BRB No. 04-0196 BLA

JOHN L. MAULDIN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 07/29/2004
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-0040) of Administrative Law Judge Thomas F. Phalen, Jr., 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 indicated that

[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

the case before him presented claimant's petition for modification of a prior denial and considered whether claimant established a change in conditions or a mistake of fact in accordance with 20 C.F.R. §725.310 (2000).[2] The administrative law judge found that claimant did not demonstrate a change in conditions, as the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that claimant failed to establish a mistake of fact. Accordingly, the administrative law judge denied claimant's petition for modification.

On appeal, claimant challenges the findings of the administrative law judge that the evidence is insufficient to demonstrate the existence of pneumoconiosis and a totally disabling respiratory impairment. Employer responds, urging affirmance of the Decision and Order 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.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his original application for benefits on August 3, 1983. Director's Exhibit 1. This case was appealed to the Board three times and subsequently remanded to the administrative law judge for further consideration. *Mauldin v. Eastern Associated Coal Corp.*, BRB No. 98-0142 BLA (April 27, 1999) (unpub.). On September 22, 2000, the administrative law judge issued a Decision and Order on Remand denying benefits based on his finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000). On appeal, the Board affirmed the denial of benefits. *Mauldin v. Eastern Associated Coal Corp.*, BRB No. 01-0105 BLA (Oct. 19, 2001)(unpub.). Claimant filed the present petition for modification on November 19, 2001. Director's Exhibit 76.

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 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 considering the administrative law judge's Decision and Order, the arguments 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 contains no reversible error. Pursuant to Section 718.202(a), claimant contends that the administrative law judge erred by failing to weigh all the evidence relevant to each subsection together as required by the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[3] We reject claimant's assertion.

At Section 718.202(a)(1), the administrative law judge weighed all of the x-ray readings of record submitted since the previous denial of benefits, and permissibly credited the greater number of negative readings by those physicians who were both Board-certified radiologists and B readers. Decision and Order at 4, 7-8; Director's Exhibits 76, 84, 87, 88; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The administrative law judge also properly found that claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3), as the record contains no biopsy evidence, and the presumptions contained in 20 C.F.R. §§718.304, 718.305, and 718.306, are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 8; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Pursuant to Section 718.202(a)(4), the administrative law judge properly found that the newly submitted medical reports of Drs. Fino, Zaldivar and Branscomb, did not establish the existence of pneumoconiosis as none of these physicians diagnosed the presence of the disease. Decision and Order at 8; Employer's Exhibits 1-6; Director's Exhibit 86; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). As the administrative law judge has rationally determined that none of the newly submitted evidence of record can establish the existence of pneumoconiosis under any subsection of Section 718.202(a), we hold that substantial evidence supports the administrative law judge's finding that the presence of the disease has not been established and, therefore, that claimant did not

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the State of West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

establish a change of condition with respect to this element of entitlement. *See Compton,* 211 F.3d 203, 22 BLR 1-162.

Claimant has also raised general allegations of error with respect to the administrative law judge's determination that the newly submitted evidence does not support a finding of total disability pursuant to Section 718.204(b). Claimant essentially maintains that because he was found to be totally disabled in the prior adjudication, the administrative law judge should have resolved this issue in his favor on modification. We decline to address claimant's arguments. In the prior adjudication of claimant's application for benefits, claimant was found to have proved that he is suffering from a totally disabling respiratory impairment. 1989 Decision and Order on Remand at 6-8; Director's Exhibit 45. His claim was denied, however, because he failed to demonstrate that he was suffering from pneumoconiosis. 2000 Decision and Order on Remand at 14-17; Director's Exhibit 73; *see also Mauldin v. Eastern Associated Coal Corp.,* BRB No. 01-0105 BLA (Oct. 19, 2001)(unpub.), slip op. at 6. In order to establish the grounds for modification pursuant to Section 725.310, therefore, claimant was required to prove that he has developed pneumoconiosis subsequent to the prior denial or that a mistake in a determination of fact was made with respect to this element of entitlement in the denial of his claim. *Jessee v. Director, OWCP,* 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Thus, because the issue of total disability was not relevant to the consideration of claimant's request for modification, we need not address the administrative law judge's finding that the newly submitted evidence was insufficient to establish total disability at Section 718.204(b). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because we have affirmed the administrative law judge's determination that the newly submitted evidence does not support a finding of pneumoconiosis under Section 718.202(a), we also affirm his finding that claimant has not demonstrated a change in conditions pursuant to Section 725.310 (2000). In addition, we affirm the administrative law judge's determination that the prior denial does not contain a mistake in a determination of fact regarding the existence of pneumoconiosis, as claimant has not challenged this finding on appeal. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We affirm, therefore, the administrative law judge's denial of claimant's request for modification and the denial of benefits.

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