BRB No. 99-0660 BLA
and 99-0660 BLA-A

LARRY W. HORTON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Larry W. Horton, Honaker, Virginia, *pro se.*

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Richard A. Seid (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (98-BLA-428) of Administrative Law Judge Stuart A. Levin denying 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). Claimant filed an application for benefits on August 2, 1989. The district director denied benefits on November 30, 1989, on the ground that claimant failed to establish any of the elements of entitlement. Director's Exhibit 34. On October 5, 1990, claimant submitted the positive x-ray reading of Dr. Sutherland to the district director. Director's Exhibits 34, 36. The district director took no action regarding claimant's newly submitted evidence. Claimant filed another application for benefits on November 7, 1994. Director's Exhibit 1. The district director denied benefits on January 25, 1995, on the ground that claimant had again failed to establish any of the elements of entitlement, or a material change in condition pursuant to 20 C.F.R. §725.309(d). Director's Exhibit 18. Claimant requested a formal hearing and on July 30, 1997, the administrative law judge remanded the claim to the district director to address the previously unadjudicated petition for modification pursuant to 20 C.F.R. §725.310, which was initiated by claimant's submission of Dr. Sutherland's x-ray reading. The district director issued a Proposed Decision and Order Denying Modification on October 29, 1997, and claimant again requested a formal hearing. Director's Exhibits 58, 60. The parties agreed to a decision on the record and in a Decision and Order issued on March 16, 1999, the administrative law judge credited claimant with over twenty years of coal mine employment, and found that the district director had erred by failing to find that a mistake of fact had been demonstrated since the uncontradicted medical report of Dr. Abernathy established the existence of pneumoconiosis on the evidence in the record at that time. Thus, the administrative law judge found that a *de novo* review of the evidence was appropriate. The administrative law judge subsequently found that the evidence of record was insufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

[1]Claimant is Larry W. Horton, the miner. 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).

In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits, and in its cross-appeal, asserts that the administrative law judge erred by finding that the instant case involved a petition for modification of the denial of claimant's 1989 claim for benefits. The Director, Office of Workers' Compensation Programs, (the Director), responds that the administrative law judge correctly adjudicated this claim as a petition for modification, but has not addressed the merits of the present 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 Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and are in accordance with applicable 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra.*

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of a totally disabling respiratory impairment has not been established pursuant to 20 C.F.R. §718.204(c). The administrative law judge considered the relevant evidence and found that the requirements of 20 C.F.R. §718.204(c)(1)-(3) were not met since all of the pulmonary function studies and blood gas studies produced non-qualifying values,[2] and the record contains no evidence of cor pulmonale with right sided congestive heart failure. Director's Exhibits 13, 18, 34, 36, 44; *see generally Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director,*

[2]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(2).

OWCP, 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19(1987). Pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge considered the relevant medical reports of record. Dr. Fino, found no evidence of pneumoconiosis or a respiratory impairment. Director's Exhibit 44. Dr. Abernathy diagnosed the presence of pneumoconiosis, but did not address the issue of disability. Director's Exhibit 34. Dr. Shoukry's report did not diagnose pneumoconiosis and did not address the issue of disability. Director's Exhibits 36, 44. In the three medical reports submitted by Dr. Forehand, two diagnosed coal workers' pneumoconiosis, but stated that there was no evidence of any respiratory impairment.[3] Director's Exhibits 12, 17, 55. As none of the medical reports indicates the presence of a totally disabling respiratory impairment, the administrative law judge rationally determined that claimant failed to establish total disability pursuant to Section 718.204(c)(4). Moreover, as claimant has submitted no evidence indicating the presence of a totally disabling respiratory impairment, the administrative law judge properly found that claimant had failed to satisfy his affirmative burden of proof at Section 718.204(c). As this finding is supported by substantial evidence, it is affirmed. *Napier v. Director, OWCP,* 890 F.2d 669, 13 BLR 2-117 (4th Cir. 1989);[4] *Budash v. Bethlehem Mines Corp.,*9 BLR 1-48 (1986). *Fields supra.*

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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 v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

In its cross-appeal, employer contends that the administrative law judge erred by finding that the instant case was subject to the provisions of 20 C.F.R. §725.310 as a petition for modification, asserting that the only viable claim is the duplicate claim filed in November 1994, which is subject to the provisions of 20 C.F.R.

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[3]The Decision and Order fails to note Dr. Forehand's progress notes dated April 24, 1997. Director's Exhibit 55. This error is harmless however, since Dr. Forehand did not address the issue of total disability. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[4]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit inasmuch as claimant's coal mine employment occurred in the State of Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

§725.309. Specifically, employer argues that the administrative law judge erred by finding that claimant's submission of Dr. Sutherland's positive x-ray reading in October 1990, is insufficient, without an accompanying written request or other indication that claimant believed that there had been a mistake of fact or a change in condition, to establish that claimant had requested modification of his previously denied claim.

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented at Section 725.310, provides that upon his own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time before one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310. Section 22 is intended to be construed liberally, and vests the fact-finder with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971); *Consolidation Coal Co. v. Borda,* 171 F.3d 175 (4th Cir. 1999). In order to meet this lenient standard, the party seeking modification "need not meet formal criteria." *I.T.O. Corp. of Virginia v. Pettus,* 73 F.3d 523(4th Cir. 1996), *cert. den.* 117 S.Ct. 49 (1996). No "smoking-gun factual error, changed conditions, or startling new evidence" is necessary. *Jessee v. Director, OWCP,* 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

The administrative law judge found that claimant's submission of Dr. Sutherland's positive x-ray reading within one year of the denial of his claim, was sufficient to meet this flexible standard. As claimant's application had been denied in part, due to claimant's failure to establish the presence of pneumoconiosis, the administrative law judge rationally inferred that claimant submitted this positive x-ray reading in response to the district director's instructions accompanying the denial, that stated claimant could ask for reconsideration by writing to the district director and submitting additional evidence. Claimant, without the assistance of counsel, adequately complied with these instructions.

Consequently, the administrative law judge properly found that claimant's 1989 claim for benefits was still pending when he filed his duplicate claim in 1994. As this finding is supported by substantial evidence, it is affirmed. *See Branham v. Bethenergy Mines Inc.,* 20 BLR 1-27 (1996); *Stanley v. Betty B Coal Co.,* 13 BLR 1-72 (1990); *Garcia v. Director, OWCP,* 12 BLR 1-24 (1988); *Searls v. Southern Construction Co.,* 11 BLR 1-161 (1988).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge