BRB No. 98-1296 BLA

MELVIN BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	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 J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Melvin Blankenship, Pikeville, Kentucky, *pro se*.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1805) of Administrative Law Judge J. Michael O'Neill 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). The administrative law judge found twenty-one years and eleven months of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Director's Exhibit 54; Decision

[1] Claimant filed his claim for benefits July 18, 1991, which was denied by Administrative Law Judge O'Neill on September 14, 1994. Director's Exhibits 1, 54. Claimant filed requests for modification on September 11, 1995 and February 16, 1996,

and Order at 2. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c), and thus insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge further found that the new evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c), and thus, insufficient to establish a change in conditions pursuant to 20 C.F.R. §715.310. 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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).

After consideration of the administrative law judge's Decision and Order, the arguments raised, 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 United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th

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which were denied by the district director on January 11, 1996 and June 4, 1996. Director's Exhibits 55, 64. Claimant made a timely request for a hearing, but the parties subsequently agreed to a decision on the record.

Cir. 1994), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been made 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. BNCR 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). The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(c) and therefore insufficient to establish modification. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge reviewed the relevant evidence of record in his original Decision and Order in determining if a mistake in determination of fact was established and properly concluded that the findings of no pneumoconiosis and no totally disabling pulmonary impairment were correct. Decision and Order at 3, 10. *Worrell*, *supra*.

Considering the newly submitted evidence, in conjunction with the earlier evidence, to determine if a change in conditions was established, the administrative law judge permissibly found that it was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge rationally found that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the preponderance of the negative x-ray readings by physicians with superior qualifications. Director's Exhibits 59, 62, 64, 68, 74; Employer's Exhibit 4; Decision and Order at 6; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *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). 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 was no biopsy evidence of record, this was a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 3; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Turning to Section 718.202(a)(4), the administrative law judge permissibly found that the newly submitted opinions were insufficient to establish the existence of pneumoconiosis. Director's Exhibits 62, 64; Employer's Exhibit 3; Decision and Order at 9; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir.1995); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

The administrative law judge also permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4) as all the new pulmonary function studies and blood gas studies of record produced non-qualifying values[2] 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 61, 62, 64, 67, 72; Decision and Order at 10; *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 permissibly accorded greater weight to the opinion of Dr. Broudy, finding claimant capable of performing coal mine employment, as well-reasoned and documented and less weight to Dr. Deguzman's opinion finding total disability, as unsupported by underlying documentation. Director's Exhibits 62, 64; Employer's Exhibits 2, 3; Decision and Order at 10; *Clark*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985). *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir.1989); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986). 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 when they are supported by substantial evidence. *See Clark*, *supra*; *Anderson v. Camp Valley of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record, considered in conjunction with the previously submitted evidence, is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Section 718.202(a) and 718.204(c) as they are supported by substantial evidence and in accordance with law.

Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Worrell*, *supra*.

[2] 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).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge