BRB No. 07-0357 BLA

M.L.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 01/04/2008
	)	
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 Denying Request for Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

M.B., Vale, North Carolina, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig L.L.P.), Washington, D.C., for employer.

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

PER CURIUM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Request for Modification (2006-BLA-5102) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent 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] The administrative law judge found that claimant failed to

[1] Claimant's original claim for benefits, filed on June 22, 1994, was denied by the district director on December 1, 1994 for failure to establish any element of entitlement.

establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and thus, denied modification.

On appeal, claimant generally challenges the administrative law judge's denial of modification, and employer has responded, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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.[2] *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, Hichman & 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a prior decision on the grounds of a change in conditions or because of a mistake in a determination of fact. If a

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Director's Exhibit 1. Claimant filed a subsequent claim for benefits on July 18, 2002. Director's Exhibit 3. In a Decision and Order issued on February 14, 2005, Administrative Law Judge Jeffrey Tureck presumed a change in an applicable condition of entitlement, specifically total respiratory disability, in order to review the merits of the subsequent claim. However, Judge Tureck found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and denied benefits. Claimant subsequently filed a motion for modification with the district director.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

party merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, modify the final order accordingly. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Because claimant has submitted no new evidence with his request for modification, and the administrative law judge properly found that the evidence submitted by the employer was not relevant to the issue of a change in conditions,[3] we affirm the administrative law judge's finding that claimant failed to establish a change in conditions that would warrant modification. *See Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

The administrative law judge next considered Administrative Law Judge Jeffrey Tureck's prior findings on the issue of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).[4] After considering the x-ray evidence, computerized tomography (CT) scan readings, and medical opinions of record, the administrative law judge found that Judge Tureck's determination that claimant did not have pneumoconiosis was correct, and that the February 14, 2005 Decision and Order did not reflect a mistake in a determination of fact. Decision and Order at 3-4; *O'Keeffe v. Aerojet-General Shipyard, Inc.*, 404 U.S. 254, 256 (1971); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In so finding, the administrative law judge determined that Judge Tureck properly found the weight of the x-ray evidence to be negative for pneumoconiosis, based on a numerical preponderance of the better qualified readers.[5] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir.

[3] All of the evidence submitted by the employer was either a re-reading of x-ray evidence already in the previous record, or testimony regarding such previous evidence, and therefore could not establish a change in condition.

[4] In his Decision and Order issued on February 14, 2005, Judge Tureck found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), as the record lacked any biopsy evidence, and none of the presumptions at 20 C.F.R. §§718.304, 718.305, or 718.306 was applicable in this case. Director's Exhibit 40 at 6. As substantial evidence supports Judge Tureck's findings, claimant cannot establish a mistake in fact thereunder.

[5] The record contained, and Judge Tureck considered the x-ray readings from claimant's initial claim and his subsequent claim. After observing that all of the x-ray readers were at least B readers, and that the majority of the probative x-ray interpretations was negative, Judge Tureck found that the negative readings of Drs. Scatarige, Wheeler and Scott were entitled to the greatest weight because of their superior qualifications as professors of radiology. February 14, 2005 Decision and Order at 5-6.

1992); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 517 U.S. 267, 18 BLR 2A-1 (1994). Similarly, the administrative law judge agreed with Judge Tureck's decision to credit Dr. Scatarige's negative CT scan interpretations over the positive interpretations of Dr. Booker, based on Dr. Scatarige's superior qualifications.[6] February 14, 2005 Decision and Order at 6; *Id*.

With regard to the medical opinions of record at Section 718.202(a)(4), the administrative law judge determined that Judge Tureck properly found that only Dr. Rasmussen affirmatively diagnosed pneumoconiosis, and that Dr. Rasmussen's diagnosis lacked credibility "because it relied too heavily on an erroneous positive x-ray interpretation by Dr. Patel and downplayed an earlier reading by Dr. Patel finding Claimant's pneumoconiosis to be asbestos-related, not coal dust related." Decision and Order at 3; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). The administrative law judge agreed with Judge Tureck's conclusion that the medical evidence of record was insufficient to establish the existence of pneumoconiosis, and found that it was buttressed by the evidence submitted by employer to support a denial of modification.[7] Decision and Order at 3.

As the administrative law judge acted within his discretion in finding that no mistake in a determination of fact was demonstrated, we affirm his denial of modification pursuant to Section 725.310.

[6] Judge Tureck reviewed a May 14, 2003 computerized tomography (CT) scan interpreted by Dr. Booker as showing mild diffuse pulmonary fibrosis and pneumoconiosis, and reread by Dr. Scatarige as negative for pneumoconiosis, but indicating emphysema. Director's Exhibit 12; Employer's Exhibit 8. A second CT scan, dated August 15, 2003, was read by Dr. Scatarige, who again found emphysema, and no pneumoconiosis. Employer's Exhibit 8. The record reflects that Dr. Scatarige is a professor of radiology as well as a dually qualified reader, while Dr. Booker is a dually qualified reader. February 14, 2005 Decision and Order at 6.

[7] In support of a denial of modification, employer submitted Dr. Scatarige's negative interpretation of a January 21, 2004 x-ray, Dr. Scott's interpretation of an August 15, 2003 CT scan that also revealed no evidence of silicosis or coal workers' pneumoconiosis, and the July 11, 2006 deposition testimony of Dr. Tuteur, attributing claimant's obstructive pulmonary disease to smoking. Employer's Exhibits 1, 3, 5.

Accordingly, the administrative law judge's Decision and Order Denying Modification 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