BRB No. 98-0254 BLA

TROY C. VANCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C & R COAL COMPANY	)	DATE ISSUED:
	)	
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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Troy C. Vance, Oakwood, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (97-BLA-00778) of Administrative Law Judge Stuart A. Levin denying 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). The administrative law judge found and the parties stipulated to, twenty-eight years of coal mine employment and

[1] Tim White, 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. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge considered the newly submitted evidence in conjunction with the prior evidence of record and concluded that the evidence was insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of modification. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he would 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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and

[2] Claimant filed his initial claim for benefits on March 25, 1991, which was denied by the district director on August 15, 1991. Claimant withdrew his claim on February 29, 1992, and it was subsequently considered administratively closed. Director's Exhibit 1. Claimant filed his second claim on July 16, 1993, which was denied by the district director on January 5, 1994. Director's Exhibits 1, 18. Claimant requested a hearing and submitted additional evidence, and the district director denied the duplicate claim on June 27, 1994. Director's Exhibits 19, 25. The administrative law judge denied benefits on June 21, 1995. Director's Exhibit 38. On appeal, the Board affirmed the denial of benefits on November 29, 1995. Director's Exhibit 45. On October 21, 1996, claimant submitted additional evidence which was treated as a request for modification, which was subsequently denied by the district director on December 17, 1996. Director's Exhibits 46, 48. Claimant requested a hearing on January 9, 1997. Director's Exhibit 49.

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 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).

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. The administrative law judge, in the instant case, permissibly determined that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). 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) as the preponderance of the newly submitted x-rays were read as negative by physicians with superior qualifications. Employer's Exhibits 1-4; Decision and Order at 3; *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). Further, the administrative law judge found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2), (3) as there is no biopsy of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 7; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). In considering the entirety of the newly submitted medical opinion evidence of record, the administrative law judge rationally accorded greater weight to Dr. Sargent's opinion, that claimant does not have pneumoconiosis, than to Dr. Sutherland's contrary opinion, in light of his superior qualifications, and as the physician's opinion is better documented, reasoned and supported by the objective evidence of record. Director's Exhibit 46; Employer's Exhibits 1, 6; Decision and Order at 8; *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hall v. Director. OWCP*, 8 BLR 1-193 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge, in the instant case, also permissibly determined that the newly submitted medical opinion evidence of record was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. 718.204(b). *Piccin, supra*. The administrative law judge rationally accorded greater weight to the opinion

of Dr. Sargent, that claimant's pulmonary impairment is due solely to emphysema due to cigarette smoking, as it is better reasoned and documented than Dr. Sutherland's opinion because the physician did not perform any objective studies to support his conclusion. Decision and Order at 8; *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Clark, supra*; *Fields, supra*; *King, supra*; *Lucostic, supra*; *Hall, 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). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis, and thus, insufficient to establish a change in conditions. Furthermore, the administrative law judge properly reviewed the entire record and concluded that there was no mistake in fact in the prior denial. Therefore, we affirm the administrative law judge's finding that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 as it is supported by substantial evidence and is in accordance with law. *Jessee v. Director, OWCP*, 5 F3.d 723, 18 BLR 2-26 (4th Cir. 1993).

Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge