

BRB No. 12-0348 BLA

HAROLD J. STEELE)
)
 Claimant-Petitioner)
)
 v.)
)
 AMERICAN METALS & COAL)
 INTERNATIONAL)
 (formerly VIRGINIA CREWS COAL) DATE ISSUED: 02/21/2013
 COMPANY))
)
 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 Modification of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (10-BLA-5581) of Administrative Law Judge Pamela J. Lakes denying claimant's request to modify the denial of benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ This case, involving a

¹ The Department of Labor has amended the regulations implementing the Federal

claim filed on January 21, 1993,² has a lengthy procedural history.³

In the Decision and Order on Remand dated April 9, 1998, Administrative Law Judge Samuel J. Smith awarded benefits. By Decision and Order dated April 27, 2000, the Board affirmed Judge's Smith's award of benefits. *Steele v. Fossil Fuels, Inc.*, BRB Nos. 98-1336 BLA & 98-1336 BLA-A (Apr. 27, 2000) (unpub.). Although the Board affirmed Judge Smith's award of benefits, it remanded the case for further consideration of the responsible operator issue. In a Decision and Order dated February 1, 2006, Administrative Law Judge Pamela Lakes Wood designated employer as the responsible operator.

On June 20, 2006, employer filed a request for modification, challenging Judge Smith's award of benefits. In a Decision and Order dated May 21, 2008, Administrative Law Judge Jeffrey Tureck found a mistake in a determination of fact in regard to Judge Smith's prior determination that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Upon review of the entire record, Judge Tureck further found that the weight of the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Judge Tureck further found that, in granting employer's request for modification, justice would be rendered under the Act. Accordingly, Judge Tureck granted employer's request for modification, and denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Tureck's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and, therefore, affirmed his finding that employer established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *H.J.S. [Steele] v. American Metals & Coal Int'l*, BRB No. 08-0639 BLA (July 21, 2009) (unpub.). The Board also held that Judge Tureck acted within his discretion in finding that granting employer's request for modification would render justice under the Act. *Id.* The Board, therefore, affirmed Judge Tureck's denial of benefits. *Id.*

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2010). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

² The 2010 amendments to the Act, which became effective on March 23, 2010, do not apply to this case, since it involves a miner's claim filed before January 1, 2005.

³ For a complete procedural history of this case, see *H.J.S. [Steele] v. American Metals & Coal Int'l*, BRB No. 08-0639 BLA (July 21, 2009) (unpub.).

Claimant timely requested modification. In a Decision and Order issued on March 15, 2012, Administrative Law Judge Pamela J. Lakes (the administrative law judge) found that the evidence did not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied claimant's request for modification. 20 C.F.R. §725.310 (2000).

On appeal, claimant argues that the administrative law judge erred in denying his request for modification. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁴

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.⁵ 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 under Part 718 in a living miner's claim, a 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. 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).

The administrative law judge may grant modification based on a change in conditions or because of 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."

⁴ We reject claimant's contention that Administrative Law Judge Jeffrey Tureck erred in finding that employer's earlier request for modification would render justice under the Act. The Board previously rejected this contention, holding that Judge Tureck acted within his discretion in finding that employer's request for modification would render justice under the Act. *Steele*, BRB No. 08-0639 BLA, slip op. at 6. Claimant has not demonstrated any exception to the law of the case doctrine. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

⁵ The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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 argues that the administrative law judge erred in denying his request for modification. We disagree. The administrative law judge initially found that Judge Tureck, in his 2008 Decision and Order, properly found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge specifically found “no mistake in a determination of fact in [Judge Tureck’s] analysis, which the Board found to be supported by substantial evidence.” Decision and Order at 5.

The administrative law judge next considered the new evidence. The only new evidence submitted by claimant in support of his modification request was Dr. Ahmed’s positive interpretation of an August 20, 2009 x-ray. Decision and Order at 4; Director’s Exhibit 133. Although the administrative law judge noted Dr. Ahmed’s status as a B reader and Board-certified radiologist, she further noted that employer submitted four negative interpretations of this x-ray by four equally qualified physicians, Drs. Wiot, Meyer, Wheeler, and Scott. Decision and Order at 4-5; Employer’s Exhibits 1-2. The administrative law judge also noted that employer submitted additional evidence; namely (1) negative interpretations of a June 7, 2006 x-ray; (2) interpretations of computerized tomography scans taken on April 7, 2009 and April 1, 2010; and (3) medical opinions submitted by Drs. Zaldivar, Rosenberg, Hippensteel, Spagnolo, and Castle. Decision and Order at 4; Employer’s Exhibits 3-13. The administrative law judge accurately noted that all of this evidence was negative for the existence of pneumoconiosis. Decision and Order at 5-6.

Considering all of the evidence of record (the new evidence, along with the previously submitted evidence before Judge Smith and Judge Tureck), the administrative law judge found that “the preponderance of the medical evidence does not establish either clinical or legal pneumoconiosis.”⁶ Decision and Order at 6. The administrative law judge, therefore, found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

⁶ “Clinical pneumoconiosis” consists of “those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis “includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

Claimant argues that the administrative law judge erred in not weighing all of the evidence together, consistent with the holding in *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000). Claimant's Brief at 6-8. We disagree. In *Compton*, the United States Court of Appeals for the Fourth Circuit held that all types of relevant evidence under Section 718.202(a) must be weighed together to determine whether a claimant suffers from pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-174. In this case, the administrative law judge considered all of the relevant evidence, both new and old, and permissibly found that the preponderance of the medical evidence does not establish either clinical or legal pneumoconiosis. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

Because it is supported by substantial evidence, we affirm the administrative law judge's findings that neither the new evidence, nor the evidence as a whole, establishes the existence of pneumoconiosis. Consequently, we affirm the administrative law judge's findings that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). See *Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28. We, therefore, affirm the administrative law judge's denial of claimant's request for modification.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge