BRB No. 97-1111 BLA

RADIE RAMEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INCOAL INCORPORATED COAL COMPANY	)	DATE ISSUED:
	)	
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 on Modification - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Radie Ramey, Hueysville, Kentucky, *pro se.*

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

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

[1]Susie Davis, a benefits counselor 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).

on Modification - Denial of Benefits (95-BLA-2165) of Administrative Law Judge Daniel J. Roketenetz, 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). This case previously has been before the Board.[2] In its last decision, the Board held that claimant's 1983 filing qualified as a request for modification under 20 C.F.R. §725.310, and remanded the case to the administrative law judge for modification proceedings under the regulations found at 20 C.F.R. §410.490 and 20 C.F.R. Part 718. *See Ramey v. Incoal Incorporated Coal Co.,*BRB No. 87-2190 BLA (Decision and Order on Reconsideration, Jan. 27, 1993)(unpub.); *Ramey v. Incoal Incorporated Coal Co.*, BRB No. 87-2190 BLA (Aug. 24, 1989)(unpub.). On remand, the administrative law judge found no basis for modifying the previous denial of benefits. Claimant's appeal of that decision on November 25, 1994, wherein he submitted evidence to the Board, was interpreted as a request for modification, and the case was remanded to the Office of Workers' Compensation Programs for further modification proceedings. *See Ramey v. Incoal Inc. Coal Co.*, BRB No. 95-0397 BLA (Jan. 19, 1995) (unpub.); Director's Exhibit 116; Decision and Order on Modification-Denial of Benefits at 2. In his decision, the administrative law judge examined the newly submitted evidence in conjunction with the previously submitted evidence of record, and determined that claimant failed to establish either a change in conditions or a mistake in fact, and accordingly, denied benefits. Employer responds to claimant's appeal, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief 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. *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 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 under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose

[2]The relevant procedural history of this case can be found in the Board's previous decisions. *See Ramey v. Incoal Incorporated Coal Co.,* BRB No. 87-2190 BLA (Decision and Order on Reconsideration, Jan. 27, 1993)(unpub.); *Ramey v. Incoal Incorporated Coal Co.*, BRB No. 87-2190 BLA (Aug. 24, 1989)(unpub.); *see also* Decision and Order on Modification-Denial of Benefits at 1-2.

out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one 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*).

Upon consideration of the administrative law judge's Decision and Order and the evidence of record, we affirm the administrative law judge's denial of claimant's request for modification. Initially, the administrative law judge reaffirmed his previous findings and determined, pursuant to *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), that there was no mistake of fact as a basis to modify the denial of benefits. Although the administrative law judge did not explicitly describe all of the old evidence in his decision, he specifically referred to his previous decision which considered the entire record. *See* Decision and Order at 6, 7, 9. We hold, therefore, that the administrative law judge's mistake of fact analysis comports with *Worrell*, and consequently affirm his finding that claimant failed to establish a mistake in a determination of fact in the previous denial. *See Worrell, supra;* 20 C.F.R. §725.310.

The administrative law judge then noted the evidence newly submitted on modification included interpretations of six x-rays, medical opinions from Drs. Sundaram, Vuskovich, Branscomb and Fino, and two pulmonary function studies. He properly accorded determinative weight to the x-ray interpretations of the most highly qualified physicians, which were overwhelmingly negative for the existence of pneumoconiosis, and found that the newly submitted x-ray evidence did not support invocation of the presumption at Section 410.490, and thus did not establish a change in conditions therein. *See 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).

Further, the administrative law judge found that the newly submitted pulmonary function studies were non-qualifying[3] under Section 718.204. In addition, the administrative law judge found that the opinion of Dr. Sundaram, that claimant is totally disabled due to pneumoconiosis arising from coal mine employment, is not well reasoned because Dr. Sundaram's conclusions are unexplained and unsupported by objective evidence. Within his discretion as trier-of-fact, the administrative law judge credited the opinions of Drs. Vuskovich, Branscomb and Fino, all of whom opined that claimant did not suffer from a totally disabling respiratory or pulmonary impairment, because he found they were well-reasoned and well-documented. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)*(en banc)*. Accordingly, the administrative law judge properly found that claimant failed to demonstrate a change in conditions under Part 718, as the newly submitted evidence failed to establish either etiology under Section 718.203(b), or the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c). We affirm these findings as rational and based on substantial evidence. *See Kovac v. BCNR Mining Co.,* 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *see also Worrell, supra*.

Accordingly, the administrative law judge's Decision and Order on Modification - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "nonqualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).