BRB No. 98-1003 BLA

JERRY D. DEEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KYV COAL COMPANY, INC., ET ALIA	)	
WEST VIRGINIA CWP FUND	)	
CUMBERLAND COAL COMPANY, INC	)	
VA INDEPENDENT COAL OPERATORS	)	
GROUP SELF-INSURANCE	)	
ASSOCIATION	)	DATE ISSUED: 6/22/99
	)	
Employers/Carriers-	)	
Respondents	)	
	)	
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 Based On A Request For Modification of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jerry D. Deel, Grundy, Virginia, *pro se*.

Stephen E. Crist (Assistant Attorney General, Employment Programs Litigation Unit), Charleston, West Virginia, for carrier, West Virginia Coal Workers' Pneumoconiosis Fund.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denying Benefits Based On A Request For Modification (97-BLA-1430) of Administrative Law Judge Richard K. Malamphy 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).

This case is before the Benefits Review Board for the second time. The history of this case is as follows: Claimant filed for benefits on February 4, 1993. Director's Exhibit 1. The claim was administratively denied, and claimant requested a hearing. Director's Exhibits 52, 56. Following a hearing, the administrative law judge credited claimant with twenty-nine years of coal mine employment and found the evidence insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant filed an appeal to the Board, generally challenging the administrative law judge's denial of benefits. The Board affirmed the denial of benefits, holding that substantial evidence supported the administrative law judge's finding that claimant had failed to establish the existence of pneumoconiosis by any of the alternative methods provided at Section 718.202(a)(1)-(4). *Deel v. KYV Coal Company, Inc.*, BRB No. 95-1923 BLA (Feb. 28, 1996) (unpublished). On January 9, 1997, claimant filed a request for modification with the district director. Director's Exhibit 95. On modification, claimant submitted a positive interpretation of an x-ray taken on January 17, 1996. *Id*. The request for modification was administratively denied, and again, claimant requested a formal hearing. Director's Exhibits 100, 101. Following the hearing, Administrative Law Judge Richard K. Malamphy found that claimant again failed to establish the presence of pneumoconiosis, and that therefore, claimant failed to establish that modification was warranted. Therefore, benefits were again denied. Claimant filed the instant appeal. 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 respond to this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant, that the Board review the administrative law judge's decision, Director's Exhibit 101, but Mr. Carson is not representing him on appeal. *See* 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 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 the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Id*. Additionally, in determining whether claimant has established a change in conditions pursuant to Section 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 at least one of the elements of entitlement which defeated entitlement in the prior decision. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Further, under Section 725.310, in considering whether a mistake of fact occurred in the prior determination, the administrative law judge is required to review the entire evidentiary record. *See Nataloni, supra; Kovac, supra*. In presenting this issue, the proponent need not show "a smoking-gun factual error, changed conditions or startling new evidence." *Jessee, supra*.

On modification, the administrative law judge first assessed the newly submitted x-ray evidence to determine whether claimant had established a change in conditions pursuant to Section 725.310. The administrative law judge noted that, on modification, claimant proffered the positive interpretation of an x-ray taken in January, 1996. Director's Exhibit 95. Although this x-ray was read as positive by Dr. Alexander, the administrative law judge noted that the other readings conflicted with that of Dr. Alexander. Decision and Order at 6. The administrative law judge stated that, in light of this conflict, the x-ray evidence failed to "clearly reflect the presence of coal workers' pneumoconiosis." *Id*. We agree. The x-ray of January 17, 1996, was found to be unreadable by Dr. Lippmann, a B-reader and negative by Drs. Navani, Scott and Wheeler, all of whom are B-readers and Board certified radiologists. Director's Exhibits 98, 99; Employer's Exhibit 1, 2. Inasmuch as the administrative law judge weighed the x-ray evidence not merely in terms of the quantity of negative interpretations but the qualifications of the interpreting physicians as well, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), and the weight of the evidence does not establish the presence of pneumoconiosis by a preponderance of the evidence, we affirm the administrative law judge's finding that the evidence fails to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

With respect to Section 718.202(a)(2), we affirm the administrative law judge's finding that inasmuch as the record contains no biopsy evidence, pneumoconiosis could not be established pursuant to this provision.

Next, we note that the administrative law judge properly determined that none of the presumptions of Section 718.202(a)(3) is applicable to the instant claim,[2] thus precluding a finding of pneumoconiosis under subsection (a)(3).

Finally, the administrative law judge found that no new medical reports had been submitted on modification, and therefore, pneumoconiosis could not be established pursuant to Section 718.202(a)(4). Decision and Order at 6. We affirm this finding. Inasmuch as we affirm the administrative law judge's finding that the newly submitted evidence fails to establish the presence of pneumoconiosis, we affirm his finding that claimant has failed to show a change in conditions at Section 718.202(a)(1)-(4) pursuant to Section 725.310.[3]

In addressing the issue of whether a mistake of fact had been made in the previous decision, the administrative law judge merely found that claimant made " no allegation as to mistakes in fact." Decision and Order at 7. While a specific allegation of mistake is not required, *see Jessee, supra*, inasmuch as the record is devoid of any credible old or new evidence that would establish the presence of pneumoconiosis, a finding of entitlement is precluded. Therefore, we affirm the administrative law judge's finding that claimant failed to establish modification pursuant to Section 725.310.

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[2]We note that the record is devoid of evidence of complicated pneumoconiosis, and therefore, Section 718.304 is inapplicable. Inasmuch as this claim was filed after January 1, 1982, Section 718.305 is also inapplicable. Section 718.306 is inapplicable because this is a living miner's case. See 20 C.F.R. §§718.304, 718.305, 718.306.

[3]Moreover, inasmuch as claimant submitted no new evidence on modification probative of the isssue of total disability at 20 C.F.R. §718.204, a finding of a change in condition thereunder is precluded.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits Based On A Request For Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge