

BRB No. 01-0296 BLA

JOSEPH O. GROSS)		
)		
Claimant-Petitioner)		
)		
v.)		
)	DATE	ISSUED:
JEWELL RIDGE MINING CORPORATION)		
)		
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph O. Gross, Whitewood, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order (2000-BLA-470) of Administrative Law Judge Richard A. Morgan denying modification and benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

¹Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge noted that the instant claim was a request for modification and determined that employer was the properly designated responsible operator. Decision and Order at 4; Hearing Transcript at 7. The administrative law judge found at least twenty-one years of qualifying coal mine employment, and based on the date of filing, considered entitlement in this living miner's claim pursuant to 20 C.F.R. Parts 727, 718 and 410, Subpart D (2000).³ Decision and Order at 4, 8-21; Hearing Transcript at 7. The administrative law

²The 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 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

³Claimant filed his claim for benefits on May 12, 1976, which was denied by Administrative Law Judge Charles P. Rippey on August 4, 1983. Director's Exhibits 1, 77. Claimant appealed to the Benefits Review Board which remanded the case for further consideration on July 29, 1987. Director's Exhibit 77. The administrative law judge again denied benefits on September 3, 1986. Director's Exhibit 78. On appeal, the Board remanded the case for further consideration on September 30, 1988. Director's Exhibit 86. The administrative law judge denied benefits on reconsideration and the Board affirmed the denial of benefits on December 26, 1991. Director's Exhibits 87, 93. Claimant requested modification on October 12, 1992, which was denied by the administrative law judge on October 17, 1995. Director's Exhibits 94, 131. On appeal, the Board vacated the denial of benefits and remanded the case on January 29, 1997. Director's Exhibit 139. The case was reassigned to Administrative Law Judge Clement J. Kichuk who denied benefits on November 10, 1997. Director's Exhibit 145. On appeal, the Board remanded the case for further consideration pursuant to 20 C.F.R. Part 410. Director's Exhibit 152. On September 15, 1999, the administrative law judge denied benefits. Director's Exhibit 156. Claimant took no further action until he requested modification on November 5, 1999. Director's Exhibit 157. The case was reassigned to Administrative Law Judge Richard A. Morgan, who denied modification and benefits on November 9, 2000, the subject of the instant appeal.

judge, applying the proper standard, initially reviewed the prior denial of benefits and then considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish invocation of the interim presumption or the existence of pneumoconiosis pursuant to 20 C.F.R. §§727.203(a), 718.202(a) and 410.414 (2000) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 8-22. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. 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 has filed a letter indicating that he will not participate in 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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. 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.⁴ Furthermore, 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 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 1-156 (1990), modified on recon., 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne*

⁴This 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 Commonwealth of Virginia. See Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 invocation of the interim presumption or the existence of pneumoconiosis pursuant to 20 C.F.R. §§727.203(a) and 410.414 (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 prior decision in determining if a mistake in determination of fact was established and properly concluded that the finding of no entitlement by Administrative Law Judge Clement J. Kichuk was correct. Decision and Order at 9, 11-13, 22; *Jessee, supra*; *Nataloni, 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 invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) (2000). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*. In addressing whether the x-ray evidence of record was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000), the administrative law judge properly weighed all of the newly submitted x-ray evidence as well as the other x-ray evidence of record. *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). In his consideration of the x-ray evidence, the administrative law judge noted that the preponderance of the prior x-ray interpretations by B-readers and/or Board-certified radiologists were negative and thus there was no mistake in fact in the prior decision. Decision and Order at 11. The administrative law judge then considered the nine newly submitted x-ray interpretations of record and accorded greater weight to the eight negative interpretations by physicians who were B-readers and/or Board-certified radiologists and properly concluded that the x-ray evidence was insufficient to carry claimant's burden of proof in establishing the existence of pneumoconiosis by a preponderance of the x-ray evidence. See *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 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 11; Director's Exhibits 157, 159, 160; Employer's Exhibits 7, 8, 14-17. We therefore affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000) as it is supported by substantial evidence.

Furthermore, the administrative law judge, noting that there were no newly submitted pulmonary function or blood gas studies and that the overwhelming majority of the prior valid pulmonary function studies and blood gas studies produced non-qualifying values, properly found that the pulmonary function study and blood gas study evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2)-(3) (2000) and therefore insufficient to establish modification. *Mullins, supra*;

Jessee, supra; Kuchwara, supra; Piccin, supra; Director's Exhibits 7, 9, 28, 39, 40, 46, 47, 64; Decision and Order at 11-12. Consequently, we affirm the administrative law judge's finding that the pulmonary function study and blood gas study evidence of record was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2)-(3) (2000).

In addition, in weighing the medical opinions of record, the administrative law judge permissibly found that the previously submitted medical opinions were insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4) (2000) as no physician opined that claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order at 13. The administrative law judge further considered the newly submitted evidence of record and properly concluded that the CT scans and hospital records were also insufficient to establish claimant's burden of proof as they failed to establish the presence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 13; Employer's Exhibits 2, 3, 6, 11, 13, 18, 19. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4) (2000). *Kuchwara, supra; Piccin, supra*. We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish modification pursuant to Section 725.310 (2000) and we affirm the denial of benefits under 20 C.F.R. Part 727 (2000).⁵ *Jessee, supra*.

The administrative law judge also found that claimant failed to establish entitlement pursuant to 20 C.F.R. Parts 718 and 410, Subpart D (2000). Decision and Order at 14-21. In this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, involving a miner with ten years of coal mine employment, the administrative law judge should have only considered this claim filed prior to March 31, 1980, under the permanent criteria of 20 C.F.R. Part 410, Subpart D (2000), following a denial of benefits pursuant to 20 C.F.R. Part 727 (2000). *Muncy v. Wolfe Creek Collieries Coal Company, Inc.*, 3 BLR 1-627 (1981). As the administrative law judge, in the instant case made

⁵We note that as the instant claim was properly adjudicated under 20 C.F.R. Part 727 (2000), the presumption at 20 C.F.R. §410.490 (2000) is inapplicable. *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991).

reviewable findings pursuant to 20 C.F.R. Part 410, Subpart D (2000), any error in reviewing the evidence pursuant to 20 C.F.R. Part 718 (2000) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Under 20 C.F.R. Part 410, Subpart D (2000), claimant has the burden of establishing that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§410.414, 410.416, 410.422, 410.426. Failure to establish any of these requisite elements precludes entitlement. *Saunders v. Director, OWCP*, 7 BLR 1-186 (1984); *Migalich v. Director, OWCP*, 2 BLR 1-27 (1979).

In the instant case, the administrative law judge weighed all of the x-ray evidence of record and properly found that this evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 11, 16, 21; *Mullins, supra*; *Clark, supra*. Further, the administrative law judge also weighed the pulmonary function studies, blood gas studies and medical opinions and rationally determined that this evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment arising out of coal mine employment. Decision and Order at 11-12, 19-21. The objective evidence was non-qualifying and thus supports the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 21; Director's Exhibits 7, 9, 28, 39, 40, 46, 47, 64. Moreover, the administrative law judge permissibly concluded that the opinions of Drs. Robinette, Modi, Myers, Claustro, Byers, Robinson, Abernathy, Scott, Wheeler, Fino, Miller and Javed were insufficient to establish that claimant suffered from a totally disabling chronic respiratory or pulmonary impairment. *Clark, supra*; *Lucostic, supra*; Decision and Order at 13, 21; Director's Exhibits 10, 28, 31, 64; Employer's Exhibits 2, 3, 6, 11, 13, 18, 19. Consequently, we affirm the administrative law judge's determination that the evidence of record fails to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§410.414, 410.416, 410.422, 410.426 (2000), and that claimant is therefore precluded from entitlement under the permanent criteria of 20 C.F.R. Part 410, Subpart D (2000). *Migalich, 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); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's denial of claimant's petition for modification as supported by substantial evidence and in accordance with law. *Jessee, supra*. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310 (2000), we affirm the denial of benefits. *Jessee, 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

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge