

BRB No. 03-0852 BLA

HENRY L. GREEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RED ASH SALES COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS’	)	DATE ISSUED: 06/29/2004
PNEUMOCONIOSIS FUND	)	
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Robert Weinberger (West Virginia Coal Workers’ Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-0072) of Administrative Law Judge Daniel F. Solomon 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).<sup>1</sup> Claimant filed an application for benefits on October 6, 1997. Director's Exhibit 1. Following a formal hearing, Administrative Law Judge Thomas M. Burke denied benefits on January 29, 2001, finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 50. On appeal, the Board affirmed the administrative law judge's denial of benefits in a Decision and Order dated January 23, 2002.<sup>2</sup> Director's Exhibits 57. Claimant filed a timely request for modification on March 5, 2002, which was denied by the district director. Director's Exhibits 58, 65. The case was subsequently assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge) for a decision on the record.<sup>3</sup> In accordance with 20 C.F.R. §725.310 (2000),<sup>4</sup> the administrative law judge reviewed the entire record and determined that there had been no mistake in a determination of fact in the prior decision denying benefits. The administrative law judge also found that claimant failed to establish a change in conditions since the prior denial of his claim as the newly submitted evidence did not establish that he suffered from coal workers' pneumoconiosis, a requisite element of

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<sup>1</sup> 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup> *Henry L. Green v. Red Ash Sales Co.*, BRB No. 01-0437 BLA (Jan. 23, 2002) (unpub.)

<sup>3</sup> Claimant initially requested a hearing, but agreed in a telephone conference held on April 10, 2003 that the case would be decided on the record.

<sup>4</sup> The amendments to the regulations at 20 C.F.R. §725.310 (2002) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

entitlement. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant argues that the administrative law judge erred in denying his modification request, and in finding that he failed to prove the existence of coal workers' pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the old evidence, to determine if the weight of the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision.<sup>5</sup> See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Burke denied the claim for benefits because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 50. Consequently, the issues now properly before the administrative law judge were whether claimant established a mistake in a determination of fact in the prior decision, and whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis, i.e., a change in conditions.

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<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment occurred in the State of West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 5.

In this case, the administrative law judge stated his agreement with the findings of Judge Burke, as affirmed by the Board, and therefore concluded that there was no mistake in fact with respect to the prior denial of benefits. Decision and Order at 7. In discussing the x-ray evidence, the administrative law judge noted that the record before Judge Burke consisted of nine x-ray readings, five of which were from physicians with unknown qualifications and four readings from dually qualified, Board-certified radiologists and B-readers. Decision and Order at 5. Of the nine x-ray readings, there were three positive readings made by physicians with unknown qualifications compared to four negative readings by physicians dually qualified as Board-certified radiologists and B-readers. Director's Exhibits 12, 13, 36, 38. In the newly submitted evidence on modification, there was one x-ray dated February 19, 2002, which had been read by Dr. Miller as positive for pneumoconiosis and by Drs. Sargent, Wiot and Spitz as negative for the disease. Decision and Order at 5; Director's Exhibits 58, 61, 62, 63. Because Dr. Miller's credentials were not of record, the administrative law judge permissibly determined that his positive reading was of little probative value. In contrast, since the qualifications of Drs. Sargent, Wiot and Spitz were contained in the record, reflecting their status as dually qualified, Board-certified radiologists and B-readers, the administrative law judge permissibly relied on their negative readings to find that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).<sup>6</sup> See 20 C.F.R. §718.202(a)(4); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

The administrative law judge also properly found that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). There was no prior medical opinion evidence of record stating that claimant had coal workers' pneumoconiosis or chronic dust disease of the lung related to dust exposure in coal mine employment.<sup>7</sup> The administrative law judge found that there

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<sup>6</sup> The administrative law judge properly noted that there was no autopsy or biopsy evidence for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and that claimant could not establish pneumoconiosis at 20 C.F.R. §718.202(a)(3) since he was unable to avail himself of the presumptions discussed therein. Decision and Order at 5.

<sup>7</sup> Although the administrative law judge did not specifically set forth the prior medical evidence in his discussion at Section 718.202(a)(4), he stated that, "[a] review of all of the medical reports shows that the [c]laimant has not met his burden on this issue also." Decision and Order at 6. The record contains three prior medical opinions from Drs. Rao, Kohli and Fino. Although Drs. Rao and Kohli opined that claimant suffered chronic obstructive pulmonary disease, neither physician offered an opinion that claimant's respiratory condition was due to coal dust exposure. Director's Exhibit 25. Dr. Fino stated in a prior June 22, 1999 report that claimant did not have coal workers' pneumoconiosis. Director's Exhibit 37.

was only one new medical report, from Dr. Fino, submitted in conjunction with claimant's modification request. However, Dr. Fino reiterated his prior opinion that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 64. Accordingly, because none of the medical opinion of evidence supports a finding of pneumoconiosis, the administrative law judge correctly determined that claimant failed to carry his burden of proof at Section 718.202(a)(4). 20 C.F.R. §718.202(a)(4); *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).

Consequently, because the administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a),<sup>8</sup> we affirm his finding that claimant failed to establish modification based on a mistake in a determination of fact or a change in condition under 20 C.F.R. §725.310 (2000). Thus, we affirm the administrative law judge's denial of benefits as supported by substantial evidence.

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<sup>8</sup> Contrary to claimant's contention on appeal, the administrative law judge's analysis of the evidence was consistent with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) insofar as he addressed all of the relevant evidence in reaching his determination that claimant failed to establish the existence of pneumoconiosis, and was therefore unable to establish modification or his entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is hereby affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge