BRB Nos. 96-1089 BLA
and 98-0345 BLA

CECIL D. FLETCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL ENERGY CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Request for Modification of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor, and the Decision and Order Denying Motion for Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Cecil D. Fletcher, Abingdon, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Request for Modification (95-BLA-1916) of Administrative Law Judge Clement J. Kichuk, and the Decision and Order Denying Motion for Modification (97-BLA-0965) of Administrative Law Judge Daniel F. Sutton 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] In a Decision and Order dated May 2, 1996, Judge Kichuk found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, Judge Kichuk found the evidence insufficient to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 and, thus, he denied benefits.[2] In a subsequent Decision and Order dated October 24, 1997, Judge Sutton found the evidence insufficient to establish complicated pneumoconiosis and invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20

[1]Claimant filed his claim for benefits on February 8, 1988. Director's Exhibit 1. On June 21, 1990, Administrative Law Judge Clement J. Kichuk issued a Decision and Order denying benefits based on claimant's failure to establish a totally disabling respiratory impairment due to pneumoconiosis, Director's Exhibit 48, which the Board affirmed, *Fletcher v. National Energy Corp.*, BRB No. 90-1749 BLA (Feb. 22, 1993)(unpub.). The United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. Director's Exhibit 52. On January 30, 1995, claimant requested modification. Director's Exhibit 53. Judge Kichuk issued a Decision and Order denying claimant's request for modification on May 2, 1996. Director's Exhibit 76. Claimant filed an appeal of Judge Kichuk's denial of benefits with the Board on May 22, 1996. Director's Exhibit 77. However, since claimant filed a request for modification with the district director on June 5, 1996, Director's Exhibit 80, the Board dismissed claimant's appeal and remanded the case to the district director for consideration of claimant's request for modification, *Fletcher v. National Energy Corp.*, BRB No. 96-1089 BLA (Order)(June 21, 1996)(unpub.). The Board also informed claimant that he may request reinstatement of the case if an administrative law judge issues a final decision which denies the petition for modification. *Id*. After denials by the district director on September 3, 1996 and January 7, 1997, Director's Exhibits 87, 94, the case was reassigned on appeal to Administrative Law Judge Daniel F. Sutton who issued a Decision and Order denying claimant's request for modification on October 24, 1997. On November 25, 1997, claimant filed an appeal of Judge Sutton's denial of benefits with the Board. Claimant also requested the Board to treat the notice of appeal as a motion to reinstate any previous appeals that claimant may have filed. Hence, the Board granted claimant's requests and reinstated claimant's prior appeal, BRB No. 96-1089 BLA, and consolidated it with claimant's most recent appeal, BRB No. 98-0345 BLA. *Fletcher v. National Energy Corp.*, BRB Nos. 98-0345 BLA and 96-1089 BLA (Order)(Dec. 4, 1997)(unpub.).

[2]Judge Kichuk found no basis to modify his previous finding of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203(b).

C.F.R. §718.304.[3] Judge Sutton also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, Judge Sutton found the evidence insufficient to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 and, thus, he denied benefits.[4]

On appeal, claimant generally challenges the denials of benefits of Judge Kichuk and Judge Sutton. Employer responds, urging affirmance of the denials. Employer also contends that Judge Kichuk and Judge Sutton erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[3]Judge Sutton accepted employer's concession of thirty-seven years of coal mine employment.

[4]Judge Sutton found that "the new evidence does not...warrant modification of Judge Kichuk's prior determinations on the other elements of entitlement." [1997] Decision and Order at 10.

Initially, Judge Kichuk considered the new evidence submitted with claimant's January 30, 1995 request for modification along with the previously submitted evidence of record. In finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2), Judge Kichuk considered all of the newly submitted pulmonary function studies and arterial blood gas studies of record. Since Judge Kichuk properly found that none of the newly submitted pulmonary function studies or arterial blood gas studies of record yielded qualifying[5] values, we affirm Judge Kichuk's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibits 53, 66, 68, 69, 71. Further, since Judge Kichuk properly found that there is no evidence of cor pulmonale with right sided congestive heart failure of record, we affirm Judge Kichuk's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3).

In finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4), Judge Kichuk considered the newly submitted medical opinions of Drs. Fino and Sargent. Judge Kichuk correctly stated that "both [of] the newly submitted physician's (sic) reports conclude [that] Claimant has no pulmonary or ventilatory disability." [1996] Decision and Order at 5; Director's Exhibits 68, 71. Since none of the physicians of record opined that claimant suffers from a total respiratory disability, we affirm Judge Kichuk's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Additionally, since Judge Kichuk properly found the newly submitted evidence of record insufficient to establish total disability at 20 C.F.R. §718.204(c), we affirm Judge Kichuk's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8, 1-11 (1994); *Napier v. Director, OWCP,* 17 BLR 1-111, 1-113 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Furthermore, we affirm Judge Kichuk's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Judge Kichuk properly based his conclusion that claimant failed to establish a mistake in a determination of fact on all of the evidence of record. [1996] Decision and Order at 2, 3.

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[5]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), (c)(2).

In Judge Sutton's subsequent Decision and Order, Judge Sutton considered the new evidence submitted with claimant's June 5, 1996 request for modification along with the previously submitted evidence of record. Since there is no evidence of complicated pneumoconiosis contained in the record, we affirm Judge Sutton's finding that the evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

Next, Judge Sutton found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). Judge Sutton considered the two newly submitted pulmonary function studies dated November 6, 1995 and February 8, 1996 which were provided by Dr. Robinette. While the November 6, 1995 pulmonary function study yielded non-qualifying pre-bronchodilator values, it yielded qualifying post-bronchodilator values. Director's Exhibit 85. The February 8, 1996 pulmonary function study yielded non-qualifying values. Director's Exhibit 91. Judge Sutton "discounted the November 1995 post-bronchodilator results as aberrational and unreliable." [1997] Decision and Order at 9. Thus, since Judge Sutton properly discounted the November 6, 1995 qualifying study because it is inconsistent with the contemporaneous non-qualifying February 8, 1996 study, we affirm Judge Sutton's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1).[6] *See Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1994).

[6]Judge Sutton also discounted the November 6, 1995 pulmonary function study "[i]n view of the serious and uncontradicted questions raised by Drs. Sargent and Fino concerning the validity of the November 1995 study due to the Claimant's poor effort." [1997] Decision and Order at 8. However, Judge Sutton did not provide an explanation for according greater weight to the opinions of Drs. Sargent and Fino, consulting physicians, than to Dr. Robinette, the physician who administered the study. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J., dissenting). Nonetheless, since Judge Sutton provided a valid alternate basis for discounting the November 6, 1995 study, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he discounted the qualifying November 6, 1995 study because it is inconsistent with the contemporaneous non-qualifying February 8, 1996 study, *see Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1994), any error by Judge Sutton in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In addition, we affirm Judge Sutton's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(2) since none of the newly submitted arterial blood gas studies of record yielded qualifying values. Director's Exhibits 85, 91. Furthermore, we affirm Judge Sutton's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since there is no evidence of cor pulmonale with right sided congestive heart failure of record.

Finally, Judge Sutton found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Judge Sutton considered the newly submitted medical opinions of Drs. Fino, Robinette and Sargent. Whereas Dr. Robinette opined that claimant is unable to perform his last duties as a coal washer or general inside miner, Director's Exhibit 80, Drs. Fino and Sargent opined that claimant does not suffer from a disabling respiratory impairment, Director's Exhibit 91; Employer's Exhibit 1. Judge Sutton properly accorded greater weight to the opinions of Drs. Fino and Sargent than to the contrary opinion of Dr. Robinette because he found the opinions of Drs. Fino and Sargent to be better reasoned and documented.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we affirm Judge Sutton's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

Since Judge Sutton properly found the newly submitted evidence of record insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and total disability at 20 C.F.R. §718.204(c), we affirm Judge Sutton's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310. *See Kingery, supra*; *Napier, supra*; *Nataloni, supra*. Moreover, we affirm Judge Sutton's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Jessee, supra*. Judge Sutton properly based his conclusion that claimant failed to establish a mistake in a determination of fact after "[h]aving

[7]Judge Sutton stated that "[w]hile Dr. Robinette cited some of the test data in his letter, he provided no explanation as to how it supported his conclusions." [1997] Decision and Order at 9. Further, Judge Sutton stated that "[o]n the other hand, the letters from Drs. Sargent and Fino are both characterized by considerably more thorough analysis of the pertinent test data than is reflected in Dr. Robinette's letter and detailed explanations of how that data led them to conclude that the Claimant does not suffer from any totally disabling respiratory or pulmonary impairment." *Id*.

carefully considered the newly submitted evidence in conjunction with that previously submitted, and noting particularly that none of the medical evidence submitted to Judge Kichuk in the previous modification proceeding established total disability under any of the methods prescribed by the regulations."[8] [1997] Decision and Order at 9.

Accordingly, the Decision and Order Denying Request for Modification of Judge Kichuk, and the Decision and Order Denying Motion for Modification of Judge Sutton are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[8]In view of our disposition of the case at 20 C.F.R. §725.310, we need not address employer's contentions at 20 C.F.R. §718.202(a)(1) and (a)(4).