BRB No. 99-1262 BLA

FREDERICK T. MEADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
and	)	
	)	
PITTSTON COAL GROUP	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Frederick T. Meade, Honaker, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

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

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St.

(1998-BLA-901) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a request for modification in 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). In the original Decision and Order dated August 1, 1996, Administrative Law Judge Frederick D. Neusner credited claimant with twenty-five years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Administrative Law Judge Neusner found that the evidence of record was insufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1)-(4), and total disability, *see* 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 50. Within one year of the denial, claimant submitted new medical evidence and requested modification. Director's Exhibit 51. Administrative Law Judge Roketenetz (the administrative law judge) credited claimant with thirty-six years of coal mine employment, adjudicated this claim pursuant to 20 C.F.R. Part 718, found that the newly submitted evidence was insufficient to establish a change in conditions since the previous denial and that, based upon a review of the entire record, that there was no mistake in a determination of fact. The administrative law judge thus found that modification was not 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 not participated 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, are 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-

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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).

26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

In determining whether claimant has established a change in conditions 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). If a claimant avers generally that the ultimate fact was mistakenly decided, the administrative law judge has the authority, without more, to modify the denial of benefits. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In his consideration of the x-ray evidence, the administrative law judge rationally concluded that the x-ray evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to Section 718.202(a)(1) as he correctly found that none of the newly submitted x-ray readings was positive for the presence of pneumoconiosis. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5-6; Director's Exhibits 57, 59-63; Employer's Exhibit 6. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Additionally, as the record contains no biopsy or autopsy evidence, and as none of the presumptions found at 20 C.F.R. §§718.304, 718.305 and 718.306 are applicable, the administrative law judge correctly found that claimant cannot establish the existence of pneumoconiosis at Sections 718.202(a)(2) and (a)(3).[2] *See* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 6. Finally, the administrative law judge properly concluded that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis as no physician opined that claimant was suffering from pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*,

[2] The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305 applies to claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

7 BLR 1-167 (1984); *Perry, supra*; Decision and Order at 6-7; Director's Exhibit 57; Employer's Exhibits 4, 7. We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), as it is supported by substantial evidence.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant, probative, new evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence failed to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c), the administrative law judge initially found that the pulmonary function study evidence would support a finding of total disability pursuant to Section 718.204(c)(1), but that the blood gas study evidence of record was non-qualifying and thus total disability was not established pursuant to Section 718.204(c)(2).[3] *See* Decision and Order at 9. Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right-sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3). *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); Decision and Order at 9.

With respect to Section 718.204(c)(4), the administrative law judge also rationally determined that the evidence of record was insufficient to establish total disability. The administrative law judge properly concluded that the newly submitted evidence, which consisted of Dr. Sargent's report and the hospital records from September 1998, was insufficient to establish total disability as no physician opined that claimant was suffering from a totally disabling respiratory or pulmonary impairment. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash*; *supra*; *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry, supra*; Decision and Order at 9-10; Director's Exhibit 57; Employer's Exhibits 4, 7. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see*

[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 exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

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 the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) as well as his finding that qualifying pulmonary function study evidence was outweighed by the contrary medical opinion and blood gas study evidence. *Fields*, *supra*; *Shedlock*, *supra*. Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), we affirm the administrative law judge's finding that claimant failed to demonstrate a change in conditions pursuant to Section 725.310. Furthermore, the administrative law judge properly reviewed the entire record and rationally concluded that there was no mistake in a determination of fact in the prior denial. Decision and Order at 11. Therefore, we affirm the administrative law judge's finding that claimant failed to establish entitlement to modification pursuant to 20 C.F.R. §725.310 as it is supported by substantial evidence and is in accordance with law. *See Jessee*; *supra*. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits.

Accordingly, the Decision and Order of the administrative law judge denying modification and benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge