BRB No. 00-0823 BLA

CHARLES G. HARTLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C.J. LANGENFELDER & SON, INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	)
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Charles G. Hartley, Windham, Ohio, *pro se*.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Rita Roppolo (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 (99-BLA-1353) of Administrative Law Judge Daniel L. Leland denying benefits 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 noted that the instant claim was a modification request and applied the proper standard. Decision and Order at 2-4. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718 (2000),[2] the administrative law judge found four and one-quarter years of qualifying coal

[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]Claimant filed his initial claim for benefits on February 25, 1991, which was denied on April 10, 1991. Director's Exhibit 43. Claimant took no further action on that claim. Claimant filed the present claim on March 31, 1995, which was denied on October 23, 1995 and claimant filed a subsequent claim on August 23, 1996 which was treated as a modification request as it was filed within one year of the prior denial. Director's Exhibits

mine employment and concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310 (1999).[3] Decision and Order at 3-6. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.

1, 26, 31, 34. The modification request was finally denied by Administrative Law Judge George P. Morin on May 19, 1998, as claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 47. Claimant filed the instant modification request on February 15, 1999. Director's Exhibit 52.

[3]The amendments to the regulation at 20 C.F.R.§725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 65 Fed. Reg. 80, 057 (2000)(to be codified at 20 C.F.R.§725.2(c)).

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 9, 2001, to which employer and the Director have responded.[4] Claimant has not responded to the order.[5] Based on the briefs submitted by employer and the Director, 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 considers 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); *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 are in accordance with 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 (1965).

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 and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes

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[4]The Director's brief, dated March 28, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a brief dated March 28, 2001, employer asserted that it generally believes that the Board's interpretation of these regulations will determine whether they affect the outcome of this case. Employer's Brief at 1. Employer contends that the provisions contained at 20 C.F.R. §§718.201(a)(2), (c) and 718.104(d) may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant appeal.

[5]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.

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 raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein.[6] The United States Court of Appeals for the Fourth Circuit issued *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), holding that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been made by claimant.[7] Furthermore, in determining whether claimant has established modification pursuant to Section 725.310 (1999), 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 the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-

[6]We note that the administrative law judge acted within his discretion in crediting the miner with four and one-quarter years of coal mine employment based on the Social Security and employment records. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984); Decision and Order at 3. We, therefore, affirm the administrative law judge's length of coal mine employment determination as it is rational and based on a reasonable method of calculation. *Vickery, supra*.

[7]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) and therefore insufficient to establish modification. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge reviewed the relevant evidence of record in the original decision in determining if a mistake in determination of fact was established and properly concluded that the finding of no pneumoconiosis by Administrative Law Judge Morin was correct. Decision and Order at 5; *Jessee*, *supra*; *Piccin, supra*.

Considering the newly submitted evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *Piccin, supra*. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000) as all of the newly submitted x-ray readings were negative. Director's Exhibits 50, 56-63; Decision and Order at 3-5; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*).

Further, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) (2000) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 6; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*. Additionally, the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) (2000) since none of the presumptions set forth therein are applicable to the instant claim.[8] *See* 20 C.F.R.

[8]The presumption at 20 C.F.R. §718.304 (2000) is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 (2000) because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e) (2000); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 (2000) is also inapplicable.

§§718.304, 718.305, 718.306 (2000); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

In weighing the newly submitted medical opinions of record, the administrative law judge also rationally concluded that this evidence was insufficient to establish the existence of pneumoconiosis as the physicians who are supportive of claimant's burden, Drs. Bermudez and Agnone, based their opinions on inaccurate smoking and length of coal mine employment histories.[9] Decision and Order at 6; Director's Exhibits 50, 51, 55, 65, 66; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Stark v. Director, OWCP*, 9 BLR 1-136 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) (2000). *Perry, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray, supra*, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) as it is supported by substantial evidence and is in accordance with law.[10] *Jessee, supra*; *Clark*, *supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[9]Drs. Bermudez and Agnone both relied upon a coal mine employment history of fifteen years and a smoking history of one-half pack of cigarettes for twenty years. Director's Exhibits 65, 66.

[10]Remand to the administrative law judge for reconsideration of the newly submitted evidence under 20 C.F.R. §718.202(a)(1)-(4) in accordance with the Fourth Circuit's recent decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000), is not necessary, as the administrative law judge properly determined that the existence of pneumoconiosis was not established under any of the relevant subsections.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge