BRB No. 02-0361 BLA

JOHNNY BELCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
	)	
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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Johnny Belcher, Grundy, Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order

[1] Pam Runyon, a benefits counselor with Stone Mountain Health Services in

- Rejection of Claim (00-BLA-1031) of Administrative Law Judge Edward Terhune Miller 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*. (the Act).[2] The administrative law judge found twenty-eight years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20

St. Charles, Virginia, requested on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Runyon is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

C.F.R. Part 718.[3] Considering the newly submitted evidence in conjunction with the previously submitted evidence in this request for modification, the administrative law judge concluded that the evidence failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, elements previously adjudicated against claimant, and therefore found that neither a mistake in a determination of fact nor a change in conditions had been shown. The administrative law judge, therefore, found that claimant failed to establish a reason to modify the prior denial of benefits. Accordingly, benefits were denied.

[3] Claimant filed his first claim for benefits on April 20, 1995, which was denied by Administrative Law Judge Jeffrey Turek on September 30, 1996, because the evidence failed to establish the existence of pneumoconiosis or any respiratory or pulmonary condition related to coal mine employment. Director's Exhibits 27, 35, 49, 51. That denial was affirmed by the Board on October 23, 1997, and by the United States Court of Appeals for the Fourth Circuit on September 22, 1998. Director's Exhibits 58, 59. Claimant filed a request for modification on October 12, 1998,which was denied by the district director, and Administrative Law Judge Thomas F. Phelan, Jr., on July 15, 1999, because neither the existence of pneumoconiosis or total disability due to pneumoconiosis were established. Director's Exhibits 65, 67, 76. Claimant filed another request for modification on May 17, 2000, which was denied by the district director who found that the existence of pneumoconiosis and total disability due to pneumoconiosis were not established. Director's Exhibits 77, 85. Claimant requested a formal hearing on July 17, 2000, which was referred to the Office of Administrative Law Judges on August 22, 2000. A hearing was held on January 9, 2001. Director's Exhibits 85, 86.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds urging affirmance of the denial of benefits. 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 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). 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 establish 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 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 determining whether modification has been established 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 Light Co.*, 12 BLR 1-162 (1989); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (1993), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been asserted:

> Thus, a claimant may simply allege that the ultimate fact - disability due to pneumoconiosis was mistakenly decided and the deputy commissioner may, if he so chooses, modify the final order on the claim. There is no need for a smoking-gun factual error, changed

conditions, or startling new evidence.

Jessee at 725, 2-28.

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. The administrative law judge permissibly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) because while claimant's new x-rays were read as positive for the existence of pneumoconiosis by Drs. Alexander and Ahmed, Board-certified radiologists and B-readers, they were read as not positive by Dr. Ranavaya, a B-reader, and as completely negative by Dr. Wiot, a Board-certified radiologist and B-reader, and Dr. Fino, a B-reader. Because these physicians were "comparably credentialed," and the weight of the previously submitted evidence was overwhelmingly negative for the existence of pneumoconiosis, the administrative law judge found that the new x-ray evidence failed to establish the existence of pneumoconiosis. This was rational. *See* Decision and Order at 8, 9; Director's Exhibits 77, 83, 87; Employer's Exhibit 3; Claimant's Exhibit 1; 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff's sub nom*. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 8, 9; *see* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Finally, the administrative law judge rationally found that the medical opinion evidence of record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) since the new opinions did not diagnose the existence of pneumoconiosis as defined by the Act, *i.e.*, Dr. Hippensteel found that claimant did not have coal workers' pneumoconiosis or a "permanent impairment consistent with pneumoconiosis, as opposed to bronchitis associated with continued cigarette smoking," and Dr. Fino concluded that claimant "had neither simple coal workers' pneumoconiosis, an occupationally acquired pulmonary condition, nor a respiratory impairment" and the two previously submitted medical opinions of record finding

pneumoconiosis, by Dr. Patel and Forehand, were "outweighed by the better reasoned [previously submitted] opinions, which were based on more extensive objective evidence of Drs. Fino and Hippensteel to the contrary." Decision and Order at 8. Further, the administrative law judge noted that Dr. Fino stated that over the course of several examinations and reviews of medical records between 1996 and 2000, he had not seen any change in claimant's condition. Decision and Order at 6; Director's Exhibit 87; Employer's Exhibits 1, 2; 20 C.F.R. §718.201; *see Jessee*, *supra*; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *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); *Trent*, *supra*; *Perry*, *supra*.

Accordingly, we affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis. *See Jessee*, *supra*. Because we affirm the administrative law judge's finding that the existence of pneumoconiosis, an essential element of entitlement, was not established based on consideration of both the old and the new evidence of record, we need not address the administrative law judge's finding regarding total disability. *See Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order Rejection of Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge