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,

administrative law judge noted that the instant claim was a request for modification of a duplicate claim and that the parties had stipulated to twenty-four years of qualifying coal mine employment and that employer was the properly designated responsible operator. Decision and Order at 4; Hearing Transcript at 7-8, 11. The administrative law judge, based on the date of filing, considered entitlement in this living miner's claim pursuant to 20 C.F.R. Part 718.[3] Decision and Order at 4, 9-12. The administrative law judge, noting the proper standard and that the claim had been denied as claimant failed to establish any element of entitlement, initially reviewed the prior denial of benefits and then considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) (2000) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 4-12. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the Decision and Order

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725 and 726 (2001).

[3] Claimant filed his initial claim for benefits on July 23, 1979, which was denied by Administrative Law Judge Melvin Warshaw on September 22, 1983. Director=s Exhibit 53. Claimant took no further action until he filed a second application for benefits on April 2, 1997. Director=s Exhibit 1. The district director finally denied this claim on December 4, 1997, as claimant failed to establish any element of entitlement. Director=s Exhibit 43. Claimant requested modification, the subject of the instant appeal, on December 1, 1998, which was denied by the district director on February 11, 1999. Director=s Exhibits 45, 48. Claimant requested a formal hearing and the case was referred to the Office of Administrative Law Judges on May 14, 1999. Director=s Exhibits 49, 54.

of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not participate 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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, 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. This case involves a request for modification of a duplicate claim. The United States Court of Appeals for the Sixth Circuit held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), with respect to modification, that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been made by claimant.[4] Furthermore, in determining whether claimant has established a change in conditions 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*,

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See* Director=s Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). In the instant case, the district director denied benefits because claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Director's Exhibits 31, 43. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's initial application for benefits was denied because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 53. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis at 20 C.F.R. §718.202(a) (2000) or a finding of total disability at 20 C.F.R. §718.204(c) (2000). Thus, in order to establish a change in conditions at 20 C.F.R. §725.310 (2000), the newly submitted evidence must support a finding of pneumoconiosis at 20 C.F.R. §718.202(a) (2000) or a finding of total disability at 20 C.F.R. §718.204(c) (2000). *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

After considering the newly submitted evidence on modification, the administrative law judge, in the instant case, rationally determined that it was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) (2000) and therefore insufficient to establish modification.[5] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Worrell, supra*.

[5] The administrative law judge properly determined that claimant=s application for benefits had been denied because the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability. Decision and Order at 3, 6, 12; Director=s Exhibits 31, 32, 43.

Considering the newly submitted evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *Piccin, supra*. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000) as all of the newly submitted x-ray readings were negative. Director's Exhibits 40, 45; Employer's Exhibits 3, 4, 7, 8; Decision and Order at 9; *Staton v. Norfolk & Western Railroad 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1988)(*en banc*). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000) as it is supported by substantial evidence.

Further, 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) (2000) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 9. Additionally, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) (2000) since none of the presumptions set forth therein are applicable to the instant claim.[6] *See* 20 C.F.R. §§718.304, 718.305, 718.306 (2000); Decision and Order at 9; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

[6] The presumption at 20 C.F.R. §718.304 (2000) is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 (2000) because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 (2000) is also inapplicable.

The administrative law judge also properly considered the entirety of the newly submitted medical opinion evidence of record[7] and properly determined that the medical opinions were insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) (2000) as all of the opinions indicate that claimant does not suffer from the disease or any coal dust related condition.[8] Decision and Order at 9-10; Director's Exhibits 14, 17; Employer's Exhibits 2, 5-8; *Clark, supra*; *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Perry, supra*; *King v. Consolidation Coal Co*., 8 BLR 1-262 (1985).

With respect to 20 C.F.R. §718.204(c) (2000), the administrative law judge rationally found the evidence insufficient to establish total disability. *Piccin, supra*. The administrative law judge properly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) (2000) as all of the newly submitted pulmonary function studies and blood gas studies of record produced non-qualifying values[9] and there is no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* 20 C.F.R. '718.204(c)(1)-(3) (2000); Director's Exhibits 41, 42, 45, 47; Employer's Exhibits 7, 8; Decision and Order at 7, 11; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge considered the relevant newly submitted medical opinion evidence of record and properly found that the opinions were insufficient to establish claimant's burden of proof as no

[7] Although the administrative law judge incorrectly considered Dr. O'Neill's deposition testimony as it was admitted into the record and considered in the prior claim, any error in reviewing this evidence in the instant case is harmless as the physician opined that claimant did not have coal workers' pneumoconiosis and suffered no impairment due to coal mine dust exposure. Decision and Order at 7; Director's Exhibits 15, 53; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] Dr. Forehand examined claimant and opined that claimant did not suffer from any occupational lung disease or any pulmonary impairment. Director's Exhibit 17. Dr. Broudy examined claimant and opined that claimant did not have coal workers' pneumoconiosis or any pulmonary impairment from the inhalation of coal mine dust and retained the respiratory capacity to perform the work of a miner. Director's Exhibit 14; Employer's Exhibits 2, 6. Dr. Fino examined claimant and reviewed the medical evidence of record and opined that claimant did not suffer from an occupationally acquired pulmonary condition and there is no respiratory impairment present. Employer's Exhibits 5, 7-8.

[9] 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(c)(1), (c)(2).

physician opined that claimant was totally disabled.[10] Decision and Order at 7-8, 11-12; Director's Exhibits 14, 17; Employer's Exhibits 2, 5-8; *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *affd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*.

The administrative law judge is empowered to weigh the medical evidence of record 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); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge rationally found that the newly submitted evidence of record failed to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(c) (2000) and was thus insufficient to establish a change in conditions pursuant to Section 725.310 (2000). *Nataloni, supra*; *Wojtowicz, supra*; *Kovac, supra*; *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Finally, we note that the administrative law judge properly considered the previously submitted evidence and rationally concluded that there was no mistake in fact in the original denial of benefits. Decision and Order at 12; *Worrell, supra*; *Nataloni, supra*. Therefore, the administrative law judge's denial of claimant's petition for modification is supported by substantial evidence and is in accordance with law. *Worrell, supra*. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310 (2000), we affirm the denial of benefits. *Worrell, supra*.

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

SO ORDERED.

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[10] As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. '718.204(c)(1)-(4) (2000), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. '718.204(d)(2) (2000); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge