BRB No. 03-0337 BLA

LYNDELL T. HERMAN WALKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/29/2003
	)	
KANAWHA 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 the Record - Denying Modification of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Lyndell T. Herman Walker, Leesburg, Florida, *pro se*.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the aid of legal counsel, the Decision and Order (2001-BLA-1132) of Administrative Law Judge Robert J. Lesnick denying modification and 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).[1] The

[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 on

administrative law judge adjudicated the instant modification request pursuant to 20 C.F.R. Part 718.[2] The administrative law judge reviewed the evidence submitted subsequent to the previous denial to determine whether claimant established a material change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. '725.310 (2000). The administrative law judge noted that the parties previously stipulated to the existence of pneumoconiosis, and found that the newly submitted evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. '718.204(b)(2)(i)-(iv). The administrative law judge thus found that the newly submitted evidence was insufficient to establish a change in conditions since the previous denial and that, based upon a *de novo* review of the entire record, there was no mistake in a determination of fact in the previous denial. The administrative law judge thus found that modification was not established pursuant to Section 725.310 (2000). Accordingly, benefits

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January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

[2] Claimant filed his initial claim for black lung benefits on July 8, 1986, which was denied by the district director. Decision and Order at 2; Director=s Exhibit 1. By Decision and Order dated March 13, 1990, Administrative Law Judge Samuel B. Groner found the evidence sufficient to establish the existence of pneumoconiosis, but that claimant failed to establish total pulmonary or respiratory disability, and denied benefits. Decision and Order at 2; Director=s Exhibit 46. On appeal, the Board affirmed the denial of benefits in *Walker v. Kanawha Coal Co.*, BRB No. 90-1407 BLA (June 27, 1991)(unpub.). Decision and Order at 2; Director=s Exhibit 52. Claimant filed a modification request on March 4, 1992, Director=s Exhibit 53, which was denied on August 17, 1993, by Administrative Law Judge Victor J. Chao. Decision and Order at 2; Director=s Exhibit 75. The denial of modification and benefits was ultimately affirmed by the Board in *Walker v. Kanawha Coal Co.*, BRB No. 93-2500 BLA (Apr. 21, 1994)(unpub.). Decision and Order at 2; Director=s Exhibit 81.

On October 3, 1994, within one year of the Board=s affirmance of the denial, claimant filed a second request for modification, Director=s Exhibit 87, which was denied on August 26, 1996, by Administrative Law Judge Thomas M. Burke. Decision and Order at 2; Director=s Exhibit 99. The denial of modification and benefits was ultimately affirmed by the Board in *Walker v. Kanawha Coal Co.*, BRB No. 96-1634 BLA (May 13, 1997)(unpub.). Decision and Order at 2; Director=s Exhibit 107. On June 5, 1997, within one year of the Board=s affirmance of the denial, claimant filed a third request for modification, Director=s Exhibit 108, which was denied on March 23, 1999, by Administrative Law Judge Daniel L. Leland. Decision and Order at 2; Director=s Exhibit 122. On August 4, 1999, within one year of Judge Leland=s denial, claimant filed a fourth request for modification, Director=s Exhibit 123, which was denied on August 31, 2000, by Administrative Law Judge John C. Holmes. Decision and Order at 2; Director=s Exhibit 138. On February 23, 2001, within one year of Judge Holmes=s denial, claimant submitted new medical evidence and filed a fifth request for modification. Decision and Order at 2; Director=s Exhibit 139.

were denied. 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 not participated 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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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*).

In determining whether claimant has established a change in conditions 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, 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. *See Kovac v. BCNR Mining Corporation*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); *see also O=Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). In determining whether there has been a mistake in a determination of fact pursuant to 20 C.F.R. '718.310 (2000), the administrative law judge must re-evaluate all of the evidence in the record. *Kovac*, 14 BLR 1-156. Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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 or a mistake in a determination of fact has been made even where no specific allegation of either has been asserted.

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. The administrative law judge rationally found that the new evidence, considered in conjunction with the old, failed to establish a change in conditions and that a review of all of the evidence of record failed to establish that a mistake in a determination of fact had been made in the prior decisions in this case. In support of this finding the

administrative law judge noted that the newly submitted pulmonary function study produced non-qualifying values.[3] Decision and Order at 4-5; Director=s Exhibit 141. Thus, the administrative law judge rationally found that claimant failed to establish a totally disabling respiratory impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113(1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff=d on recon*. 9 BLR 1-236 (1989)(*en banc*).

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *see Underwood*, 105 F.3d 946, 21 BLR 2-23; *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 if the administrative law judge=s findings are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge=s finding that the evidence of record is insufficient to establish total disability and, therefore, a basis for modification of the prior denial of benefits, as it is supported by substantial evidence and in accordance with law. *Jessee*, 5 F.3d 723, 18 BLR 2-26.

[3] A Aqualifying@ pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A Anon-qualifying@study exceeds those values. *See* 20 C.F.R. ' 718.204(b)(2)(i).

Accordingly, the Decision and Order of the administrative law judge denying modification and 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