BRB No. 01-0121 BLA

CARSON CLAY CHAPMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARBON FUEL 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 - Denying Benefits and Order of Remand of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Carson Clay Chapman, Spencer, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (00-BLA-0500) and Order of Remand (00-BLO-14) of Administrative Law Judge Daniel L. Leland rendered 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).[1] Considering claimant's request for modification, the administrative law judge adopted

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[1] 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

Judge Mollie W. Neal's prior finding of sixteen and one-quarter years of coal mine employment, concluded that the evidence failed to establish the existence of pneumoconiosis

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on January 19, 2001, and are found at 65 Fed. Reg. 80,107 (2000) to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief 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, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association 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 Association 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.

or total disability due to pneumoconiosis, and failed therefore to establish a basis for modification. Accordingly, claimant's request for modification and benefits was denied and the overpayment case was remanded to the district director.[2]

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 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. *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 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)(*en banc*).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), that the administrative law judge must determine whether a change in conditions

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[2] Claimant, who was not represented by counsel, but was represented by his wife, was informed by the administrative law judge of his right to an attorney at no cost to him, asked whether he wanted to proceed without any attorney, informed of the issues in the case, and allowed the opportunity to admit evidence, object to evidence, and provide testimony concerning relevant issues pursuant to *Shapell v. Director, OWCP*, 7 BLR 1-304, 1-305-6 (1984). *See* Hearing Transcript at 4-6, 12-41.

or a mistake in a determination of fact has been made even where no specific allegation of either has been raised. Furthermore, in determining whether modification has been established pursuant to Section 725.310 (2000), 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. 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); *see 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 evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the negative x-ray readings by the physicians with superior qualifications. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see Staton v. Norfolk v. 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). 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 is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 5; *see* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Considering the medical opinion evidence, the administrative law judge permissibly accorded more weight to the opinions of Drs. Crisalli, Dahhan, Castle and Zaldivar because they were board-certified pulmonary specialists and because their opinions were better supported by the evidence of record than the opinions of Drs. Ambrosio and Rasmussen. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, the administrative law judge rationally found that the evidence did not support a finding of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, No. 98-2051 (4th Cir. May 2, 2000).[3]

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[3] The medical opinions of record consist of: the opinion of Dr. Ambrosio, diagnosing a combination of congestive heart failure and chronic obstructive pulmonary disease, and noting that a lung biopsy would determine the presence of pneumoconiosis, Director's Exhibits 61, 69; Hospital records, noting congestive heart failure, chronic obstructive pulmonary disease secondary to acute bronchitis, severe hypoxemia secondary to chronic obstructive pulmonary disease and coal miner's pneumoconiosis, Director's Exhibit 61; the opinion of Dr. Zaldivar finding no evidence of pneumoconiosis, diagnosing a pulmonary

Turning to the issue of total disability, the administrative law judge rationally found that the evidence was insufficient to establish a totally disabling pulmonary impairment, as only the prebronchodilator values of one of the two pulmonary function studies of record produced qualifying values, only the exercise values of one of the three blood gas studies of record produced qualifying values, there was no evidence of cor pulmonale with right-sided congestive heart failure in the record, and the medical opinion evidence did not establish a totally disabling respiratory impairment. Decision and Order at 6; Director's Exhibit 61; Employer's Exhibit 1; 20 C.F.R. 718.204(b)(2)(i)-(iii); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*).

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 (1989). Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis and total disability and, therefore, insufficient to establish a basis for modification in this case. *See Jessee*, *supra*.

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impairment due to congestive heart failure, smoking, and abdominal fluid and finding that claimant had the pulmonary capacity to perform his usual coal mine employment, Employer's Exhibit 1; the opinion of Dr. Dahhan finding no pneumoconiosis or pulmonary disability, but noting that claimant was totally disabled due to coronary artery disease, congestive heart failure and renal failure, Employer's Exhibit 4; the opinion of Dr. Rasmussen diagnosing pneumoconiosis arising out of coal mine employment as a major contributing factor to claimant's totally disabling respiratory insufficiency, Director's Exhibit 61; and the opinion of Dr. Crisalli finding congestive heart failure and no obstructive pulmonary impairment, Director's Exhibit 44.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order of Remand are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge