BRB No. 01-0315 BLA

JAMES O. DEEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEM TRUCKING COMPANY,	)	DATE ISSUED:
	)	
INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN CASUALTY 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 Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

James O. Deel, Haysi, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying

[1] Ron Carson, 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).

Benefits (00-BLA-0471) of Administrative Law Judge Richard A. Morgan on a request for modification 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).[2] The administrative law

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determined that the regulations at issue in the lawsuit would not affect the outcome of

judge credited claimant with at least 16.5 years of coal mine employment, found employer to be the responsible operator, and found the evidence of record insufficient to show that claimant's adult daughter was a dependent. Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge found it insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Thus, the administrative law judge found that claimant had not established a change in conditions or a mistake in a determination of fact sufficient to establish a basis of modification. Accordingly, benefits were denied.[3]

On appeal, claimant generally challenges the findings of the administrative law judge

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the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

[3] Claimant filed his claim for benefits on January 12, 1996. *See* Director's Exhibit 1. Following a hearing on the merits, Administrative Law Judge Richard T. Stansell-Gamm denied benefits after finding the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4)(2000). *See* Director's Exhibit 48. Pursuant to claimant's appeal, the Board affirmed Judge Stansell-Gamm's findings on the existence of pneumoconiosis and the denial of benefits. *Deel v. Kem Trucking Company*, BRB No. 98-0586 BLA, Jan. 21, 1999 (unpub.); Director's Exhibit 53. Subsequently, claimant filed a request for modification, the denial of which is now before us on appeal. *See* Director's Exhibit 54.

denying modification and entitlement to benefits. 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 (the Director), 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 considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 one 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*).[4]

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order denying benefits must be affirmed as it is rational, supported by substantial evidence and in accordance with law. The administrative law judge correctly concluded that the newly submitted x-ray evidence, which included one positive reading and eleven negative readings, was insufficient to establish the existence of pneumoconiosis. *See* Decision and Order at 13; Director's Exhibits 54, 55; Employer's Exhibits 1-10, 12, 13. In reaching this conclusion, the administrative law judge permissibly found that the preponderance of interpretations by the Board-certified radiologists and B-readers was negative. 20 C.F.R. §718.202(a)(1); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Furthermore, the administrative law judge properly reviewed the previously submitted x-ray evidence, and permissibly found that

[4] Since the miner's last coal mine employment took place in Virginia, 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 (1989)(*en banc*).

there was no mistake in the prior administrative law judge's determination of fact that the weight of the x-ray evidence by the majority of well qualified physicians was negative for pneumoconiosis, in light of the predominately negative x-ray readings in the new evidence. *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying*, 14 BLR 1-156 (1990). We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and a basis for modification with the x-ray evidence as it is supported by substantial evidence. 20 C.F.R. §718.202(a)(1). *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Likewise, relevant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the existence of pneumoconiosis and a basis for modification were not established because the record contained no biopsy evidence and claimant was not entitled to the presumptions contained at Sections 718.304, 718.305, 718.306 as this living miner's claim was filed after January 1, 1982 and the record did not contain any evidence of complicated pneumoconiosis. We, therefore, affirm the administrative law judge's findings relevant to Section 718.202(a)(2)-(3) as supported by substantial evidence. 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305(e), 718.306.

Finally, relevant to Section 718.202(a)(4), the administrative law judge correctly noted that Dr. Dahhan and Dr. Castle, who were Board-certified in internal medicine and pulmonary disease, did not diagnose the existence of coal workers' pneumoconiosis, and that Dr. Castle related the mild respiratory impairment he diagnosed solely to claimant's smoking. *See* Decision and Order at 14; Employer's Exhibits 5, 9. Further, as Dr. Dahhan also stated that claimant retained the respiratory capacity to perform his usual coal mine employment or comparable and gainful work, *see* Employer's Exhibit 9, the administrative law judge properly found that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 114 (1988). In addition, after reviewing the previously submitted medical opinion evidence, the administrative law judge did not err when he found that no mistake in a determination of fact was made in the previous Decision and Order as the administrative law judge correctly concluded that Drs. Fino, Sargent, Forehand and Thakkar failed to diagnose not only coal workers' pneumoconiosis, but also pneumoconiosis as defined at 20 C.F.R. §718.201. *Jessee*, *supra*; *Kovac*, *supra*. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by the medical opinion evidence, and therefore, a basis for modification. Because the administrative law judge considered all the evidence of record relevant to the existence of pneumoconiosis and found it insufficient to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider the administrative law judge's findings regarding total disability. *See 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

NANCY S. DOLDER
Administrative Appeals Judge