BRB No. 98-0773 BLA

BILLY E. JACKSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY RIVER MINING, INCORPORATED	)	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 Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Billy E. Jackson, Vansant, Virginia, *pro se*.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (97-BLA-1736) of Administrative Law Judge Edward J. Murty, Jr., 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). Based on

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge concluded that the evidence of record was insufficient to establish pneumoconiosis or total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. Part 718. 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 filed a letter indicating that he would not participate in 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. *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 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).

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[2] Claimant filed his initial claim for benefits on July 7, 1995, which was denied by the Department of Labor September 6, 1995, finding failure to establish any of the elements of entitlement. Director's Exhibits 1, 18. Claimant filed a request for a hearing on October 25, 1995, which was denied by the district director on a proposed Decision and Order on April 19, 1996 and May 20, 1996, for failure to establish any elements of entitlement. Director's Exhibits 18, 19, 36, 40. Claimant's submission of 2 x-rays on April 17, 1997, was treated as a request for modification and denied by the district director on June 2, 1997. Director's Exhibits 46, 48. Claimant requested a formal hearing June 24, 1997. Pursuant to a formal hearing held December 17, 1997, the administrative law judge denied modification in the Decision and Order issued February 3, 1998.

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. 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).

This case presents a request for modification. The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction the instant case arises, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989), issued *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), holding that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been asserted by claimant. Furthermore, in determining whether claimant has established modification 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 the element or elements of entitlement which defeated entitlement in the prior decision. *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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge, in the instant case, permissibly determined that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). He permissibly determined that the existence of pneumoconiosis was not established based on the preponderance of negative x-ray readings by physicians with superior qualifications. Director's Exhibits 13-17, 29-31, 37, 43; Decision and Order at 2; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there is no biopsy of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 2; *Langerud v. Director,*

OWCP, 9 BLR 1-101 (1986). Further, the administrative law judge considered the entirety of the medical opinion evidence of record and permissibly found the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4) as neither physician of record diagnosed pneumoconiosis. Director's Exhibits 11, 30; Decision and Order at 3; 20 C.F.R. §718.201; *Perry*, *supra*.

The administrative law judge, in the instant case, also permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204. *Piccin*, *supra*. The administrative law judge permissibly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as all of the pulmonary function studies and blood gas studies of record produced nonqualifying values[3] and there was no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 10, 12 30; Decision and Order at 3; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge properly considered the entirety of the medical opinion evidence of record and permissibly found that total disability was not established as neither physician found claimant totally disabled. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry*, *supra*; Director's Exhibit 58; Employer's Exhibits 1-7; Decision and Order at 14. 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. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis and total disability pursuant to Section 718.202(a) and 718.204(c) as it is supported by substantial evidence and is in accordance with law.[4]

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[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

[4] The administrative law judge did not make a separate mistake of fact or change in condition determination in this modification request. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). A remand, however, is not required as these determinations are subsumed into the administrative law judge's decision on the merits. *See Motihak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

Inasmuch as claimant has failed to establish the existence of pneumoconiosis and total disability, requisite elements of entitlement pursuant to Part 718, entitlement thereunder is precluded. *Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge