

BRB No. 02-0875 BLA

WILLIAM W. MUNCY )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 SMC COAL & TERMINAL COMPANY ) DATE ISSUED: 08/27/2003  
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 and )  
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 PIER IX TERMINAL COMPANY )  
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 and )  
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 ZEIGLER COAL HOLDING COMPANY )  
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 Claimant- Respondent )  
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 DIRECTOR, OFFICE OF WORKERS=  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane,  
Administrative Law Judge, United States Department of Labor.

William W. Muncy, Warfield, Kentucky, *pro se*.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for  
employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order B Denying Benefits (01-BLA-1193) of Administrative Law Judge Joseph E. Kane (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).<sup>1</sup> Claimant filed his application for black lung benefits on June 27, 1997. Administrative Law Judge Daniel J. Roketenetz denied benefits, finding that claimant failed to establish the existence of pneumoconiosis or total disability. Director=s Exhibit 44. The Board affirmed the denial on April 10, 2000. Director=s Exhibit 49. Claimant filed a request for modification on April 4, 2001, with additional medical evidence. Director=s Exhibit 50. The administrative law judge credited claimant with twenty-nine years and nine months of coal mine employment, considered the new evidence submitted on modification in conjunction with previously submitted evidence, and found that the existence of pneumoconiosis and total disability were not established and that claimant failed, therefore, to establish a change in conditions or a mistake in a determination fact. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the administrative law judge=s Decision and Order as supported by substantial evidence. The Director, Office of Workers= Compensation Programs (the Director), has filed a letter indicating that he will 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. *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, claimant must

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<sup>1</sup> 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.

prove that he suffers from pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§ 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. *Id.* Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of a denial of benefits. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). Further, even if a claimant only avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, there is no need for a smoking gun factual error, changed conditions or startling new evidence), to modify the prior order. *See Worrell, supra*; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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. Considering the evidence as a whole,<sup>2</sup> the administrative law judge rationally found that it did not demonstrate total disability and that a basis for modification of the previous decision was not established. The administrative law judge correctly found that both pulmonary function studies submitted in support of claimant's request for modification produced non-qualifying values as well as the sole blood gas study submitted on modification. 20 C.F.R. § 718.204(b)(2)(i), (ii). Regarding the medical opinion evidence submitted in support of modification, the administrative law judge permissibly accorded less weight to the opinion of Dr. Sundaram as Dr. Sundaram failed to demonstrate an understanding of the exertional requirements of claimant's usual coal mine employment and relied on a flawed pulmonary function study in finding that claimant could not continue to work in coal mine employment. The administrative law judge, therefore, weighing this opinion along with the newly submitted non-qualifying pulmonary function and blood gas studies, and in conjunction with the previous evidence, rationally found that claimant failed to establish total disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-55 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We, therefore, affirm the administrative

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<sup>2</sup> While the administrative law judge declined to memorialize the evidence competently recorded in the previous administrative law judge's decision, he nonetheless indicated that he was considering it in conjunction with the new evidence submitted on modification. Decision and Order at 5 n. 2, 10. That evidence consists of non-qualifying pulmonary function and blood gas studies and the medical reports of Drs. Younes and Dineen, that claimant retained the respiratory capacity to perform his usual coal mine employment. Employer's Exhibit 1; Director's Exhibits 14, 15.

law judge=s finding that the evidence of record failed to establish a totally disabling respiratory impairment, an essential element of entitlement. Because we affirm the administrative law judge=s finding that claimant failed to establish total disability on the record as a whole we need not address his finding regarding the existence of pneumoconiosis. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge=s Decision and Order B Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge