BRB No. 01-0853 BLA

DONALD N. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 Determining Stay Unnecessary and Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Donald N. Ratliff, Davenport, Virginia, *pro se*.

Ashley M. Harman, Douglas A. Smoot (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Determining Stay and Denying Benefits (00-BLA-0685) of Administrative Law Judge Pamela Lakes Wood rendered 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.

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services in St. 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 Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

§901 *et seq*. (the Act).[2] The administrative law judge found that employer conceded to eleven and one-half years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[3] Considering the newly submitted evidence, in conjunction with the previously submitted evidence in this request for modification, the administrative law judge concluded that the evidence failed to establish the existence of pneumoconiosis, an element previously

[2] 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 January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Claimant filed his first claim for benefits on July 11, 1994, which was denied on July 12, 1995 for failure to establish any of the elements of entitlement. Director's Exhibits 26-1, 26-25. Claimant filed the claim before us on December 13, 1996. It was denied by Administrative Law Judge John C. Holmes on January 29, 1998, for failure to establish the existence of pneumoconiosis and total disability. Director's Exhibits 1, 35, 36. On appeal, the Board affirmed the administrative law judge's denial of benefits. Director's Exhibits 37, 41. Claimant filed a request for modification on January 18, 2000, which was denied by the district director on March 3, 2000. Director's Exhibits 42, 46. The case was subsequently forwarded to the Office of Administrative Law Judges on August 25, 2000, pursuant to claimant's request for a hearing on modification. Director's Exhibits 48, 50, 51.

adjudicated against claimant, and therefore found that neither a mistake in a determination of fact nor a change in conditions had been shown. The administrative law judge, therefore, found that claimant failed to establish a basis for modification. 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, contends that the revised regulations will not affect the outcome of this case, but is not otherwise participating 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). 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 modification has been established pursuant to Section 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. *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); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (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 permissibly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) since only one of the new x-rays was read as positive for pneumoconiosis while eleven were read negative by equally qualified readers, and the previous x-ray evidence was consistently negative for pneumoconiosis. *See* Decision and Order at 6; Employer's Exhibits 1, 3, 6, 7; 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence 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. Decision and Order at 6; *see* 20 C.F.R. 718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Finally, the administrative law judge permissibly found that the medical opinion evidence of record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) because it did not diagnose the existence of pneumoconiosis as defined by the Act. Decision and Order at 6; Director's Exhibits 14, 26, 29, 32, 33, 34; 20 C.F.R. §718.201; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent*, *supra*; *Perry*, *supra*. Accordingly, we affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis and therefore a basis for modification. *See Jessee*, *supra*. Further, because we affirm the administrative law judge's finding that the existence of pneumoconiosis, an essential element of entitlement, was not established, the denial of benefits is likewise affirmed on the merits. *See Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order Determining Stay Unnecessary And Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge