BRB No. 00-1162 BLA

WARREN D. BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	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 - Denial of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Warren D. Bailey, Cleveland, Virginia, *pro se.*

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

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denial of Benefits (00-BLA-0125) of Administrative Law Judge Thomas M. Burke 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 determined that this case involves a request for modification, pursuant to 20 C.F.R. §725.310 (2000), of the denial of claimant's duplicate claim by Administrative Law Judge John C. Holmes, in a Decision and Order issued on December 26, 1996, and affirmed by the Board in a Decision and Order issued November 7, 1997.[2] Initially, the administrative law judge credited claimant with at least fourteen years of coal mine employment and adjudicated the case pursuant to 20 C.F.R. Part 718 (2000).[3] In considering

[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).

[2] Claimant filed his application for benefits on January 30, 1995, which was initially awarded by the district director on July 18, 1995. Director's Exhibits 1, 25. Following a formal hearing, Administrative Law Judge John C. Holmes denied benefits in a Decision and Order issued on December 26, 1996, finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Director's Exhibit 95. On appeal, the Board affirmed the administrative law judge's denial of benefits in a Decision and Order dated November 7, 1997. *Bailey v. Clinchfield Coal Co.*, BRB No. 97-0389 BLA (Nov. 7, 1997)(unpub.); Director's Exhibit 102.

Thereafter, claimant filed a request for modification on September 23, 1998, which was denied by the district director following an informal conference on April 22, 1999. Director's Exhibits 104, 112. Claimant filed a second request for modification on May 18, 1999. Director's Exhibit 118.

[3] 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, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the

claimant's request for modification, the administrative law judge found the newly submitted medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Therefore, the administrative law judge found the new evidence insufficient to establish a change in conditions pursuant to Section 725.310 (2000). Additionally, the administrative law judge found that the record does not support a finding of a mistake in a determination of fact. Accordingly, the administrative law judge denied claimant's request for modification. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of claimant's

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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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

request for modification. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[4]

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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 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 under 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 (2001); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

[4] The parties do not challenge the administrative law judge's decision to credit claimant with at least fourteen years of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant's original claim, filed in January 1995, was denied because claimant failed to establish the existence of pneumoconiosis.[5] Director's Exhibit 95. Consequently, in order to establish entitlement to benefits, claimant must establish either a mistake in a determination of fact, or that the newly submitted medical evidence supports a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[6] Herein, the newly submitted evidence must support a finding

[5] As the administrative law judge properly found, employer conceded the existence of a totally disabling respiratory or pulmonary impairment in both the prior claim before Judge Holmes, *see* 1996 Hearing Transcript at 6; Director's Exhibit 89, as well as in the current case, *see* 2000 Hearing Transcript at 22-23. Decision and Order at 8, n.6.

[6] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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 made by claimant. Furthermore, in determining whether claimant has established modification pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence,

of the existence of pneumoconiosis pursuant to Section 718.202(a). 20 C.F.R. §725.310 (2000); *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director,* OWCP, 17 BLR 1-82 (1993).

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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 and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of claimant's request for modification under Section 725.310 (2000). In determining whether claimant established a change in conditions, the administrative law judge properly found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis inasmuch as all of the x-ray interpretations submitted with the new claim were read as negative for the existence of pneumoconiosis.[7] Decision and Order at 4, 8-9; Director's Exhibits 109, 110, 117; Employer's Exhibits 5-7; 20 C.F.R. §718.202(a)(1) (2001); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), *aff'd*, 806 F.2d 258 (4th Cir. 1986)(table); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Furthermore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(2) (2000). As the administrative law judge reasonably found, the weight of the biopsy evidence, from claimant's left lung transplant, was insufficient to support a finding of the existence of pneumoconiosis. Decision and Order at 9. Specifically, the administrative law judge reasonably found that Dr. Roggli's finding of a silicotic nodule was insufficient to establish the existence of pneumoconiosis inasmuch as there was no specific pathological finding of pneumoconiosis or silicosis.[8] Decision and Order at 9; Director's Exhibits 109, 113; *see generally Bueno v. Director, OWCP*, 7 BLR 1-337 (1984). Moreover, the administrative law judge reasonably found that the overwhelming weight of the pathology evidence is negative for the existence of pneumoconiosis. Decision and Order at 4-5, 9; Director's Exhibits 108, 109, 111, 113, 116; Employer's Exhibits 1, 3, 4, 9; 20 C.F.R. §718.202(a)(2) (2000). Inasmuch as the administrative law judge properly weighed all of the relevant evidence, we affirm

[7] The newly submitted x-ray evidence consists of sixteen interpretations of six x-ray films dated between February 14, 1996 and February 21, 2000, all of which are negative for the existence of pneumoconiosis. Director's Exhibits 109, 110, 117; Employer's Exhibits 5-7.

[8] Based on his microscopic examination of claimant's biopsy slides, Dr. Roggli opined that the lymph nodes show noncaseating granulomatous inflammation consistent with sarcoidosis and also show silicotic nodules. Dr. Roggli further opined that claimant's left lung shows severe centrilobular emphysema. However, Dr. Roggli did not provide a determination as to the cause of these conditions. Director's Exhibits 109, 113.

his finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(2). 20 C.F.R. §718.202(a)(2) (2001); *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see generally Bueno, supra*.

Moreover, the administrative law judge rationally found that claimant is not entitled to the presumptions set forth under 20 C.F.R. §718.202(a)(3) (2000), *i.e.*, there is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2001); the claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e) (2001); and the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a) (2001). Decision and Order at 9; 20 C.F.R. §718.202(a)(3) (2001).

We further affirm the administrative law judge's finding that the newly submitted medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2001). The administrative law judge reasonably found that none of the interpretations of the December 3, 1996 CT scan was positive for the existence of pneumoconiosis. Rather, each of the physicians diagnosed the presence of emphysema, but further stated either that there was no evidence of silicosis or coal workers' pneumoconiosis or that there were no changes consistent with a coal mine dust related occupational lung disease.[9] Decision and Order at 6, 9; Director's Exhibits 110, 117.

[9] In his interpretation of the December 3, 1996 CT scan, Dr. Scott opined that there was moderate diffuse emphysema and a small pleural scar in the left lower lobe, but also stated that there was no evidence of silicosis or coal workers' pneumoconiosis. Director's Exhibit 110. Similarly, Dr. Wheeler diagnosed moderate emphysema with areas of decreased and distorted lung markings, as well as minimal arteriosclerosis of the aorta, but further opined that there was no evidence of silicosis or coal workers' pneumoconiosis. Director's Exhibit 110. Dr. Fino interpreted the CT scan as showing significant bullous emphysema with

some crowding of the markings at the bases due to the bullous emphysema, but that there were no changes consistent with a coal mine dust associated occupational lung disease. Director's Exhibit 117.

In addition, the administrative law judge reasonably found the newly submitted medical opinions of record insufficient to establish the existence of pneumoconiosis inasmuch as the preponderance of this evidence fails to support a finding of pneumoconiosis. Decision and Order at 6-7, 9. As the administrative law judge properly found, the sole opinion supportive of claimant's burden was the March 21, 2000 supplemental letter of Dr. Kowatli, claimant's treating physician, wherein the physician stated that claimant suffered from pneumoconiosis and severe emphysema due to years of underground mining.[10] Decision and Order at 6, 9; Claimant's Exhibit 1. The administrative law judge, however, reasonably exercised his discretion in finding that this report was entitled to little evidentiary weight because it was conclusory and not well reasoned. Specifically, the administrative law judge found that while Dr. Kowatli was claimant's treating physician, he had not previously diagnosed the existence of pneumoconiosis nor previously opined that claimant's emphysema, or other pulmonary conditions, were attributable to coal mine employment. Decision and

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[10] The March 21, 2000 letter from Dr. Kowatli states, in its entirety,

> Mr. Bailey has suffered from pneumoconiosis and severe emphysema secondary to years of underground mining. He underwent a left lung transplant for his disease and his pathology report of central emphysema and silicotic nodules, both are consistent with pneumoconiosis. Patient was on 4 liters of oxygen and by-pap machine before transplant, secondary to his severe lung disease.

Claimant's Exhibit 1.

Order at 9; *see* Director's Exhibits 92, 108. The administrative law judge further found that Dr. Kowatli failed to discuss the apparent improvement in claimant's respiratory condition following his lung transplant or the effect of claimant's long history of cigarette smoking. Decision and Order at 9. Consequently, the administrative law judge rationally found the March 21, 2000 letter of Dr. Kowatli was not sufficient to establish the existence of pneumoconiosis inasmuch as the physician failed to adequately explain his conclusions in light of the prior reports and underlying documentation. Decision and Order at 9; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *see also Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Furthermore, within a reasonable exercise of his discretion, the administrative law judge credited the opinions of Drs. Castle and Fino, that claimant was not suffering from pneumoconiosis, finding that these opinions were better reasoned and documented than the opinion of Dr. Kowatli, inasmuch as they were more consistent and better supported by the objective evidence of record. Decision and Order at 9; Employer's Exhibits 5, 8, 10; *Clark, supra*; *Lucostic, supra*; *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Inasmuch as the administrative law judge properly considered all of the relevant evidence, we affirm his finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2001). Consequently, we affirm the administrative law judge's finding that the newly submitted medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2001). *See Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Inasmuch as the administrative law judge rationally found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant, we affirm his finding that the newly submitted medical evidence is insufficient to establish a change in conditions. 20 C.F.R. §725.310 (2000); *Jessee*, *supra*; *Nataloni, supra*.

Moreover, we affirm the administrative law judge's finding that a review of the entire record establishes that there was no mistake in a determination of fact in the previous decisions. Decision and Order at 8; 20 C.F.R. §725.310 (2000); *Jessee, supra*; *see also Aerojet-General Shipyards, Inc. v. O'Keeffe*, 404 U.S. 254 (1971); *Nataloni, supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge