BRB No. 00-1050 BLA

KEENIS PREECE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KERMIT COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
ZIEGLER COAL HOLDING COMPANY	)	
Employer/Carrier	)	
Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Keenis Preece, Louisa, Kentucky, *pro se*.

Eileen O'Brien (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denial of Benefits (99-BLA-1043) of Administrative Law Judge Daniel J. Roketenetz 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] The administrative law judge found

[1] The Department of Labor has amended the regulations implementing the Federal

eighteen and three-quarter years of coal mine employment established and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4. Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability and therefore a basis for modification, *i.e.*, a mistake in determination of fact or a change in conditions. Accordingly, benefits were denied.

Coal Mine Health and Safety Act of 1969 as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80, 107 (2000)(to be codified at 20 C.F.R. parts 718, 722,725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his claim for benefits on September 4, 1995, which was denied by the district director on August 15, 1995. Director's Exhibits 1, 16. On appeal, after submission of additional evidence, the district director issued a proposed Decision and Order denying benefits on January 16, 1997. Director's Exhibits 22, 23, 31. Claimant appealed again and a hearing was held on October 2, 1997. Director's Exhibits 33, 38. On October 7, 1997, Judge Daniel J. Roketenetz issued an order remanding the case to the district director, granting claimant additional time to secure counsel and present additional evidence. Director's Exhibits 38-40. The claim was treated as a request for modification since the prior claim was denied less than a year before. Director's Exhibits 44, 45. After submission of additional evidence, Judge Roketenetz issued the Decision and Order denying modification on June 21, 2000.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 23, 2001, to which all parties have responded. Claimant contends that the new regulations will affect the outcome of this case and therefore urges the adjudication of this claim using the new regulations.[3] Specifically, claimant contends that 20 C.F.R. §718.104(d), relating to the weighing of treating physicians, 20 C.F.R. §718.201(a)(2), relating to the definition of pneumoconiosis, 20 C.F.R. §718.201(c), relating to the progressivity of pneumoconiosis, and 20 C.F.R. §718.204(a), (c), relating to the cause of total disability, as revised, will affect the outcome of this case. Director contends that the regulations at issue will not affect the outcome of this case. Having considered the responses of the parties and reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations. Contrary to claimant's contentions, the regulation as revised at Section 718.104 applies only to evidence developed after January 19, 2001. Regarding Section 718.201, relating to the definition of pneumoconiosis, we note that the regulation as revised, broadening the definition of pneumoconiosis to include both "clinical" and "legal" pneumoconiosis and recognizing the progressive nature of pneumoconiosis, merely codifies existing circuit law, *see Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 304, (6th Cir. 1987); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 442 (6th Cir. 1989); *Crace v. Kentland Elkhorn Coal Co.*, 109 F.3d 1163, 1167 (6th Cir. 1997). Additionally, contrary to claimant's argument, the revised regulation at Section 718.204(a), (c) which deals with causation is not at issue in the instant case, where the administrative law judge found that claimant did not establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). We conclude that none of the other challenged regulations affect the outcome of this case based on our review. Therefore, we will proceed to adjudicate the merits of this appeal.

[3] A special appearance on behalf of claimant was entered by Jeffrey Hinkle of the law firm of Anderson, Hinkle, Keenan & Childers, P.S.C. solely for the purpose of submitting a brief concerning the applicability of the new regulations which were issued on January 19, 2001 and stayed by the Preliminary Injunctive Order dated February 9, 2001.

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'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 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*).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been made. Furthermore, in determining whether modification has been established 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*, 17 BLR 1-82 (1993); *see 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); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge rationally determined that the new evidence of record was insufficient to establish either the existence of pneumoconiosis or total disability, and was therefore, insufficient to establish a change in conditions. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Further, upon reviewing the prior decision of the district director, the administrative law judge properly concluded that a mistake in a determination of fact had not been made since claimant failed to establish the existence of pneumoconiosis and total disability. Decision and Order at 11; *Worrell, supra*.

Considering the newly submitted evidence in conjunction with the prior 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. *See Piccin, supra*. The administrative law judge rationally found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis because the November 24, 1998 x-ray was uniformly interpreted as negative by Board-certified, B-readers, and a B-reader and the October 30, 1998 x-ray was interpreted as positive and negative by equally qualified readers. The administrative law judge also noted that the x-ray evidence submitted before the prior denial was interpreted as negative by readers with superior qualifications. Decision and Order at 7, 9; Claimant's Exhibit1; Director's Exhibits 12, 14-15, 50, 51, 56-61; Employer's Exhibit 1; Decision and Order at 7, 9. *Staton v. Norfolk & Western Ry. 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); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3)(2000) as there was no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). The administrative law judge also considered all of the medical opinion evidence of record and permissibly found it insufficient to establish the existence of pneumoconiosis. The new medical opinions of record consist of the report of Dr. Potter diagnosing pneumoconiosis, Director's Exhibit 51, and the report of Dr. Fino finding no pneumoconiosis, Director's Exhibit 54. The administrative law judge permissibly accorded greater weight to Dr. Fino's opinion based on his superior qualifications and as his report was better supported by the objective evidence of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Thus, the administrative law judge rationally found that these new medical opinions, considered in conjunction with the previously submitted reports which the administrative law judge noted, "also fail to affirmatively establish the presence of pneumoconiosis," Decision and Order at 10, were insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4); *Perry, supra*.

The administrative law judge also permissibly found the evidence insufficient to establish total disability. *Piccin, supra*. The administrative law judge rationally found that the evidence of record was insufficient to establish total disability on the basis of newly submitted pulmonary function and blood gas studies of record as they produced non-qualifying values and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(i)-(iii). Director's Exhibits 51, 54; Decision and Order at 9, 10; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge also

permissibly found that the medical opinion evidence of record which consisted of the report of Dr. Fino finding that claimant had the respiratory capacity to perform his usual coal mine employment, Director's Exhibit 54, and the report of Dr. Potter finding claimant could not return to his previous coal mine employment, Director's Exhibit 51, was insufficient to establish total disability. The administrative law judge permissibly accorded greater weight to Dr. Fino's opinion as it was better supported by the objective evidence, Dr. Fino had superior qualifications, and Dr. Potter failed to provide any explanations for his conclusions. *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-130 (6th Cir. 1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1988)(unpub.); *Dillon, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King, supra*. Thus, the administrative law judge rationally found that the new medical opinions, in conjunction with the previously submitted reports, did not establish a totally disabling respiratory impairment. Decision and Order at 10.

The administrative law judge is empowered to weigh the medical 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); *Clark, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis or total disability and, therefore, a basis for modification. *See Worrell, supra*; *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge