

BRB No. 06-0955 BLA

B. C.)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 08/22/2007
)	
EASTERN ASSOCIATED COAL)	
CORPORATION)	
)	
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-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (05-BLA-0033) of Administrative Law Judge Daniel L. Leland 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 filed this application for benefits on August 15, 1995. Director's Exhibit 1. It is now before the Board for the fourth time. The Board

previously discussed this claim's full procedural history.¹ In this decision we shall discuss only that procedural history related to the administrative law judge's decision to deny claimant's modification request and deny benefits.

In a Decision and Order on Third Remand-Denying Benefits issued on January 15, 2003, Administrative Law Judge Clement J. Kichuk found that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).² Specifically, Judge Kichuk found that Dr. Rasmussen's opinion diagnosing pneumoconiosis was not sufficiently reasoned and explained to meet claimant's burden of proof, and that two pulmonary specialists, Drs. Tuteur and Zaldivar, did not diagnose pneumoconiosis. Judge Kichuk additionally found that claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

Upon review of claimant's appeal, the Board affirmed the finding that claimant did not establish the existence of pneumoconiosis, and affirmed the denial of benefits. [*B.C.*] v. *Eastern Associated Coal Co.*, BRB No. 03-0324 BLA (Jan. 12, 2004) (unpub.); Director's Exhibit 100.

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 (2000), and submitted two additional positive chest x-ray readings. Director's Exhibits 101, 103. Employer responded with negative x-ray and CT-scan readings, and a new medical opinion from Dr. Zaldivar stating that claimant does not have pneumoconiosis. After the district director denied modification, claimant requested a hearing and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 104, 108.

After considering the x-ray evidence, negative CT-scan readings, and medical opinions of record, the administrative law judge found that claimant did not establish the existence of pneumoconiosis and thus, did not demonstrate a change in conditions or a mistake in a determination of fact. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and did not fully evaluate the evidence for the existence of legal

¹ [*B.C.*] v. *Eastern Associated Coal Co.*, BRB No. 00-0875 BLA (May 25, 2001)(unpub.); Director's Exhibit 86.

² By that point in the claim proceedings, the Board had affirmed the findings that claimant did not establish the existence of pneumoconiosis by the other methods of proof at 20 C.F.R. §718.202(a)(1)-(3).

pneumoconiosis. Claimant additionally contends that the administrative law judge erred by failing to determine whether claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).³ Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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 a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge may grant modification based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a) (2000). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Claimant contends that the administrative law judge erred in crediting the opinions of employer's physicians "based on their inability to diagnose pneumoconiosis by x-ray," and in deciding whether the existence of pneumoconiosis was established without "a complete evaluation of all the evidence of record." Claimant's Brief at 5. Claimant contends that Dr. Rasmussen's opinion alone is sufficient to establish the existence of pneumoconiosis because the physician relied on all the evidence. Claimant's Brief at 5-6. Claimant's contentions lack merit.

Considering the new medical opinion evidence, the administrative law judge noted that Dr. Zaldivar, a Board-certified pulmonary specialist, had concluded that claimant does not have either clinical or legal pneumoconiosis, based on a physical examination, claimant's work history, claimant's smoking history, negative chest x-ray, negative CT

³ Claimant does not challenge the administrative law judge's finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1). The finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

scan, and normal pulmonary function study. Employer's Exhibits 6, 8. The administrative law judge additionally agreed with Judge Kichuk's evaluation of the previously submitted medical opinion evidence, specifically, that Dr. Rasmussen's earlier opinion diagnosing pneumoconiosis was not well-reasoned, and that Drs. Tuteur and Zaldivar had not diagnosed pneumoconiosis. Finding no "persuasive reasons . . . that Judge Kichuk's evaluation of the medical opinions was erroneous," the administrative law judge concluded that the medical opinion evidence did not support a finding of pneumoconiosis. Decision and Order at 4. Thus, contrary to claimant's contention, the administrative law judge did not evaluate the medical opinions based solely on whether claimant's x-rays established pneumoconiosis. We therefore reject claimant's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

Further, after weighing all the x-rays, CT scans, and medical opinions of record, the administrative law judge permissibly found that the evidence as a whole did not establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a). It is therefore affirmed.

Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, a finding of entitlement is precluded. *See Trent*, 11 BLR at 1-27; *Perry* 9 BLR at 1-2. Consequently, we need not address claimant's contentions with regard to total disability due to pneumoconiosis.

In light of the foregoing, we affirm the administrative law judge's determination that a basis for modification was not established pursuant to 20 C.F.R. §725.310 (2000), because claimant did not establish a change in conditions or a mistake in a determination of fact.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge