

BRB No. 03-0423 BLA

ELBERT O. SHEPPARD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 01/12/2004
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Petition for Modification of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Elbert O. Sheppard, McCoy, Virginia, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 appeals the Decision and Order Denying Petition for Modification (01-BLA-0120) of Administrative Law Judge Pamela Lakes Wood 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 Based on the date of filing, 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.

administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. Considering the newly submitted evidence in conjunction with the previously submitted evidence in this request for modification, the administrative law judge concluded that the evidence failed to establish the existence of pneumoconiosis and therefore failed to establish total disability due to pneumoconiosis,² 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 reason to modify the prior denial of benefits. Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs, (the Director) 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. *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'Keefe 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*).

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 permissibly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) because there were no newly submitted x-rays of record and a review of the x-ray evidence of record showed that no mistake in a determination of fact had been made by the previous administrative law judge who found

² The Director concedes that claimant is totally disabled. See Director's Brief at 12 n.4.

the weight of the previously submitted x-rays to be overwhelmingly negative.³ Thus, the administrative law judge rationally found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) as there was no biopsy of record, and no evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Finally, noting that the previous administrative law judge properly found that the earlier submitted medical opinions did not support a finding of pneumoconiosis, the administrative law judge also found that the two newly submitted medical opinions of record: the opinion of Dr. Conatser, claimant's treating physician, Claimant's Exhibit 2; and the opinion of Dr. Michos, Director's Exhibit 76, also failed to establish the existence of pneumoconiosis based on his consideration of the bases for the doctors' opinions and their credentials. This was rational. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997)(in weighing opinions, the administrative law judge is called upon to consider their quality, taking into account, among other things, the opinion's reasoning and detail of analysis); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Thus, the administrative law judge rationally found that the medical opinion evidence of record failed to establish the existence of pneumoconiosis. Further, on weighing all the old and new evidence, together, *i.e.*, x-rays and medical opinions, the administrative law judge found that it failed to establish the existence of pneumoconiosis. This was proper. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). We, therefore, affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

The administrative law judge is empowered to weigh the evidence 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 Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we

³ The majority of x-rays were read negative for the existence of pneumoconiosis including the two most recent x-rays, which were read negative by dually-qualified physicians.

affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis and, therefore, a basis for modification of the prior denial of benefits as it is supported by substantial evidence and is in accordance with law. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order Denying Petition for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge