BRB No. 98-0253 BLA

ELI SPARKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KNOX CREEK COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Eli Sparks, Wolford, Virginia, *pro se*.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (97-BLA-684) of Administrative Law Judge Jeffrey Tureck denying his request for modification

[1] 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* 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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 originally filed for benefits on July 23, 1990, and the claim was administratively denied on the basis that claimant failed to establish the presence of pneumoconiosis and that he was totally disabled. Director's Exhibit 12. The claim was not pursued further. Claimant filed a second claim on August 9, 1994, and it too was administratively denied on the same basis. Director's Exhibit 12. Subsequently, claimant filed a request for modification of the denial of benefits on the duplicate claim. Director's Exhibit 13. This request was administratively denied, and the case was transferred to the Office of Administrative Law Judges for hearing. Director's Exhibit 30. Following the hearing, the administrative law judge, in the instant case, found that the newly submitted evidence of record was insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or to establish that claimant is now totally disabled pursuant to 20 C.F.R. §718.204(c). Thus, the administrative law judge concluded that claimant failed to establish a change in conditions. The administrative law judge also concluded that after review of the prior evidence, claimant failed to establish modification. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to 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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose 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 establish 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*).

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 therein. The administrative law judge correctly stated that thirteen x-ray

interpretations were rendered since the previous denial and that of these, only one was interpreted as positive for the presence of pneumoconiosis. Decision and Order at 2-3. He found that although the positive interpretation was rendered by a B-reader it was insufficient to establish the existence of pneumoconiosis in view of the fact that of the other x-ray interpretations, all of which were negative, eleven of the negative interpretations were rendered by B-readers. Decision and Order at 2-3. Therefore, the administrative law judge concluded that the x-ray evidence failed to establish the presence of pneumoconiosis. Decision and Order at 3. Inasmuch as the administrative law judge properly relied upon the numerical superiority of the negative readings and the qualifications of the physicians, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), we affirm his finding that the newly submitted x-ray evidence failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Further, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2), (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. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 2-3; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). In considering the entirety of the newly submitted medical opinion evidence of record, the administrative law judge rationally found that none of the medical reports submitted since the prior denial of benefits diagnosed the presence of pneumoconiosis.[2] Director's Exhibits 8, 36; Employer's Exhibits 2, 6. Therefore, the administrative law judge's determination that the newly submitted evidence failed to establish the existence of pneumoconiosis is affirmed as it is supported by substantial evidence.

[2] The record shows that Dr. Forehand found claimant having "no respiratory impairment", Director's Exhibit 8, and that Dr. Broudy opined that there was no evidence that claimant suffers from pneumoconiosis. Director's Exhibit 36; Employer's Exhibit 2. The report of Dr. Branscomb concluded that claimant "has no coal workers' pneumoconiosis or other occupational pulmonary disease." Employer's Exhibit 6.

The administrative law judge, in the instant case, also permissibly found that the newly submitted evidence failed to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204. The administrative law judge properly determined that all the newly submitted pulmonary function and blood gas studies were non-qualifying.[3] Director's Exhibits 7, 9, 28, 36. Further, the administrative law judge rationally concluded that all the newly submitted medical opinions find that claimant has no impairment related to his lungs and that from a pulmonary perspective, claimant could perform his usual coal mine employment.[4] Decision and Order at 3. 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 findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or total disability, and thus, insufficient to establish a change in conditions. Furthermore, the administrative law judge properly reviewed the evidence developed since claimant's initial application and concluded that there was no basis for modification. Decision and Order at 3; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *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, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

[4] The record in the instant case is devoid of any evidence that claimant suffers from cor pulmonale with right sided congestive heart failure. Thus, total disability can not be established pursuant to 20 C.F.R. §718.204(c)(3). *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge