BRB No. 97-1754 BLA

CLYDE DANIELS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOVEREIGN COAL COMPANY	)	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 on Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Clyde Daniels, Phelps, Kentucky, *pro se*.

William T. Brotherton, III, Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification (96-BLA-1545) of Administrative Law Judge Thomas F. Phalen, Jr. 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge

[1] Claimant filed his claim for benefits on December 7, 1993, which was denied by the district director on September 23, 1994. Director's Exhibits 1, 12. Claimant requested modification which the district director denied on December 5, 1994, as claimant failed to submit any additional evidence. Director's Exhibit 13. Claimant filed another request for modification which was denied by the district director on

concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204© and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310. Accordingly, benefits 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 filed a letter indicating that he would not 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 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 are 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).

After consideration of the administrative law judge's Decision and Order on Modification, 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 therein. The United States

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January 17, 1995, as the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 14. Claimant filed another request for modification on November 6, 1995, which was denied. Director's Exhibits 15, 21. Claimant subsequently requested a hearing before an administrative law judge.

Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held 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. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-90 (6th Cir. 1994). Furthermore, 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). Initially, as the administrative law judge noted, claimant did not submit any additional evidence with his modification request. Thus, the administrative law judge, in the instant case, properly determined that the evidence of record was insufficient to establish a change in conditions pursuant to Section 725.310. *Worrell, supra*; *Nataloni, supra*; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Considering the evidence of record to determine if a mistake in fact occurred, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as the majority of the x-ray interpretations were negative and were read by physicians with superior qualifications. Director's Exhibits 10, 11, 31; Employer's Exhibit 2; Decision and Order at 6; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). Further, the administrative law judge found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) as there is no biopsy of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306; Decision and Order at 6; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). In addition, the administrative law judge considered the entirety of the medical opinion evidence of record and rationally accorded greater weight to Dr. Iosif's opinion, finding no pneumoconiosis, than to Dr. Mettu's contrary opinion, based on Dr. Iosif's superior qualifications and because his report was better documented, reasoned and supported by the objective evidence of record. Director's Exhibits 5, 7; Employer's Exhibit 1; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-1-26 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985).

With respect to Section 718.204(c), the administrative law judge properly found that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) as there are no pulmonary function studies of record, the only blood gas study of record produced non-qualifying values,[2] and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Director's Exhibit 5; Decision and Order at 9, 10; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, after considering the entirety of the medical opinion evidence, the administrative law judge rationally found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(4), as neither physician of record opined that claimant was totally disabled. Directors Exhibits 5, 7; Employer's Exhibit 1; Decision and Order at 10; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Piccin, supra*. 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, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant has failed to establish a mistake in fact pursuant to Section 725.310 as the evidence of record is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(c).

Inasmuch as claimant has failed to establish modification pursuant to Section 725.310, we affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law. *Worrell, supra*.

[2] 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, Appendix B, C respectively. 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 on Modification denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge