BRB No. 00-1014 BLA

HARRY HURD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER MINING 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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Harry Hurd, Bristol, Virginia, *pro se*.

W. Stacy Huff (Huff Law Offices) Harlan, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-BLA-0326) of Administrative Law Judge Pamela Lakes Wood 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] This is a request for modification of the denial of a duplicate claim.[2]

[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, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

refer to the amended regulations.

[2] Claimant filed his first claim for benefits with the Social Security Administration (SSA) on December 1, 1970. After denials by SSA, it was forwarded to the Department of Labor (DOL) where it was finally denied by Administrative Law Judge Richard E. Huddleston on March 15, 1985 because, although claimant established the existence of pneumoconiosis, he failed to establish that he was totally disabled by the disease. Director's Exhibits 51-78.

After crediting claimant with eight and one-half years of coal mine employment, based on the prior finding by Administrative Law Judge Richard E. Huddleston which she found reasoned, the administrative law judge found, after reviewing the prior decision, the newly submitted evidence, and all the evidence of record, that the existence of pneumoconiosis and a totally disabling respiratory impairment were not established and that the evidence was, therefore, insufficient to establish a basis for modification.[3] Accordingly, benefits were denied.

Claimant filed a second claim on July 16, 1992, which was denied on September 25, 1992 because the district director found that claimant failed to establish any element of entitlement and therefore a material change in conditions. Director's Exhibits 52-1, 52-15. No appeal was taken and the decision became final. Director's Exhibit 52.

The third, and instant, claim was filed on August 3, 1994. It was denied by Administrative Law Judge Frederick D. Neusner on May 13, 1996 because claimant failed to establish a material change in conditions. Director's Exhibits 1, 31. Subsequent to this denial, claimant filed the instant modification request on April 17, 1997, Director's Exhibit 33, which was denied by Administrative Law Judge Pamela Lakes Wood.

[3] Judge Wood adopted the finding of Judge Huddleston with respect to the years of

coal mine employment. Judge Huddleston originally found eight and one-half years of coal mine employment in his Decision and Order of March 15, 1985. Director's Exhibit 51-78 at 6. Subsequent to claimant's request for modification and the submission of additional evidence of coal mine employment, Director's Exhibit 51-82, however, while Judge Huddleston concluded that a material change in conditions was not established, he did modify his finding on years of coal mine employment to nine and one-half years. Order Denying Request For Modification of June 19, 1986. Director's Exhibit 51-83. Inasmuch as this finding does not affect the outcome of the instant case, however, the administrative law judge's error in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant appeals, generally challenging the administrative law judge's denial of benefits. 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 (the Director), has filed a letter indicating that he will not respond 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 20, 2001. Employer and the Director responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[4] 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, 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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[4] 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 April 20, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

Pursuant to Section 725.310 (2000), any party may, within a year of a final order, request modification of the order.[5] Modification may be granted if there are changed circumstances or there was a mistake in determination of fact in the earlier decision. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *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. *Jessee*, *supra*; *Worrell*, *supra*.

In determining whether claimant has established modification pursuant to Section 725.310 (2000), the administrative law judge's 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. 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 newly submitted x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the majority of the newly submitted negative interpretations by physicians possessing the dual qualifications of Board-certified radiologist and B reader. This was rational. 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d

[5] Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits. 20 C.F.R. §725.310(a)(2000).

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 9. Further, inasmuch as there were no biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis at 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 newly submitted physicians' opinions, the administrative law judge rationally accorded little weight to Dr. Jabour's opinion, that claimant suffers from pneumoconiosis, because Dr. Jabour did not provide a basis for his diagnosis, apart from the x-ray evidence. Decision and Order at 10; Director's Exhibit 33; *Hicks, supra*; *see Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). The administrative law judge also rationally accorded less weight to Dr. Dahhan's new opinions, as they "lack[ed] a detailed analysis," even though, "they appear[ed] to be written to supplement his previous reports." Decision and Order at 10; Director's Exhibits 43, 38; *see Clark, supra*; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 (1984).[6] Further, the administrative law judge did not abuse her discretion, as trier of fact, in relying on Dr. Branscomb's opinion as she rationally found it to be the best reasoned and documented of record. Employer's Exhibit 1; *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8 (1996); *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich, supra*. 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 if the administrative law judge's findings are supported by substantial evidence, *see Clark*, *supra*; *Anderson*, *supra*. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and, therefore, a basis for modification. *Nataloni*, *supra*; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Turning to the issue of total disability, the administrative law judge correctly found that total disability was not established based on the pulmonary function studies, as the newly submitted pulmonary function study was non-qualifying, and the two recent pulmonary function studies submitted in connection with the duplicate claim, although not the instant

[6] In any case, even if Dr. Dahhan's new opinions were found sufficiently detailed to constitute reasoned opinions, as Dr. Dahhan opined that claimant did not have coal worker's pneumoconiosis or occupational pneumoconiosis, they would not be supportive of claimant's case. Director's Exhibits 43, 38.

modification, were also non-qualifying. *See* 20 C.F.R. §718.204(b)(ii)(2); Director's Exhibits 7, 33. 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)(2)(iii). Regarding the blood gas studies, the administrative law judge permissibly found that, as one of the newly submitted blood gas studies was qualifying, and one was non-qualifying, Director's Exhibits 33, 44, and the recent studies submitted in connection with the duplicate claim, although not the instant modification, were also non-qualifying, they did not establish total disability. 20 C.F.R. §718.204(b)(2)(ii).

Turning to the physicians' opinions, the administrative law judge correctly noted that as none of the medical opinions submitted in connection with this request for modification supported a finding that claimant had a totally disabling respiratory impairment, Decision and Order at 11; Director's Exhibits 43, 38, 33; Employer's Exhibit 1, claimant failed to establish total disability based on the medical opinion evidence. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish total disability, and, therefore, failed to establish a basis for modification. *See Nataloni*, *supra*. Further, considering the newly submitted evidence on total disability together, the administrative law judge properly found that claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); *Fields*, *supra*.

Finally, considering all the evidence of record and reviewing the decision of the prior administrative law judge, the administrative law judge properly found that no mistake in a determination of fact had been made. Accordingly, the administrative law judge properly concluded that claimant failed to establish a basis for modification and properly denied benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge