

BRB No. 02-0658 BLA

PAUL K. SALVATORE)
)
 Claimant-Petitioner)
)
 v.)
)
 SILVERBROOK ANTHRACITE,)
 INCORPORATED)
)
 and)
)
 INSERVCO INSURANCE)
)
 Employer/Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Paul K. Salvatore, Wilkes-Barre, Pennsylvania, *pro se*.

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 (01-BLA-0459) of Administrative Law Judge Robert D. Kaplan denying claimant's request for modification and 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 administrative law judge found that claimant waived any contention that a

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, 725 and 726 (2002). All citations

mistake in a determination of fact had been made in the prior denial and found that new evidence submitted in support of claimant's request for modification of the prior denial of benefits was insufficient to establish a change in conditions because it failed to establish a totally disabling respiratory impairment. Accordingly, benefits were again denied.²

On appeal, claimant generally challenges the findings of the administrative law judge. Employer responds, urging affirmance of the administrative law judge's decision denying benefits. 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant filed a claim on September 6, 1989, which was denied because claimant failed to establish total disability. Director's Exhibits 35. The Board affirmed the denial on April 9, 1992. Director's Exhibit 43. Claimant filed a second claim on February 2, 1993, which constituted a request for modification, and which was denied by an administrative law judge on March 14, 1995. Director's Exhibit 101. The Board affirmed that decision on November 28, 1995. Director's Exhibit 112. Claimant again requested modification, which was denied by an administrative law judge on May 7, 1998 and affirmed by the Board on August 20, 1999 because claimant failed to establish total disability. Director's Exhibits 113, 135, 141.

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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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, 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 Corp.*, 14 BLR 1-156 (1990), *modif. on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); *see also O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62 (3d Cir. 1995); *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, BLR 2-26 (4th Cir. 1993).³

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Considering the issue of total disability, the administrative law judge correctly found that the newly submitted pulmonary function study and blood gas study were non-qualifying and did not, therefore, establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(i), (ii); Employer's Exhibit 1. Likewise, the administrative law judge correctly found that the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, and that total disability could not, therefore, be established on that basis. 20 C.F.R. §718.204(b)(2)(iii).

Finally, considering the newly submitted medical opinion evidence, the administrative law judge credited the opinion of Dr. Levinson, that claimant was not totally disabled, as it was based on a pulmonary function study and a blood gas study which produced normal results. Decision and Order at 7; Employer's Exhibits 1, 2. The administrative law judge did

³ The administrative law judge properly found that claimant had waived any contention that a mistake in a determination of fact had been made in the prior denial. *See* Hearing Transcript at 6.

not abuse his discretion in finding Dr. Levinson's opinion entitled to determinative weight, as it was the only opinion which he found to be supported by underlying objective evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge accorded no weight to Dr. Weiss's opinion, that claimant has a severe restrictive ventilatory defect, because he found it to be without foundation inasmuch as Dr. Weiss provided no values in connection with the pulmonary function study upon which he relied, because Dr. Weiss, himself, indicated that the study was not valid because of claimant's suboptimal effort or neuromuscular weakness, and because Dr. Weiss stated that claimant had normal oxygen consumption. Decision and Order at 7; Claimant's Exhibit 2. This was rational. *See Clark, supra*; *see Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Likewise, the administrative law judge accorded less weight to Dr. Fasciana's opinion because Dr. Fasciana had placed substantial reliance on Dr. Weiss's rejected opinion, and because his attempt to invalidate a normal pulmonary function study was refuted by Dr. Levinson. Decision and Order at 7; Claimant's Exhibit 1. Thus, the administrative law judge found Dr. Fasciana's opinion to be neither reasoned nor documented. This was rational. *Clark, supra*; *Oggero, supra*. Accordingly, the administrative law judge's finding that total disability was not established is supported by substantial evidence and is, therefore, affirmed. Consequently, we affirm the administrative law judge's finding that total disability has not been established and affirm the administrative law judge's denial of claimant's request for modification as supported by substantial evidence.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge