BRB No. 11-0554 BLA

HOWARD O. HYPES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 03/14/2012
RAG AMERICAL COAL COMPANY	)	
	)	
Employer/Carrier-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 Claimant's Petition for Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Howard O. Hypes, Powellton, West Virginia, *pro se*.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel[1], appeals the Decision and Order Denying Claimant's Petition for Modification of Administrative Law Judge Thomas M. Burke, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves claimant's request for modification of the denial of a claim filed on January 28, 2003.[2] Director's Exhibit 2. The claim was previously denied by Administrative Law Judge Michael P. Lesniak on November 13, 2006. Judge Lesniak credited claimant with fifteen years of coal mine employment, but found that claimant did not establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 64.

On November 1, 2007, claimant filed a request for modification. The case was subsequently referred to the Office of Administrative Law Judges, and a hearing was held by Judge Burke (the administrative law judge). At the hearing, claimant submitted x-rays, computerized tomography (CT) scans, and medical treatment records which he asserted establish the existence of both simple and complicated pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.304, as well as total disability due to pneumoconiosis, pursuant to 20 C.F.R. §§718.204(b), (c), 718.304.

In his decision denying modification, the administrative law judge considered the newly submitted evidence along with the evidence already in the record, and found that the evidence did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.304, or the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), 718.304. Therefore, the administrative law judge found that claimant failed to establish grounds for modification of the prior denial of benefits. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The

[1] Carol Ann Blankenship, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested on claimant's behalf that the Board review the administrative law judge's decision. Ms. Blankenship, however, is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as the claim was filed before January 1, 2005.

Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.

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 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[3] 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).

To establish entitlement to benefits under 20 C.F.R. Part 718, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure 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*).

An administrative law judge may grant modification based on a change in conditions[4] or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

After consideration of the administrative law judge's Decision and Order and the evidence in the record, we conclude that the decision was rational and supported by substantial evidence. In finding that claimant failed to establish the existence of either simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (3);

[3] Claimant's last coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[4] In the prior decision, Administrative Law Judge Michael P. Lesniak denied benefits because claimant did not establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 64. Consequently, in order to establish a change in conditions, the new evidence would have to establish the existence of pneumoconiosis or total disability.

718.304(a), the administrative law judge concluded that there was no mistake in the previous determination that the x-ray evidence was in equipoise concerning the existence of both simple and complicated pneumoconiosis. Decision and Order at 15-16. The administrative law judge further considered the newly submitted x-ray evidence, noting that while Dr. Miller, a B reader and Board-certified radiologist, interpreted a July 23, 2008 x-ray as positive for both simple and complicated pneumoconiosis, Claimant's Exhibit 1, Dr. Scott, an equally qualified radiologist, interpreted the x-ray as negative for any form of pneumoconiosis. Employer's Exhibit 15. Because equally qualified physicians interpreted the July 23, 2008 x-ray as both positive and negative for pneumoconiosis, the administrative law judge permissibly found that these x-ray readings are in equipoise, and fail to support claimant's burden of proof to establish the existence of either simple or complicated pneumoconiosis.[5] *See* 20 C.F.R. §§718.202(a)(1), (3); 718.304(a); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-336 (4th Cir. 1998); Decision and Order at 16. We therefore affirm the administrative law judge's determination that the weight of the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (3); 718.304(a).

The administrative law judge next considered six readings of three CT scans dated April 1, 2005, April 19, 2007 and April 10, 2009, pursuant to 20 C.F.R. §718.107. Decision and Order at 4-5, 16-17; Claimant's Exhibit 3, Employer's Exhibits 10, 13. The April 1, 2005 CT scan was initially interpreted by Dr. Davis as showing a fibrotic mass with fibrotic scarring, but Dr. Davis did not offer an opinion as to the etiology of the mass. Claimant's Exhibit 3. The scan was also read by Drs. Wheeler and Scott, who are both B readers and Board-certified radiologists, and who attributed the changes they saw to granulomatous disease. Employer's Exhibits 4, 6.

Dr. Davis, a radiologist associated with Montgomery General Hospital, read the April 19, 2007, CT scan as revealing fibrotic masses in the lung apices bilaterally, right larger than left, but did not offer an opinion as to the etiology of the masses. Claimant's Exhibit 3. Dr. Scott read the April 19, 2007 scan as showing a four to five centimeter mass in the right apex, and a two centimeter mass in the left apex, probably due to granulomatous disease. Employer's Exhibit 10. Dr. Scott stated that there were no changes to suggest silicosis or coal workers' pneumoconiosis. Employer's Exhibit 10.

[5] The administrative law judge correctly noted that the only remaining new x-ray evidence consists of uncontradicted negative readings of x-rays dated August 12, 1999 and April 10, 2009 by Dr. Scott. Decision and Order at 4, 15; Employer's Exhibits 12, 13.

The administrative law judge noted that Dr. Dwyer read the new, April 10, 2009 CT scan as revealing bilateral fibrotic masses that he attributed to conglomerate pneumoconiosis. Decision and Order at 5-6, 16; Claimant's Exhibit 3. Dr. Scott opined that the masses seen on this CT scan are probably due a healed infection process, such as tuberculosis or histoplasmosis, and that there are no lung changes to suggest silicosis or coal workers' pneumoconiosis. Employer's Exhibit 13.

Noting that the record does not contain the qualifications of Drs. Davis or Dwyer, the administrative law judge acted within his discretion in crediting the negative interpretations of the April 1, 2005, April 19, 2007, and April 10, 2009 CT scans, by Drs. Scott and Wheeler, based on their superior qualifications. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65 (4th Cir. 1992); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); Decision and Order at 16. The administrative law judge, therefore, reasonably found that the CT scan evidence is negative for both simple and complicated pneumoconiosis, and thus fails to establish either a mistake in a determination of fact in the prior proceedings or a change in conditions. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 17.

The administrative law judge also properly considered whether claimant established the existence of pneumoconiosis through medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge initially found that a review of the prior medical opinions by Drs. Rasmussen, Crisalli, Hippensteel, Atassi, Alexander, and Wheeler, revealed no mistake in Judge Lesniak's previous determination that the medical opinion evidence did not establish the existence of simple or complicated pneumoconiosis. Decision and Order at 17; Director's Exhibits 10, 12, 59, 60, 62. The administrative law judge then noted, correctly, that the only new medical opinion of record is that of Dr. Scott, who reviewed a series of x-rays and CT scans and opined that claimant does not have complicated pneumoconiosis. Decision and Order at 17; Employer's Exhibit 14. Dr. Scott explained that the large masses in claimant's lungs are not surrounded by smaller masses and are not located in the hilar region of the lungs, as would be typical for masses formed due to coal dust exposure. Employer's Exhibit 14. The administrative law judge reasonably credited Dr. Scott's opinion as thorough and persuasive, noted that it corroborated previously submitted opinions in the record, and found that the weight of the medical opinions does not establish the presence of either simple or complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), (4), 718.304(c); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-42 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 17.

Finally, as required by *Compton*, 211 F.3d at 211, 22 BLR at 2-174, the administrative law judge weighed together all of the evidence – including the new x-ray interpretations, CT scan interpretations, and medical opinions, and those previously of record – before finding that claimant failed to demonstrate the presence of either simple or complicated pneumoconiosis. Decision and Order at 18. We therefore affirm that finding. In light of our affirmance of the administrative law judge's finding that the evidence of record does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of claimant's request for modification.[6] 20 C.F.R. §725.310(a); *see Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's the Decision and Order Denying Claimant's Petition for Modification is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[6] In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304, we need not address the administrative law judge's additional finding that claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 18.