

BRB No. 00-0652 BLA

ERNEST A. ARTIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Based On A Request For Modification of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Ernest A. Artis, N. Tazewell, Virginia, *pro se*.

Barry H. Joyner (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, without the assistance of counsel, appeals the Decision and Order Denying Benefits Based On A Request for Modification (99-BLA-1034) of Administrative Law Judge Richard K. Malamphy 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).<sup>1</sup>

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<sup>1</sup> 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.

This case has a lengthy procedural history which was detailed in the Board's previous Decision and Order, where the Board affirmed the finding of Administrative Law Judge John C. Holmes that the opinion of Dr. Spagnolo established rebuttal of the presumption at 20 C.F.R. §718.305 (2000) and therefore affirmed the denial of benefits.<sup>2</sup> *See Artis v. Director, OWCP*, BRB No. 96-0920 BLA (Apr. 25, 1997)(unpub.). Director's Exhibit 66. Claimant appealed, and the United States Court of Appeals for the Fourth Circuit, where jurisdiction of the case lies, affirmed the Board's Decision and Order. *See Artis v. Director, OWCP*, No. 97-1664 (Apr. 28, 1998)(unpub.)(*per curiam*). Director's Exhibit 68.

On July 13, 1998, claimant filed a motion for modification pursuant to 20 C.F.R. §725.310 (2000), submitting new evidence consisting of an x-ray reading by Dr. Alexander. Director's Exhibit 69; Claimant's Exhibits 1, 2. The Director, in response, submitted x-ray readings by Drs. Forehand and Barrett. Director's Exhibits 79, 80. Reviewing all the evidence of record and the prior decisions, the administrative law judge found that the evidence failed to establish a basis for modification of the prior denial, *i.e.*, a change in condition or a mistake in a determination of fact, and, therefore, denied benefits. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. The Director responds, urging affirmance of the administrative law judge's Decision and Order, or in the alternative, remand of this case for further consideration.

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 2, 2001, to which the parties have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of

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<sup>2</sup> Administrative Law Judge John C. Holmes had previously found that claimant established fifteen years of coal mine employment and the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). *See Artis v. Director, OWCP*, BRB No. 94-4061 BLA (Aug. 30, 1995)(unpub.). Director's Exhibit 59.

this case. Based on the responses of the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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 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. *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*).

The Director contends that even though the administrative law judge did not specifically address Section 718.305 and did not directly address the earlier evidence, any error is harmless, inasmuch as he reviewed and adopted Judge Holmes's findings regarding the earlier evidence, specifically that Dr. Spagnolo's opinion established that claimant's totally disabling respiratory impairment, if any, did not arise out of coal mine employment, 20 C.F.R. §725.305(d), a finding affirmed by the Board and the Fourth Circuit. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibits 66, 68. We agree.

Thus, as claimant has submitted no new evidence which bears on the issue of disability causation, a necessary element of entitlement, the administrative law judge properly found that claimant failed to establish eligibility for benefits. Decision and Order at 4. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Trent, supra*; *Perry, supra*. We therefore affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits Based On A Request For Modification is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge