BRB No. 97-0459 BLA

JAMES H. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETH ENERGY MINES	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James H. Johnson, McRoberts, Kentucky, *pro se.*

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1], without the assistance of counsel[2], appeals the Decision and Order

[1]Claimant is James H. Johnson, the miner, whose initial claim for benefits was filed on August 27, 1982 and denied on September 30, 1988. Director's Exhibit 27. Claimant filed his second claim for benefits on October 16, 1990, which was denied on March 18, 1991. Director's Exhibit 26. Claimant's present claim was filed on June 8, 1994 and denied on November 25, 1994. Director's Exhibits 1, 13. Claimant filed a petition for modification of the denial of the present claim on February 28, 1995, which was denied on June 6, 1995. Director's Exhibits 14, 18.

[2]Ron Carson, a benefits counselor with Stone Mountain Health Services of St.

(95-BLA-2546) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge found that claimant established the existence of at least twenty-six years and six months of qualifying coal mine employment but that claimant failed to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 in the instant modification request. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

In determining whether claimant has established modification pursuant to Section 725.310, 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); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

Furthermore, the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction the instant case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989), issued *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-90 (6th Cir. 1994), 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. The Court further held that "[o]nce a request for

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Charles, 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* 20 C.F.R. §§802-211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

modification is filed, no matter the grounds stated, if any, the [administrative law judge] has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." *Id.*

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. In the instant case, although claimant filed the petition for modification, the only additional evidence was submitted by employer. As the administrative law judge noted, the newly submitted evidence consists of four negative x-ray interpretations, a non-qualifying pulmonary function study, a non-qualifying arterial blood gas study, and two medical opinions which do not support a finding of the existence of pneumoconiosis or total respiratory disability.[3] Decision and Order at 8; Employer's Exhibits 2-6.

The administrative law judge first considered all of the evidence of record and permissibly determined that claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310. Decision and Order at 3; *Worrell, supra; Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989). The administrative law judge then considered the newly submitted evidence, in conjunction with the previously considered evidence, and rationally determined that claimant failed to establish a change in conditions pursuant to Section 725.310. *Worrell, supra; Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). 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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)*(en banc); Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's findings that claimant failed to establish a change in condition or a mistake in a determination of fact pursuant to Section 725.310 and the denial of benefits as it is supported by substantial evidence and in accordance with law. *Worrell, supra.*

[3]A "qualifying" pulmonary function study or blood gas 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. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge