BRB No. 02-0678 BLA

KESTER J. MEADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD 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.

Kester J. Meade, Coeburn, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (01-BLA-00583) 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).[1] The

[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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 based on the filing date.[2] Considering newly submitted evidence in conjunction with the

[2] Claimant filed his claim for benefits on May 26, 1987. Administrative Law Judge John J. Forbes, Jr. awarded benefits on November 10, 1989 finding the existence of pneumoconiosis arising out of coal mine employment as well as a totally disabling respiratory impairment established. Director's Exhibits 1, 44. On appeal the Board affirmed the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(c)(1)-(3)(2000), but remanded the case for consideration of the medical opinion evidence at Section 718.204(c)(4)(2000), now 20 C.F.R. §718.204(b)(2)(iv). Director's Exhibit 51. On remand, Administrative Law Judge Stuart A. Levin found that the medical opinion evidence did not establish total

disability and denied benefits. The denial was affirmed by the Board on March 29, 1994. Director's Exhibits 55, 62. The United States Court of Appeals for the Fourth Circuit vacated the finding under Section 718.204(c)(4)(2000) and remanded the case for the receipt of further information regarding Dr. Garcia's opinion. Director's Exhibit 66. The Board remanded the case for further proceedings in accordance with the Fourth Circuit's decision. Director's Exhibit 68. On remand Judge Levin afforded the parties the opportunity to adduce additional information regarding Dr. Garcia's opinion pursuant to the court's remand order. Because neither party filed new evidence, Judge Levin remanded the case to the district director to permit either party to develop further evidence or to permit claimant to pursue modification. On May 9, 1997, the district director denied benefits. Director's Exhibit 83. Claimant requested a hearing. Subsequent to the hearing, Administrative Law Judge Richard T. Stansell-Gamm found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4)(2000) and denied benefits. Director's Exhibit 99. The Board affirmed the denial on October 18, 1999 and the Fourth Circuit upheld the denial on May 16, 2000. Director's Exhibits 107, 110. Following the court's decision, claimant filed a request for modification on January 5, 2001, which was denied by the district director. Director's Exhibit 111. A hearing on modification before Judge Levin was held on March 6, 2002. Director's Exhibits 85, 86, which resulted in the decision before us on appeal.

previously submitted evidence, in this request for modification, the administrative law judge concluded that the evidence failed to establish total disability, the element of entitlement previously adjudicated against claimant, and, therefore, found that neither a mistake in a determination of fact nor a change in conditions had been shown. The administrative law judge, therefore, found that claimant failed to establish a reason to modify the prior denial of benefits. 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, is not participating 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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 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'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)(*en banc*).

In determining whether claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), the 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 the element or elements of entitlement which defeated entitlement in the prior decision. *See Kovac v. BCNR Mining Corporation*, 14 BLR 1-156 (1990), *modified on recon*., 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). In determining whether there has been a mistake in a determination of fact pursuant to 20 C.F.R. §718.310 (2000), the administrative law judge must re-evaluate all of the evidence in the record. *Kovac*, *supra*. Further, the United States Court of Appeals for the Fourth

Circuit, within whose jurisdiction this case arises, held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (1993), that the administrative law judge must determine whether a change in conditions or a mistake in a determination of fact has been made even where no specific allegation of either has been asserted.

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. The administrative law judge rationally found that the new evidence, considered in conjunction with the old, failed to establish a change in conditions and that a review of all of the evidence of record failed to establish that a mistake in a determination of fact had been made in the prior decisions in this case, citing *Jessee*, *supra*. In support of this finding the administrative law judge noted that the pulmonary function studies and blood gas studies of record produced non-qualifying values[3] and there was no evidence of cor pulmonale with right sided congestive heart failure in the record. Employer's Exhibits 3, 16, 19; Claimant's Exhibit 1; 20 C.F.R. §718.204(b)(2)(i)-(iii). Further, the administrative law judge noted that the medical opinion evidence of record failed to establish total disability. Specifically, addressing the new opinion of Dr. Robinette, which found a total respiratory disability, the administrative law judge concluded that Dr. Robinette's opinion did not establish a total respiratory disability because Dr. Robinette failed to provide adequate reasons for his finding of total disability in light of claimant's work duties and non-qualifying clinical study results. This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113(1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1995); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Bates v. Director, OWCP*, 7 BLR 1-113 (1984). Thus, weighing the non-qualifying pulmonary function studies and blood gas studies along with the medical opinion evidence, the administrative law judge rationally found that claimant failed to establish a totally disabling respiratory impairment. *See Hicks*,

[3] 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(b)(2)(i), (ii).

supra; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1989)(*en banc*).

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *see Underwood*, *supra*; *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 if the administrative law judge's findings are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability and, therefore, a basis for modification of the prior denial of benefits as it is supported by substantial evidence and in accordance with law. *Jessee*, *supra*; *Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge