BRB No. 00-1082 BLA

DOUGLAS M. GOOSLIN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHANY COAL COMPANY	)	DATE ISSUED:
	)	
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.

Douglas M. Gooslin, McCarr, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: 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 (99-BLA-0804) of Administrative Law Judge Daniel J. Roketenetz denying 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).[1] The administrative law judge credited claimant with fifteen years of coal mine employment. Considering the newly submitted evidence and the evidence from the prior claims together, the administrative law judge found it insufficient to establish either the existence of pneumoconiosis or total disability, and thus insufficient to establish a change in conditions or a mistake in a determination of fact. Accordingly, benefits were denied.[2]

On appeal, claimant generally challenges the findings of the administrative law judge.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). For the convenience of the parties, all citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his claim on December 9, 1993. Director's Exhibit 1. Claimant was found entitled to benefits on February 1, and May11, 1995. Director's Exhibits 21, 22, 27, 33. After a hearing before an administrative law judge, benefits were denied. Director's Exhibits 47, 50. Claimant appealed, and on December 16, 1997 the Benefits Review Board affirmed the denial of benefits. Director's Exhibits 51, 58. Claimant filed a request for reconsideration, which the Board denied on February 11, 1998. Claimant appealed to the United States Court of Appeals for the Sixth Circuit, which dismissed the appeal at claimant's request, Director's Exhibits 64, 67, and requested modification, before the administrative law judge. The administrative law judge denied claimant's request for modification on July 14, 2000.

Employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the Decision and Order as supported by substantial evidence.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United 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 claims, 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 May 16, 2001, to which only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[3] Based on the brief submitted by the Director, and our review of the record, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of 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. *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). 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).

Pursuant to Section 725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits. *See Worrell, supra*; *Jessee v. Director, OWCP*, 5 F.3d 723, BLR 2-26 (4th Cir. 1993).

In determining whether claimant has established modification pursuant to Section

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

725.310, 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 an element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992); *Wojtowicz v. Dusquesne Light Co.*, 12 BLR 1-162 (1989); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 (2000). 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*).

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the majority of negative interpretations by the physicians possessing the dual qualifications of board-certified radiologist and B-reader and noted that x-ray evidence submitted in the earlier claim was negative for pneumoconiosis. This was rational. 20 C.F.R. §718.202(a)(1); *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), *see Perry, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. Further, inasmuch as there were no biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis based on that evidence. 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis by the use of presumptions covering complicated pneumoconiosis, claims filed prior to January 1, 1982, or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Turning to the medical opinion evidence, the administrative law judge accorded greater weight to the opinions of Drs. Castle, Morgan, Fino, Dahhan and Jarboe, who found that claimant did not suffer from pneumoconiosis, as he found that these reports were better reasoned and better documented. As these reports were better supported by the objective evidence, the administrative law judge accorded them determinative weight. This was rational. Director's Exhibit 90; Employer's Exhibits 3, 4, 5, 7. *See Clark, supra*; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986). The administrative law judge found Dr. Sundaram's opinion insufficient to outweigh the other opinions because he relied upon a positive reading of an x-ray subsequently reread negative by better qualified readers, and a pulmonary function study which was found to be invalid by several pulmonary

specialists. Decision and Order at 10; Director's Exhibits 75, 81, 82, 83, 84, 90, 91. *See Clark, supra*; *Minnich, supra*; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-88 n.4 (1984).

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 Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis and therefore a change in conditions or a mistake in a determination of fact on that basis. *See Nataloni, supra*.

Regarding the pulmonary function studies, the administrative law judge gave less weight to the July 29, 1998 pulmonary function test conducted by Dr. Sundaram because it was invalidated by Drs. Burki, Fino, Renn and Castle and accorded more weight to the November 24, 1998 non-qualifying test. Decision and Order at 12; Director's Exhibits 82, 90, 91; Employer's Exhibits 2. This was rational. *See Clark, supra*; *Minnich, supra*; *Winters, supra*. The administrative law judge also correctly found that the newly submitted blood gas study was non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(ii)(2); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). Director's Exhibits 90. Likewise, the administrative law judge correctly found that inasmuch as the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(iii).

Turning to the medical opinions, the administrative law judge correctly noted that the opinions of Drs. Fino, Morgan, Castle, Dahhan and Jarboe supported a finding that claimant was not totally disabled as their opinions were supported by the objective evidence of record and they were highly qualified physicians. *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Minnich, supra*. Decision and Order at 13; Director's Exhibit 90, Employer's Exhibits 3, 4, 5, 7. The administrative law judge found Dr. Sundaram's opinion less persuasive, as it was not supported by the objective evidence of record and Dr. Sundaram relied on a pulmonary function study which was subsequently invalidated, *Id.*; Director's Exhibits 75, 81, 82, 83, 84, 90, 91, *see Clark, supra*; *Minnich, supra*, and Dr. Sundaram was not board-certified in internal or pulmonary medicine. *See Dillon, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, the administrative law judge found that claimant failed to establish total disability. *Id.* This was rational. We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish total disability, and, therefore, failed to establish either a change in conditions or a mistake in a determination of fact on that basis. *See Nataloni, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits

is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge