BRB No. 97-1196 BLA

BAILEY WHITED	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DAVIS & WHITED COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Bailey Whited, Abingdon, Virginia, *pro se.*

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

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

[1] Claimant is Bailey Whited, the miner. Tim White, 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, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(96-BLA-1000) of Administrative Law Judge Mollie W. Neal 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). Claimant's application for benefits filed on October 30, 1985 was denied on June 4, 1990 by Administrative Law Judge John H. Bedford, who credited claimant with twenty-eight years and eight months of coal mine employment, but concluded that the medical evidence failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 63. Accordingly, he denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding pursuant to Section 718.202(a) as supported by substantial evidence and, accordingly, affirmed the denial of benefits. *Whited v. Davis & Whited Coal Co*., BRB No. 90-1726 BLA (Oct. 25, 1991)(unpub.); Director's Exhibit 73. Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 74. Administrative Law Judge Nicodemo DeGregorio denied modification because he found that the evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and concluded therefore that the record failed to demonstrate either a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. Director's Exhibit 110.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a) and 725.310. *Whited v. Davis & Whited Coal Co.*, BRB No. 94-3782 BLA (May 31, 1995)(unpub.); Director's Exhibit 115. Claimant again requested modification, but did not submit additional medical evidence.[2] Director's Exhibit 117. In considering claimant's second modification request, Administrative Law Judge Mollie W. Neal weighed the new x-rays and the new medical opinion submitted by employer in conjunction with the previously submitted evidence and found that the evidence failed to establish the existence of

[2] A claimant need not submit new evidence on modification to trigger the administrative law judge's authority to review the record for a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Jessee v. Director, OWCP*, 5 F.3d 723, 724, 18 BLR 2-26, 2-28 (4th Cir. 1993).

pneumoconiosis. [1997] Decision and Order at 7. The administrative law judge additionally concluded that the record disclosed no change in conditions or mistake in a determination of fact. [1997] Decision and Order at 9. Accordingly, she denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), 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 to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In addition, Section 725.310 provides that a party may request modification of the terms of an award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has further held that the administrative law judge has the authority, if he so chooses, to modify the final order on the claim, *i.e.*, "[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence." *Jessee v. Director, OWCP*, 5 F.3d 723, 724, 18 BLR 2-26, 2-28 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

Pursuant to Section 718.202(a)(1), the administrative law judge correctly noted that none of the eleven readings of the three new x-rays taken since the previous denial was positive for the existence of pneumoconiosis.[3] Employer's

[3] A twelfth x-ray classification form indicating Dr. Spitz's determination that the

Exhibits 2-10, 12-14. Substantial evidence supports the administrative law judge's additional finding that the new readings "substantiate[d] the findings" of the previous administrative law judges that the x-ray readings of record did not establish the existence of pneumoconiosis. [1997] Decision and Order at 7. Overall, the record contains eighty-seven readings of twenty-five x-rays. Seventy-two readings were negative for pneumoconiosis, eleven readings were positive, two readings were not classified in the form required to constitute evidence of pneumoconiosis, *see* 20 C.F.R. §718.102(b), and two readings indicated that certain x-rays were unreadable. Director's Exhibits 8, 9, 12, 16, 19, 29, 34, 35, 44, 45, 48, 50, 52, 59, 60, 74, 76, 83, 84, 86-88, 90, 99, 100, 101, 103, 106; Employer's Exhibits 2-10, 12-14. Fifty-seven of the negative readings were by Board-certified radiologists, B-readers, or both, while eight of the positive readings were rendered by similarly-qualified readers. The prior two administrative law judges permissibly found the weight of the x-ray readings viewed in light of the readers' radiological qualifications to be negative for pneumoconiosis. Director's Exhibits 63 at 16, 110 at 4; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). Since the current administrative law judge considered the new x-ray readings in conjunction with the previously submitted x-ray readings, we affirm her finding that, "[o]n consideration of all of the x-ray reports of record . . . the overwhelming weight of the x-ray evidence remains negative for pneumoconiosis." [1997] Decision and Order at 7.

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. [1997] Decision and Order at 7; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge accurately noted that the new medical examination report by Dr. Sargent did not contain a diagnosis of pneumoconiosis. Employer's Exhibit 2. The administrative law judge additionally found that Dr. Sargent's new examination report was "consistent with the persuasive reports of Drs. Fino and Endres-Bercher as well as Dr. Sargent's earlier

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January 25, 1994 x-ray was unreadable for pneumoconiosis was listed as Employer's Exhibit 11 and considered by the administrative law judge. [1997] Decision and Order at 5. This reading does not appear in the record on appeal, but since it is not a positive reading, its absence does not affect the disposition of this case.

report as credited by Judges Bedford and DeGregorio." Decision and Order at 8. Substantial evidence supports the administrative law judge's finding. In the initial claim and pursuant to the first modification request, Drs. Taylor, Modi, and Robinette, claimant's treating physician, diagnosed pneumoconiosis. Director's Exhibits 6, 21, 74, 102. The previous administrative law judges permissibly found that the opinions of Drs. Taylor and Modi were unreasoned, and that Dr. Robinette's opinion was outweighed by the contrary opinions of examining physicians Drs. Abernathy, Endres-Bercher, and Sargent, and by the opinion of Dr. Fino, who reviewed the medical evidence of record. Director's Exhibits 35, 50, 63 at 17-21, 101, 106, 110 at 4-5; *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Since the current administrative law judge considered the new medical opinion evidence and permissibly found it to be consistent with the weight of the previously submitted medical opinion evidence, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Inasmuch as the administrative law judge considered the old and new evidence and permissibly concluded that it failed to establish the existence of pneumoconiosis, and further determined that the record did not demonstrate a change in conditions or a mistake in a determination of fact, [1997] Decision and Order at 9, we affirm her findings pursuant to Sections 718.202(a) and 725.310. *See Jessee, supra*. Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement under Part 718, entitlement is precluded. *Trent, supra.*

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

REGINA C. McGRANERY
Administrative Appeals Judge