BRB No. 02-0306 BLA

JIMMY A. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SILCOX TRUCKING, INCORPORATED	)	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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Jimmy A. Ratliff, Patterson, Virginia, *pro se*.[1]

Michael F. Blair and J. Jasen Eige (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

[1]Pam Runyon, 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. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (01-BLA-0159) of Administrative Law Judge Pamela Lakes Wood 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).[2] The administrative law judge credited claimant with twenty-five years of coal mine employment based upon employer's concession and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[3] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[4] The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The

[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, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Claimant filed a claim on February 24, 1997. Director's Exhibit 1. On June 1, 1999, Administrative Law Judge Pamela Lakes Wood issued a Decision and Order denying benefits. Director's Exhibit 52. Judge Wood's denial was based upon claimant's failure to establish the existence of pneumoconiosis. *Id*. Claimant filed a request for modification on April 19, 2000. Director's Exhibit 59.

[4]The revisions to the regulations at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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).

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), an 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 at least one element of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *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). In the instant case, the administrative law judge stated that "[t]his claim involves a timely request for modification of [her] June 1, 1999 decision, which denied the claim based upon [c]laimant's failure to establish pneumoconiosis." Decision and Order at 6.

In finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence. Of the twenty-four newly submitted x-ray interpretations of record, twenty-three readings are negative for pneumoconiosis, Director's Exhibits 60, 63, 64, 71; Employer's Exhibits 1-3, 6, 7, 10-22, and one reading is positive, Director's Exhibit 59.[5] In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians. *See*

[5]The record contains an Industrial Commission report which refers to interpretations of a March 18, 1988 x-ray. Employer's Exhibit 4. The administrative law judge stated that "[a]lthough there is narrative evidence in the Industrial Commission report of multiple positive readings of a 1988 x-ray, the Commission report also references negative readings of the same x-ray." Decision and Order at 7. The administrative law judge additionally stated, "given the absence of the readings themselves, as well as the fact that they relate to an x-ray from more than a decade ago, I am unable to give the Industrial Commission evidence much weight." *Id*.

Adkins v. Director, OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge stated that "[t]he single positive interpretation that was actually submitted in connection with this modification request was made by B-reader and [B]oard-certified radiologist Michael S. Alexander, related to an December 21, 1999 x-ray." Decision and Order at 7. However, the administrative law judge also stated that "four equally qualified readers (who are dually qualified as B-readers and [B]oard-certified radiologists) and one other B-reader read the same x-ray as negative for pneumoconiosis." *Id*. In addition, the administrative law judge stated that "there were multiple x-ray readings that were negative for pneumoconiosis based upon later and contemporaneous x-rays." *Id*. The administrative law judge concluded that "[t]aken together, these multiple negative readings outweigh the single positive one." *Id*. Based upon his consideration of all the newly submitted x-ray evidence, the administrative law judge reasonably found that claimant has not met his burden of proof of establishing the existence of pneumoconiosis. Thus, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Adkins, supra*; *Fitts, supra*.

Next, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since there is no biopsy or autopsy evidence demonstrating the existence of pneumoconiosis. In addition, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Further, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge correctly stated that "[o]nly one medical opinion has been submitted in connection with the instant modification request, that of Dr. Fino." Decision and Order at 7. Dr. Fino opined that claimant does not suffer from pneumoconiosis or any other occupationally acquired pulmonary condition. Employer's Exhibit 5. Since the record does not contain a physician's opinion that claimant suffers from pneumoconiosis or any chronic obstructive lung disease arising out of coal mine employment, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Shoup v.*

Director, OWCP, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a),[6] we affirm the administrative law judge's finding that claimant failed to establish a change in conditions at 20 C.F.R. §725.310 (2000). *See Kingery, supra*; *Nataloni, supra*.

Finally, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge stated, "based upon consideration of all of the evidence, I do not find that the ultimate fact (i.e., my finding that the [c]laimant has not proven the existence of pneumoconiosis) was mistakenly decided." Decision and Order at 8.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[6]The administrative law judge noted that "[t]he single CT scan interpretation (by Dr. Fino) was negative for pneumoconiosis." Decision and Order at 7; Employer's Exhibit 9.

PETER A. GABAUER, Jr.
Administrative Appeals Judge