

BRB No. 00-0614 BLA

JESSE DANIELS)
)
 Claimant-Petitioner)
)
 v.)
)
 ENERGY COAL INCOME PARTNERSHIP) DATE ISSUED:
)
 and)
)
 AMERICAN BUSINESS & MERCANTILE)
 INSURANCE MUTUAL, INCORPORATED)
)
 Employer/Carrier-)
 Respondent)
)
 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.

Jesse Daniels, Prestonsburg, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

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 - Denial
of Benefits (99-BLA-0240) of Administrative Law Judge Daniel J. Roketenetz rendered 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.*¹ 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 change in conditions.² Benefits were, accordingly, denied. Claimant appeals, generally challenging the administrative law judge's findings. 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 she 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

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 Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

established a briefing schedule by order issued on February 21, 2001, to which the Director and the employer have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.³ Claimant, however, asserts that while he does not have access to a copy of the challenged regulations, he “feels certain that they would apply to the standards and qualifications of this claimant for black lung benefits.” Claimant, therefore, requests that his case be held in abeyance pending the final ruling in the 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).

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. 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*).

After consideration of the administrative law judge’s Decision and Order, the arguments 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. Upon reviewing the new evidence submitted on modification along with the prior evidence and the findings made in the November 17, 1997

³ As a preliminary matter, employer notes its objection to the retroactive application of the revised rules, but concedes that none of the new regulations affect the outcome of this claim and that whether the appeal is decided under the old or new regulations, the outcome is the same.

Decision and Order by Administrative Law Judge Richard A. Morgan, the administrative law judge found that a mistake in a determination of fact had not been made in the prior decision and that a change in conditions since the prior denial had not been established. Decision and Order at 6-7. In evaluating the evidence, the administrative law judge found that both the pulmonary function study dated January 9, 1997 and the x-ray reading dated September 12, 1996, by Dr. Reddy, had been previously submitted and considered by Judge Morgan in his Decision and Order, and that claimant had submitted no new studies in support of his modification request. *Id.* The administrative law judge also found that the supplemental reports by Drs. Branscomb and Fino reiterated their earlier opinions that claimant neither suffered from pneumoconiosis, nor was he totally disabled. Employer's Exhibits 1, 3. Regarding Dr. Sundaram's opinion, the administrative law judge found it was insufficient to establish a change in conditions because Dr. Sundaram's diagnosis was based upon studies which did not support his conclusions, and that the supplemental opinions of Drs. Fino and Branscomb, which were fully supported by the evidence of record, which had been previously considered by Dr. Morgan, continued to establish that claimant did not have pneumoconiosis and was not totally disabled. Decision and Order at 7. This was permissible. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, as the administrative law judge properly weighed all of the relevant evidence with respect to both a change in conditions or a mistake in fact, we affirm the findings of the administrative law judge as supported by substantial evidence. As the administrative law judge found the evidence insufficient to establish either the existence of pneumoconiosis or total disability, we affirm his finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact and, therefore, a basis for modification.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge