

BRB No. 06-0721 BLA

BURNS MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 05/09/2007
	)	
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 Denying Benefits on Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Burns Mullins, North Tazewell, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits on Modification (05-BLA-5672) of Administrative Law Judge Linda S. Chapman (the administrative law judge) on a subsequent 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). The administrative law judge found that claimant established thirty-one years of qualifying coal mine employment and also found that employer was the responsible operator. Decision and Order at 2-4. Based on the date of filing, the administrative law judge considered entitlement pursuant to 20 C.F.R.

Part 718.<sup>1</sup> Decision and Order at 3; Director's Exhibit 81. The administrative law judge noted that the subsequent claim had been denied for failure to establish the existence of pneumoconiosis. 20 C.F.R. §725.309(d); Decision and Order Denying Benefits of Administrative Law Judge Edward Terhune Miller issued December 31, 2003. The administrative law judge found that because claimant was requesting modification of the denial of a subsequent claim, claimant had to establish a change in an applicable condition of entitlement since the previous denial of benefits by establishing the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. 20 C.F.R. §§725.309, 725.310; *see Hess v. Director, OWCP*, 21 BLR 1-141 (1998). Considering the newly submitted evidence, the administrative law judge found that it failed to establish the existence of pneumoconiosis. The administrative law judge found: the newly submitted x-ray interpretations did not contain findings of pneumoconiosis; the treatment notes from Tazewell Family Physicians did not contain any suggestion that claimant suffered from pneumoconiosis; and Dr. Hippensteel, who examined claimant, administered testing, and reviewed newly submitted evidence, concluded that there was no evidence that claimant had pneumoconiosis or any respiratory impairment related to coal dust exposure. The administrative law judge concluded, therefore, that claimant had not shown a change in an applicable condition of entitlement and had not, therefore, established a basis for modifying the denial of the subsequent claim. Accordingly, claimant's request for modification and benefits on the claim were denied.

On appeal, claimant generally contends that the administrative law judge erred in not granting his request for modification and awarding benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as

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<sup>1</sup> Claimant filed his first claim for benefits on November 9, 1981. After numerous requests for modification, Administrative Law Judge Vivian Schreter-Murray denied that claim because, while claimant established total disability, he failed to establish the existence of pneumoconiosis. The Board affirmed the denial on June 26, 1997. Director's Exhibit 1. Claimant took no further action until he filed the present claim on January 22, 2001. Director's Exhibit 3.

incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order-Denying Benefits on Modification is rational, supported by substantial evidence, and in accord with law.<sup>2</sup> Considering the newly submitted evidence, the administrative law judge rationally determined that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and therefore insufficient to establish a change in an applicable condition of entitlement and a basis for modification in this case. *See* 20 C.F.R. §§725.309, 725.310; *Hess*, 21 BLR at 1-143-44. The administrative law judge correctly found that the new x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the newly submitted x-ray interpretations did not contain any findings of pneumoconiosis.<sup>3</sup> Employer's Exhibits 2, 4, 5; Decision and Order at 7; *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).<sup>4</sup>

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<sup>2</sup> The record indicates that claimant was last employed in the coal mine industry in Virginia. Director's Exhibits 1, 4, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup> The administrative law judge correctly noted that the newly submitted x-rays of record, dated November 25, 2003, May 14, 2004 and June 10, 2004, were interpreted by Dr. Antoun as showing emphysematous lungs without radiographic findings of acute cardiopulmonary disease and the November 16, 2005 x-ray was interpreted by Dr. Wheeler as negative for the existence of pneumoconiosis. Decision and Order at 4-5; Employer's Exhibits 2, 4, 5.

<sup>4</sup> Further, although not specifically addressed by the administrative law judge, claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the new evidence does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis. Claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3), because the presumptions set forth at 20 C.F.R. §§718.304, 718.305 and 718.306 are inapplicable since there is no new evidence of complicated pneumoconiosis in the record, the claim was filed after January 1, 1982 and the claim was not a survivor's claim. *See* 20 C.F.R. §§718.304, 718.305(e), 718.306; Director's Exhibit 3. Claimant could not, therefore, establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

In determining that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and therefore a change in an applicable condition of entitlement, the administrative law judge properly considered all of the newly submitted medical opinion evidence and rationally found that the treatment notes from Tazewell Family Physicians, as well as the opinion of Dr. Hippensteel, did not indicate that claimant suffered from pneumoconiosis or any respiratory impairment related to coal dust exposure. Decision and Order at 7; Employer’s Exhibits 1-5, 7; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Consequently, we affirm the administrative law judge’s finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Because claimant failed to establish a basis for modification in this case, *i.e.*, a change in an applicable condition of entitlement, by establishing the existence of pneumoconiosis, we affirm the denial of benefits. *Hess*, 21 BLR at 1-143-44.

Accordingly, the administrative law judge’s Decision and Order Denying Benefits on Modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge