BRB No. 00-0897 BLA

JERRY K. DEEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DO & W 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 on Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Jerry K. Deel, Haysi, Virginia, *pro se*.[1]

Sarah M. Hurley (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, on behalf of claimant, requested an appeal of the administrative law judge's Decision and Order, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (97-BLA-1490) of Administrative Law Judge Alexander Karst denying benefits on a request for modification of a claim[2] 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).[3] This is the second time this case is before the Board. The Board previously affirmed in part and vacated in part the administrative law judge's Decision and Order denying benefits. *Deel v. DO & W Coal Co.*, BRB No. 99-0128 BLA (Dec. 15, 1999)(unpublished). Additionally, the Board remanded the case for further consideration of the evidence regarding the existence of pneumoconiosis and a totally disabling respiratory impairment. *Id.* On remand, the administrative law judge found claimant has not established a change in conditions since the prior denial, nor a mistake in a determination of fact. Accordingly, the administrative law judge denied benefits. Claimant appeals, generally challenging the denial of benefits. No response has been received from employer and the Director, Office of Workers' Compensation Programs (the Director), did not file a brief on the merits of this appeal.

[2]This claim, filed on March 31, 1995, was denied by the district director on April 18, 1996 because the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibits 1, 43. There is no record that claimant requested reconsideration, appealed or further pursued this claim until April 10, 1997 by filing this petition for modification pursuant to 20 C.F.R. §725.310 (2000).

[3]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. 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.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Colombia granted limited injunctive relief and stayed for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which only the Director has responded. Claimant and employer have not responded to the Board's order.[4] Based on the brief submitted by the Director asserting that the regulations at issue in the lawsuit do not affect the outcome of the present case, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See 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 conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable 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 (1985).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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 (2000); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

After consideration of the administrative law judge's Decision and Order on Remand, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718 (2000). The administrative law judge, based on his review of all the evidence of record, found that there was no mistake in a determination of fact in the previous decision holding that claimant failed to establish the existence of pneumoconiosis. The record consists of thirteen readings of five x-rays taken between 1987 and 1996. Director's Exhibits 20, 21, 32, 38-40, 48, 49. The administrative law judge correctly found that only one x-ray reading was interpreted as positive for pneumoconiosis, while numerous, dually qualified Board-certified radiologists and B readers,[5] read the x-rays as negative for pneumoconiosis. Decision and Order on Remand at 4; Director's Exhibits 20, 21, 32, 38, 39, 40, 48, 49. As the majority of qualified physicians interpreted the x-ray evidence as negative for pneumoconiosis, the administrative law judge properly found that the x-ray evidence does not support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1) (2000). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Further, the administrative law judge correctly found that the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000), and that the presumptions contained in 20 C.F.R. §§718.305 and 718.306 (2000) are inapplicable in this living miner's claim filed after January 1, 1982. *See* 20 C.F.R. §718.305(e) (2000); Decision and Order on Remand at 4; Director's Exhibit 1. Consequently, claimant cannot, as a matter of law, establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), (3) (2000).

The administrative law judge further reasonably found that the relevant medical opinions of record do not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) as only Dr. Sutherland, whose opinion the administrative law judge found was neither documented nor reasoned, diagnosed pneumoconiosis. *See Deel, supra; Clark v. Karst-Robbins Coal Co.* 12 BLR 1-1-149 (1989)(*en banc*); Decision and Order on Remand at 4; Director's Exhibits 17, 48, 52; Employer's Exhibits 1, 2. As a result, the administrative law judge's finding, based on all of the evidence of record, that claimant failed

[5]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2000); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Board-certified means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. *See* 20 C.F.R. §718.202(a)(1)(ii)(C) (2000).

to establish a mistake in a determination of fact or a change in conditions regarding his earlier conclusion that claimant does not have pneumoconiosis is affirmed as it is supported by substantial evidence.[6]

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718 (2000). *Anderson v. Valley Camp of Utah, Inc.* 12 BLR 1-111(1989)*; Trent, supra; Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[6]On the issue of total disability, the administrative law judge properly found that the newly submitted pulmonary function study of record did not yield qualifying values under 20 C.F.R. §718.204(c)(1) (2000). Decision and Order at 3; Director's Exhibit 48. Furthermore, under 20 C.F.R. §718.204(c)(2), (4) (2000), the Board previously held that the newly submitted medical opinion and blood gas study evidence did not support a finding of total disability. *Deel v. DO &Coal Co.,* BRB No. 99-0128 BLA (Dec. 15, 1999) (unpublished). We, therefore, affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000).

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge