BRB No. 02-0390 BLA

LEO BRADLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
COBRA COALS INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, 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 - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leo Bradley, Royalton, Kentucky, *pro se*.

Laura M. Klaus and David S. Panzer (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and

Order (2001-BLA-0691) of Administrative Law Judge Joseph E. Kane denying claimant's request for modification and 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] This case has been before the Board previously and involves a modification request of a claim filed on December 11, 1985.[2] On remand most recently, the administrative law judge credited claimant with fifteen years of coal mine employment and adjudicated the instant modification request pursuant to 20 C.F.R. Part 718. The administrative law judge reviewed the evidence submitted subsequent to the previous denial to determine whether claimant established a material change in conditions or a mistake in a determination of fact

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

[2] Claimant filed an application for benefits on December 11, 1985. Director's Exhibit 1. In a Decision and Order issued on July 22, 1993, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or that he was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 81. Accordingly, benefits were denied. *Id.*. On appeal, the Board affirmed the administrative law judge's findings under Section 718.204(c) (2000) and the denial of benefits. *Bradley v. Cobra Coals, Inc.*, BRB No. 93-2173 BLA (Mar. 29, 1995)(unpub.); Director's Exhibit 93.

Claimant filed a request for modification of the denial of benefits on April 28, 1995 and submitted additional evidence. Director's Exhibit 94. The district director determined that modification was not warranted and the case was forwarded to the Office of Administrative Law Judges for a hearing. In a Decision and Order on the record, dated May 13, 1998, the administrative law judge considered the newly submitted evidence and determined that it was insufficient to establish a change in conditions under Section 725.310. The administrative law judge also found that his prior Decision and Order contained no mistake in a determination of fact pursuant to Section 725.310. Director's Exhibit 105. Accordingly, benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Bradley v. Cobra Coals, Inc.*, BRB No. 98-1223 BLA (June 17, 1999)(unpub.), the Board vacated the administrative law judge's Decision and Order on Modification Denying Benefits and remanded the case to the administrative law judge to hold a hearing with respect to claimant's request for modification.

pursuant to 20 C.F.R. §725.310 (2000).[3] The administrative law judge found that the newly submitted medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge thus found that the newly submitted evidence was insufficient to establish a change in conditions since the previous denial and that, based upon a review of the entire record, that there was no mistake in a determination of fact. The administrative law judge thus found that modification was not established pursuant to Section 725.310 (2000). Accordingly, benefits were denied. 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 not participated 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. *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, are supported by substantial evidence, and are 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 under 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, 718.201, 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*).

Claimant may establish a basis for modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000). In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an 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 at least one element of entitlement which defeated entitlement in the prior decision. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994); *see*

[3] The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as this, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c).

Kingery v. Hunt Branch Coal Co., 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).[4]

After consideration of the administrative law judge's Decision and Order on Remand, 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. In his consideration of the x-ray evidence, the administrative law judge rationally concluded that the x-ray evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to Section 718.202(a)(1) as he correctly found that none of the newly submitted x-ray readings was positive for the presence of pneumoconiosis. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent*, *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 10; Director's Exhibit 105; Employer's Exhibit 1.

Further, the administrative law judge properly concluded that the provisions of Section 718.202(a)(2) and the presumptions enumerated at Section 718.202(a)(3) are inapplicable to this claim as the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; claimant filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305; and this is not a survivor's claim. *See* 20 C.F.R. §718.306; Decision and Order on Remand at 10.

Moreover, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as he found that none of the newly submitted medical opinions were sufficiently reasoned and documented to demonstrate a change in conditions. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry*, *supra*; Decision and Order on Remand at 11-12. The administrative law judge reviewed the opinion of Dr. Heironymus, diagnosing pneumoconiosis, and the contrary opinions of Drs. Dahhan and Fino, both of whom found that claimant did not suffer from

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

pneumoconiosis. Decision and Order on Remand at 7-8, 11-12; Director's Exhibit 105; Employer's Exhibits 2-3. The administrative law judge acted within his discretion as fact-finder in discounting Dr. Hieronymus's opinion, despite his status as claimant's treating physician, because the administrative law judge found that Dr. Hieronymus's opinion was vague and conclusory. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Clark*, *supra*; Decision and Order on Remand at 11. In addition, the administrative law judge noted that Dr. Heironymus did not refer to any objective criteria, medical test results or other relevant documentation to explain the basis for his diagnosis. *Id.* Furthermore, because Drs. Dahhan and Fino found that claimant did not suffer from pneumoconiosis, their opinions cannot satisfy claimant's burden of proof. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *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 finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Anderson*, *supra*; *Trent*, *supra*.

In addition, the administrative law judge permissibly found that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv) since none of the pulmonary function study or blood gas study evidence was qualifying, there was no evidence of cor pulmonale and none of the credible physicians' opinions concluded that claimant was totally disabled due to a respiratory or pulmonary impairment. Decision and Order on Remand at 13-14; Director's Exhibit 105; Employer's Exhibits 2-3; *see Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). The administrative law judge also rationally concluded that there was no mistake in a determination of fact in the prior decision and thus properly determined that claimant failed to establish a basis for modification. *Worrell*, *supra*; Decision and Order on Remand at 9. Inasmuch as the administrative law judge properly considered the newly submitted evidence of record and determined that it failed to establish modification pursuant to Section 725.310 (2000), we affirm the administrative law judge's denial of benefits. *See King v. Jericol Mining, Inc*., 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Worrell*, *supra*.

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

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge