BRB No. 01-0162 BLA

RAYMOND G. RAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
ISLAND CREEK COAL COMPANY	)	
	)	
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 on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Raymond G. Ray, Vansant, Virginia, *pro se.*

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification Denying Benefits (2000-BLA-0250) of Administrative Law Judge Jeffrey

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

Tureck 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). This claim has been before the Board previously. After noting that the claim was initially denied for failure to establish the existence of pneumoconiosis, the administrative law judge considered the new evidence submitted by claimant on modification. The administrative law judge found that the evidence failed to establish a change in conditions or a mistake in fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge's findings are erroneous. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated 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 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.*

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[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 20 C.F.R. Parts 718, 725, 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States 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 claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). On August 10, 2001, the Board rescinded its supplemental briefing order in this case.

[3]Claimant filed his claim on February 17, 1995. Director's Exhibit 1. The claim was denied by Administrative Law Judge Robert Mahony on April 25, 1997. Director's Exhibit 39. Claimant appealed to the Board. In *Ray v. Island Creek Coal Co.*, BRB No. 97-1195 (April 8, 1998)(unpub.), the Board affirmed the administrative law judge's findings of twenty-nine years of coal mine employment and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000). Director's Exhibit 41. On February 9, 1999, claimant requested modification. Director's Exhibit 42.

Director, OWCP, 9 BLR 1-36 (1986). 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. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by Section 725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly, *see 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, 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 found that claimant submitted a report by Dr. Robinette and ventilatory studies from Stone Mountain Health Services dated April 27, 1999 in conjunction with his request for modification. Decision and Order at 3. The administrative law judge properly determined that Dr. Robinette's report, based upon his October 16, 1996 examination of claimant, could not establish a change in conditions as it predates the previous decision in this case, which was issued on April 28, 1997. *See Wilkes v. F & R Coal Co.*, 12 BLR 1-1 (1988); Decision and Order at 3; Director's Exhibits 39, 42. With respect to the April 1999 pulmonary function study performed at Stone Mountain Health Services by Debi Coleman, a registered nurse and case manager, the administrative law judge rationally relied upon the pulmonary expertise of Drs. Zaldivar and Renn to accord weight to their invalidations of the study. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985) Director's Exhibits 46, 48, 56. Thus, we affirm the administrative law judge's determination that claimant failed to establish a change in conditions pursuant to Section 725.310 (2000).

The administrative law judge then considered Dr. Robinette's 1996 opinion to determine whether claimant established a mistake in fact. The administrative law judge noted that the record before the prior administrative law judge contained x-ray evidence which was "almost unanimously negative for pneumoconiosis" and only one medical opinion diagnosing pneumoconiosis which was based on a severely understated cigarette smoking history. Decision and Order at 3; Director's Exhibit 39. The administrative law judge concluded that "Judge Mahony's finding of no pneumoconiosis clearly was correct based on the record before him." *Id*.

The administrative law judge then considered Dr. Robinette's qualifications as a B-reader, and his x-ray reading, but permissibly found that it was outweighed by the contemporaneous negative readings and later negative readings by B-readers. *See Worhach v. Director, OWCP*, 17 BLR 1- 105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 3; Director's Exhibits 18, 28, 29, 29A, 36, 45, 54, 55; Employer's Exhibits 2-4, 6. The administrative law judge further found that although Dr. Robinette diagnosed coalworkers' pneumoconiosis in his medical report, his opinion was based significantly on his positive x-ray interpretation which is outweighed by the negative x-ray readings and CT scan interpretations by Drs. Wiot and Wheeler. Decision and Order at 3. The administrative law judge observed that Dr. Robinette's opinion particularly lacked credibility because the physician failed to diagnose pneumoconiosis in his interpretation of a CT scan conducted on October 22, 1996 in conjunction with his examination of claimant. *Id*. The administrative law judge also found that the contrary opinions by Drs. Castle, Dahhan, Fino, McSharry, and Spagnolo are well-explained and provide probative evidence that claimant does not have coalworkers' pneumoconiosis. Decision and Order at 4. Based on the preceding findings, the administrative law judge rationally determined that Dr. Robinette's opinion failed to establish a mistake in fact. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra.*

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 (1988) *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions, or mistake in determination of fact, tantamount to a finding that claimant has

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[4]Dr. Robinette's impressions included a diagnosis of coal workers' pneumoconiosis with a profusion abnormality of 1/0, predominant Q/P opacities. Director's Exhibit 42.

failed to establish the existence of pneumoconiosis, as it is supported by substantial evidence and is in accordance with law. *See Jessee, supra*. Inasmuch as claimant has failed to establish a basis for modification pursuant to Section 725.310 (2000), we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Modification 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