BRB No. 99-0678 BLA

ROY GRAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER MINING 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Roy Gray, Flat Lick, Kentucky, *pro se*.

Antony Saragas (Huff Law Offices), Harlan, Kentucky, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (97-BLA-1537) of Administrative Law Judge Daniel J. Roketenetz denying benefits in a request for modification of a duplicate claim[1] 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 case has been appealed to the Board for a second time. In the initial Decision and Order, Administrative Law Judge William Pope II credited claimant with eighteen years of coal mine employment based on the parties' stipulation. As the claim was filed November 21,

[1] Claimant filed his initial application for benefits on November 21, 1983 which the district director denied on January 16, 1984 and again on May 16, 1984. *See* Director's Exhibit 59. Claimant requested a hearing which was held on June 11, 1987. *Id.*

1983, Judge Pope applied the regulations at 20 C.F.R. Part 718. Judge Pope found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). Judge Pope, however, found the evidence of record insufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, the Board affirmed the findings of Judge Pope on the grounds that claimant raised no reviewable allegations of error. *Gray v. Eastover Mining Co.*, BRB No. 87-3824 BLA (June 23, 1989)(unpub.).

Claimant filed his second application for benefits on December 16, 1993. *See* Director's Exhibit 1. The district director denied the claim on June 7, 1994 and again after conference on November 11, 1994. *See* Director's Exhibits 48, 58. Claimant requested a hearing. *See* Director's Exhibit 50. Administrative Law Judge Donald W. Mosser issued a Decision and Order on May 15, 1996.[2] Judge Mosser credited claimant with eighteen years of coal mine employment, found that claimant's prior claim had been finally denied on June 23, 1989, and determined that the second claim was a duplicate claim under the provisions of 20 C.F.R. §725.309. Judge Mosser determined that in his prior claim, claimant had established the existence of pneumoconiosis arising out coal mine employment at Sections 718.202(a)(1), 718.203(b), but had not demonstrated the presence of a totally disabling respiratory impairment at Section 718.204(c). Judge Mosser reviewed the newly submitted evidence under the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and found this evidence insufficient to demonstrate a material change in conditions at Section 725.309. Accordingly benefits were denied. *See* Director's Exhibit 71.

Claimant timely requested modification on February 27, 1997, which the district director denied on April 21, 1997. *See* Director's Exhibits 72, 77. Following a hearing on the merits, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) determined that claimant had not submitted any new medical evidence upon which a basis for a change in conditions could be determined, and after a review of the evidence filed since the denial of claimant's first claim on June 23, 1989, concluded that a mistake in a determination of fact had not been made. The administrative law judge found that claimant had failed to establish a change in conditions or a mistake in a determination of fact, and denied modification pursuant to Section 725.310. Accordingly, benefits were denied. In the instant appeal, claimant generally challenges the findings of the administrative law judge. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.

[2] Director's Exhibit 71.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 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 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, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement.[3] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The instant case involves a request for modification from the denial of benefits in a duplicate claim; thus, the issue before the administrative law judge is whether since Judge Pope's denial of benefits, the evidence submitted in support of modification and the evidence before Judge Mosser establishes a material change in conditions pursuant to Section 725.309. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998). The administrative law judge correctly noted that claimant did not submit any new medical evidence following Judge Mosser's determination that the evidence submitted with claimant's second application for benefits was insufficient to establish a material change in conditions since Judge Pope's earlier denial of benefits, and that claimant, therefore, was not entitled to benefits. *See* Decision and Order at 4-5; 20 C.F.R. §725.309. While the administrative law judge did not specifically reconsider the medical opinion evidence submitted with claimant's duplicate claim on the issue of a material change in conditions, we need not remand this case for the administrative law judge to reconsider this issue as the administrative law judge did consider all the medical evidence submitted with claimant's duplicate claim under a mistake in a determination of fact. *See* 20 C.F.R. §725.310; *Hess, supra*.

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit, the jurisdiction where the miner last worked. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In reviewing the new medical evidence, the administrative law judge properly concluded that claimant failed to demonstrate the presence of a totally disabling respiratory impairment based on the pulmonary function study and the blood gas study evidence as the administrative law judge correctly concluded that all of the new pulmonary function study and blood gas study evidence produced values above the qualifying values for a totally disabling respiratory impairment set forth in the regulatory criteria at Section 718.204(c)(1)-(2). *See* Decision and Order at 6; 20 C.F.R. §718.204(c)(1)-(2); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). Likewise, the administrative law judge properly found Section 718.204(c)(3) inapplicable as the new evidence failed to present evidence of cor pulmonale with right-sided congestive heart failure. *See* Decision and Order at 6; 20 C.F.R. §718.204(c)(3). Finally, the administrative law judge did not err when he found that the new medical opinion evidence failed to demonstrate the presence of a totally disabling respiratory impairment as the administrative law judge acted within his discretion when he concluded that Judge Mosser did not make a mistake in a determination of fact. *See* Decision and Order at 7, 20 C.F.R. §725.310; *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying* 14 BLR 1-156 (1990). In so doing, the administrative law judge permissibly concluded that Judge Mosser properly determined that Drs. Jarboe, Baker, Myers and Dahhan found claimant capable of performing his usual coal mine employment from a respiratory standpoint as these physicians opined that claimant did not suffer from a totally disabling respiratory impairment. *See Beatty*, *supra*; *Carson v. Westmoreland Coal Co.*, 18 BLR 1-16 (1994). In addition, the administrative law judge also acted within his discretion when he determined that Judge Mosser permissibly accorded less weight to the medical opinion of Dr. Bushey, which stated that claimant was totally disabled from a respiratory standpoint, because it was belied by his underlying documentation, and therefore, insufficient to meet claimant's burden of proof. *See* Decision and Order at 7; Director's Exhibit 71. We, therefore, affirm the finding of the administrative law judge that claimant failed to establish a material change in conditions pursuant to Section 725.309. We also affirm the denial of benefits by the administrative law judge as it is supported by substantial evidence.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge