BRB No. 00-0896 BLA

CHARLIE C. MEADOWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
GARDEN CREEK POCAHONTAS COMPANY	)	
	)	
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 Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Charlie C. Meadows, Oakwood, Virginia, *pro se*.

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

Barry H. Joyner (Judith E. Kramer, 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: DOLDER and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order

(1999-BLA-797) of Administrative Law Judge Edward Terhune Miller denying benefits on a request for modification in 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).[2] The administrative law judge adjudicated the instant modification request pursuant to 20 C.F.R. Part 718 (2000).[3] The administrative law judge judge reviewed the evidence submitted subsequent to the previous denial to determine whether claimant established a change in condition or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (1999)[4] in accordance with *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge noted that employer conceded that claimant is totally disabled, but found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). The administrative law judge concluded that the newly submitted evidence was insufficient to establish a change in condition since the previous denial and that, based upon a review of the entire record, there was no mistake in a determination of fact in the previous denial. The administrative law judge thus found that modification was not established pursuant to Section 725.310 (1999). Accordingly, benefits were denied. 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 not participated 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 March 9, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order.[5] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board 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. *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, are supported by substantial evidence, and are 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 (2000). Failure of claimant 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*).

In determining whether claimant has established a change in condition pursuant to Section 725.310 (1999), 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). If a claimant avers generally that the ultimate fact was mistakenly decided, the administrative law judge has the authority, without more, to modify the denial of benefits. *Jessee, supra*.

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 and that there is no reversible error contained therein. In his consideration of the x-ray evidence, the administrative law judge rationally concluded that the x-ray evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to Section 718.202(a)(1) (2000) as he correctly found that none of the newly submitted x-ray readings were positive for the presence of pneumoconiosis. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5-6; Director's Exhibits 97-98; Employer's Exhibit 1. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000) as it is supported by substantial evidence.

Further, the administrative law judge properly concluded that the provisions of Section 718.202(a)(2) (2000) and the presumptions enumerated at Section 718.202(a)(3) (2000) are inapplicable to this claim as the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000); claimant filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305 (2000); and this is not a survivor's claim. *See* 20 C.F.R. §718.306 (2000); Decision and Order at 5.

Moreover, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000) as the weight of the more comprehensive and more credible medical opinions did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton*

Industries, Inc., 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry*, *supra*; Decision and Order at 6-9. The administrative law judge found that the opinions of Drs. Javed and Forehand diagnosing pneumoconiosis were outweighed by the contrary opinions of Drs. Jarboe, Fino, Iosif, Dahhan and Hippensteel, all of whom found that claimant did not suffer from pneumoconiosis, but instead suffered from a smoking induced lung condition. *Id*. The administrative law judge rationally gave greatest weight to the opinions of Drs. Jarboe, Fino, Iosif, Dahhan and Hippensteel, as their opinions were well-reasoned and documented and these physicians possessed superior qualifications.[6] *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); *Clark*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 7-10. In addition, the administrative law judge acted within his discretion as fact-finder in concluding that the opinions of Dr. Javed, a cardiologist and Board-certified internist, and Dr. Forehand, who is Board-certified in allergy, immunology and pedicatrics, were entitled to little weight as the physicians failed to adequately explain the rationale for their diagnoses. *Clark*, *supra*; Decision and Order at 6, 8, 10. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). *Anderson*, *supra*; *Trent*, *supra*.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000), a requisite element of entitlement under 20 C.F.R. Part 718 (2000), we affirm the administrative law judge's finding that claimant failed to demonstrate a change in condition pursuant to Section 725.310 (1999). Furthermore, the administrative law judge properly reviewed the entire record and rationally concluded that there was no mistake in a determination of fact in the prior denial. Decision and Order at 10. Therefore, we affirm the administrative law judge's finding that claimant failed to establish that modification of the previous denial of benefits is warranted pursuant to Section 725.310 (1999) as it is supported by substantial evidence and is in accordance with law. *See Jessee*, *supra*. Inasmuch as claimant has failed to establish modification pursuant to Section 725.310 (1999), we affirm the denial of benefits.

Accordingly, the Decision and Order of the administrative law judge denying modification and benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge