BRB No. 00-0949 BLA

MACK A. VARNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Mack A. Varney, Rosedale, Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (99-BLA-1205) of Administrative Law Judge Rudolf L. Jansen 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).[1] The administrative law judge accepted the parties' stipulation to 27.26 years of coal mine employment. In the instant request for modification, the administrative law judge considered the newly submitted evidence and the evidence from the prior claims together, and found it insufficient to establish either the existence of pneumoconiosis or total disability, and thus insufficient to establish a basis for modification.[2] *See* 20 C.F.R. §§718.202(a)(1)-(4); 718.204(b)(2)(i)-(iv); 725.310 (2000). Benefits were, according, denied.

On appeal, claimant challenges the administrative law judge's denial of benefits.[3]

[1] 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. Reg. 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.

[2] Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Claimant filed for benefits on June 23, 1995. Director's Exhibit 1. The district director denied the claim on October 23, 1995. Director's Exhibit 25. Claimant petitioned for modification on January 10, 1996. Director's Exhibit 5. That request was denied on January 15, 1996. Director's Exhibit 25. Claimant again petitioned for modification on April 18, 1996, Director's Exhibit 28, which was denied on April 26, 1999. Director's Exhibit 9.

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 in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia 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 16, 2001, to which employer and the Director have responded.[4] Employer contends that the revised regulations at 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), and 20 C.F.R. §718.204(a)(specifying that a non respiratory disability is irrelevant to whether a miner is totally disabled due to pneumoconiosis) could possibly affect the outcome of this case. The Director asserts that the regulations at issue in the lawsuit will not alter the outcome of this case. Based on the responses from the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 rational, supported by substantial evidence, and 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).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in determination of fact in the earlier decision. Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, "there is no need for a smoking

[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 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits. *See Jessee v. Director, OWCP*, 5 F.3d 723, BLR 2-26 (4th Cir. 1993).

In determining whether claimant has established modification pursuant to Section 725.310 (2000), 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 an element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992); *Wojtowicz v. Dusquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In order to establish entitlement to benefits in a living miner's claim 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. *See* 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*).

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to the negative interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader. This was rational. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), *see Perry, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Decision and Order at 10. Further, inasmuch as there were no biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis based on that evidence. 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis by the use of presumptions covering complicated pneumoconiosis, claims filed prior to January 1, 1982, or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Turning to the medical opinion evidence, the administrative law judge credited the opinions of Drs. Castle, McSharry, Fino and Jarboe, who found that claimant does not suffer from pneumoconiosis, as these physicians hold multiple board certifications in fields relevant to this claim. The administrative law judge accorded even greater additional weight to the opinions of Drs. McSharry and Castle inasmuch as they defended their opinions on deposition.[5] This was rational. Director's Exhibits 4, 9, 13, 31, 48; Employer's Exhibits 6,

[5] The administrative law judge found Dr. Forehand's opinion to be reasoned and

12. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Finally, the administrative law judge accorded less weight to Dr. Robinette's opinion, which supported a finding of pneumoconiosis, as it was based, at least in part, on Dr. Robinette's positive readings of three x-rays which were subsequently read as negative by numerous radiologists with superior credentials. Decision and Order at 10; Director's Exhibits 31, 57. This was permissible. *See Tedesco, supra*; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *Clark, supra*; *Lucostic, supra*. Moreover, we note that the administrative law judge correctly concluded that, weighing all the evidence together, claimant failed to establish the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Turning to the issue of total disability, the administrative law judge correctly found that all of the blood gas studies were non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibits 10, 31, 48, Employer's Exhibit 4. Likewise, the administrative law judge correctly found that inasmuch as the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(2)(iii). Regarding the pulmonary function studies, the administrative law judge gave less weight to the July 20, 1999 pulmonary function study, which was the only qualifying pulmonary function test of record, because it was subsequently invalidated by four highly qualified physicians and because the July 22, 1999 pulmonary function study, performed only two days later, was non-qualifying. Decision and Order at 11; Claimant's Exhibit 1, Employer's Exhibits 4, 8, 9. This was rational. *Tedesco, supra*; *see Clark, supra*; *Lucostic, supra*.

Turning to the medical opinions, the administrative law judge correctly noted that Drs. Forehand, McSharry, Castle, Fino and Jarboe supported a finding that claimant was not totally disabled, Decision and Order at 12; Director's Exhibits 4, 9, 13, 48; Employer's Exhibits 6, 12, and accorded their opinions the greatest weight because of their superior credentials and the explanations provided by Drs. Castle and McSharry on deposition. This was rational. *Tedesco, supra*; *Clark, supra*; *Lucostic, supra*. The administrative law judge further found that Drs. Dahhan, Renn and Robinette did not address the issue of total disability. *Id*.; Director's Exhibit 31; Employer's Exhibit 8. Moreover, in conclusion, the administrative law judge rationally found, weighing all of the evidence together, that claimant failed to establish a totally disabling respiratory impairment. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish a totally disabling respiratory impairment. *See*

---

documented, but found no reason to give this opinion special weight.

Nataloni, supra.

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). Thus, we affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis or total disability and therefore a basis for modification of the prior denial. *See Jessee, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge