BRB No. 03-0251 BLA

RONNIE MOSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 09/22/2003
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE 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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Ronnie Mosley, Martin, Kentucky, *pro se*.[1]

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

[1] Susie Davis, with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge=s decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, who is not represented by counsel, appeals the Decision and Order (02-BLA-0043) of Administrative Law Judge Joseph E. Kane 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). On March 17, 2000, claimant filed an application for black lung benefits, Director=s Exhibit 1, which was denied by the Office of Workers= Compensation Programs on June 22, 2000, Director=s Exhibit 18. Thereafter, claimant submitted additional evidence that was accepted as a request for modification pursuant to 20 C.F.R. '725.310 (2000).[2] Director=s Exhibits 25, 26, 28. Following the denial of this request by the district director, the case was transferred to the Office of Administrative Law Judges for a formal hearing. Director=s Exhibits 30, 35.

The administrative law judge accepted the stipulation of the parties and thus credited claimant with eighteen years of coal mine employment. The administrative law judge then found that, based upon his review of the prior decision, he could not Alocate@ a mistake in a determination of fact. Moreover, upon reviewing the new evidence in conjunction with the previously submitted evidence, he determined that the evidence did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Consequently, the administrative law judge denied claimant=s request for modification. Claimant appeals this denial. In response, the employer urges affirmance of the administrative law judge=s decision. The Director, Office of Workers= Compensation Programs, has filed a letter indicating that, in this case, he will not file a response.

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. Jewel Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge=s Decision and Order if the findings of fact and the 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).

The administrative law judge properly reviewed all of the evidence of record,

[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.

including evidence submitted since the most recent denial of this claim, and concluded that there was no mistake in a determination of fact. Consequently, we affirm the finding that the evidence of record fails to establish a mistake in a determination of fact. *See Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990).

The administrative law judge then assessed the newly submitted evidence, in conjunction with the previously submitted evidence and determined that the weight of the new evidence was insufficient to establish any of the elements that previously defeated entitlement. Specifically, the administrative law judge acted within his discretion in determining that because a majority of the x-ray interpretations by more highly qualified physicians is negative for the existence of pneumoconiosis, the x-ray evidence did not establish the existence of pneumoconiosis. We affirm this finding. *Staton v. Norfolk & 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).

Moreover, we affirm the administrative law judge=s finding that Section 718.202(a)(2) is inapplicable since the record does not contain any biopsy or autopsy evidence. 20 C.F.R. '718.202(a)(2). We also affirm the finding that none of the presumptions of Section 718.202(a)(3) is applicable as this case involves a claim filed by a living miner after January 1, 1982, and there is no evidence of complicated pneumoconiosis. 20 C.F.R. '718. 202(a)(3).

The administrative law judge also properly concluded that the only medical opinion of record that established the existence of pneumoconiosis was entitled to no weight since it was simply based on a chest x-ray and claimant=s coal dust exposure history. *See Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). Thus, the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Taylor*, *supra*; *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). We affirm, therefore, the administrative law judge=s determination that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a).

Turning to the other element previously adjudicated against claimant, the administrative law judge correctly concluded that the record does not contain any qualifying pulmonary function studies, nor does it contain any arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. ''718.204(b)(2)(i), (ii), and (iii). Finally, the administrative law judge reviewed the four new medical opinions of record and within his discretion, concluded that the one opinion in which a physician found a totally disabling respiratory impairment, the opinion of Dr. Sundaram, was poorly reasoned in light of that doctor=s failure to address the non-qualifying pulmonary function studies. The

administrative law judge thus found that Dr. Sundaram=s opinion was outweighed by the contrary opinion of Dr. Fino in which he found that claimant was not totally disabled. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). We, therefore affirm the administrative law judge=s finding that the medical opinion evidence fails to establish a totally disabling respiratory impairment.

Inasmuch as we affirm the administrative law judge=s finding that the evidence fails to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment, the two elements previously adjudicated against claimant, we also affirm the finding that the evidence fails to establish a change in conditions. Since claimant has failed to demonstrate either a mistake in a determination of fact or a change in conditions, the administrative law judge properly denied claimant=s request for modification. 20 C.F.R. ' 725.310 (2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Accordingly, the administrative law judge=s Decision and Order-Denying Benefits is affirmed.

SO ORDERED

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge