

BRB No. 07-0172 BLA

B.J.D., for)	
H.D., deceased Miner)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED: 10/24/2007
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 Denial of Modification Request of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

B. J. D., Cyclone, West Virginia, *pro se*.¹

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

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

PER CURIAM:

¹ By Order dated August 31, 2007, the Board acknowledged claimant's counsel's request to withdraw as counsel. The Board stated that it would review the administrative law judge's decision under the general standard of review, which is whether the Decision and Order of the administrative law judge is rational, is in accordance with law, and is supported by substantial evidence. 20 C.F.R. §§802.211(e), 802.220.

Claimant,² without the assistance of counsel, appeals the Decision and Order Denial of Modification Request (05-BLA-0047) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) 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). The administrative law judge noted that employer acknowledged that the miner had simple pneumoconiosis that arose out of coal mine employment, 20 C.F.R. §§718.202, 718.203. The administrative law judge determined, therefore, that the issue before him on modification was whether the evidence established total disability due to pneumoconiosis.³ 20 C.F.R. §718.204(b), (c). Considering the newly submitted evidence, in conjunction with the previously submitted evidence, the administrative law judge found that the newly submitted evidence failed to establish that claimant's total disability was due to pneumoconiosis, *i.e.*, a change in conditions. The administrative law judge also found, on reviewing the decision of the previous administrative law judge, that a mistake in a determination of fact had not been made when that administrative law judge found that total disability due to pneumoconiosis was not established. Accordingly, the administrative law judge denied claimant's request for modification under 20 C.F.R. §725.310 (2000) and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits.⁴ In response, employer contends that the administrative law judge's decision

² Claimant, the widow of the miner, is pursuing this claim on behalf of the miner, who died on May 31, 2004. Director's Exhibit 160. The miner filed his claim for benefits on August 11, 1993. Director's Exhibits 1. Claimant has not filed a separate survivor's claim in the instant case.

³ This case involves a third petition for modification. In the most recent denial of this case in 2004, Administrative Law Judge Richard A. Morgan found that the medical evidence failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and therefore, denied modification because neither a mistake in a determination of fact nor a change in conditions was demonstrated under 20 C.F.R. §725.310 (2000). Director's Exhibit 152. The miner appealed Judge Morgan's decision. While the appeal was pending, the miner died. Consequently, claimant requested that the miner's appeal be withdrawn, which request the Board granted by Order dated July 28, 2004. Director's Exhibit 161. Claimant filed a third petition for modification accompanied by the death certificate and autopsy report. Director's Exhibit 160.

⁴ Pursuant to claimant's request for a formal hearing, the administrative law judge held a telephone conference hearing on July 14, 2006, at which time the parties agreed that a decision should be made on the record. Decision and Order at 2.

denying benefits should be affirmed. The Director, Office of Workers' Compensation Programs, is not participating in the 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 Co.*, 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is rational, supported by substantial evidence, and in accordance with law. It is, therefore, affirmed. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

In assessing the newly submitted evidence in support of the modification request, the administrative law judge found that the only probative new evidence relevant to the cause of the miner's disability was the autopsy evidence.⁵ The administrative law judge properly concluded, on review of that evidence in conjunction with the previously submitted evidence, that it failed to establish a change in conditions because the evidence failed to establish that the miner was totally disabled due to pneumoconiosis. The administrative law judge noted that: Dr. Dy found "marked" pneumoconiosis on autopsy, Director's Exhibit 160; Dr. Naeye, after reviewing the autopsy and other evidence, opined that the miner's pneumoconiosis was "far too mild to have had any measurable effect on lung function or to have caused any disability," Employer's Exhibits 1, 2, and Dr. Zaldivar, after review of the autopsy and other evidence, also opined that the miner's pneumoconiosis was too mild to have contributed to his impairment. The administrative law judge, therefore, found that the newly submitted evidence failed to establish a change in conditions because it failed to establish that pneumoconiosis was the cause of disability. Employer's Exhibit 3. The administrative law judge also correctly found that a review of the previously submitted evidence failed to show that the prior administrative law judge made a mistake in a determination of fact when he found that the miner's pneumoconiosis did not contribute to his disability. *See* 20 C.F.R. §§718.204(c), 725.310 (2000); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir.

⁵ The administrative law judge noted that the miner's death certificate showed only that the miner died by drowning when flood waters entered his home. Decision and Order at 4; Director's Exhibit 160.

1998); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201, 1-204 (1986); Decision and Order at 4-5; Director's Exhibit 160; Employer's Exhibits 1-3. Because the administrative law judge properly found that claimant failed to satisfy her burden of establishing a change in conditions or a mistake in a determination of fact, we affirm the administrative law judge's finding that claimant failed to demonstrate a basis for modification of the prior denial pursuant to Section 725.310 (2000). See *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-14-15 (1994) (*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Accordingly, the Decision and Order Denial of Modification Request of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge