BRB No. 00-0436 BLA

ERNEST J. ABNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED COAL, INCORPORATED	)	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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ernest J. Abner, Manchester, Kentucky, *pro se*.

Mary Forrest-Doyle (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-0609) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) 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). The administrative law judge credited claimant with seven years of

coal mine employment and adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish a change in conditions pursuant to

[1]Claimant's initial claim was filed with the Social Security Administration (SSA) on July 23, 1973. Director's Exhibit 36. After several denials by the SSA, this claim was forwarded to the Department of Labor (DOL). *Id*. On March 7, 1988, Administrative Law Judge Robert M. Glennon issued a Decision and Order denying benefits, *id*., which the Board affirmed, *Abner v. Director, OWCP*, BRB No. 88-1011 BLA (Oct. 31, 1989)(unpub.). The bases of Judge Glennon's denial were claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 36. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed with the DOL on August 14, 1992. Director's Exhibit 1. On July 27, 1995, Administrative Law Judge Rudolf L. Jansen issued a Decision and Order denying benefits because claimant failed to establish a material change in conditions, Director's Exhibit 60, which the Board affirmed, *Abner v. United Coal Co.*, BRB Nos. 95-2079 BLA and 95-2079 BLA-A (Mar. 14, 1996)(unpub.). The Board subsequently denied claimant's request for reconsideration. *Abner v. United Coal Co.*, BRB Nos. 95-2079 BLA and 95-2079 BLA-A (Order)(Jan. 8, 1997)(unpub.). In a letter dated November 1997, claimant requested review of his claim, which the DOL construed as a request for modification. Director's Exhibit 76.

20 C.F.R. §725.310. The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.

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).

This case involves a request for modification of a duplicate claim. The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310, an 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 at least one element of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Administrative Law Judge Rudolf L. Jansen denied benefits because claimant failed to establish a material change in conditions at 20 C.F.R. §725.309, a finding subsequently affirmed by the Board. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish a material change in conditions at 20 C.F.R. §725.309.

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's 1973 claim was denied because claimant failed to establish the existence of pneumoconiosis and

total disability. Director's Exhibit 36. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309, the newly submitted evidence must support a finding of pneumoconiosis at 20 C.F.R. §718.202(a) or a finding of total disability at 20 C.F.R. §718.204(c). Thus, in order to establish a change in conditions at 20 C.F.R. §725.310, the newly submitted evidence must support a finding of pneumoconiosis at 20 C.F.R. §718.202(a) or a finding of total disability at 20 C.F.R. §718.204(c).

After considering the newly submitted evidence on modification, the administrative law judge stated that "[n]one of the new medical evidence concerns the [c]laimant's pulmonary condition or is supportive of a finding of pneumoconiosis or respiratory disability." Decision and Order at 5. Rather, the administrative law judge stated that "[t]he medical evidence concerns the heart condition of the [c]laimant." *Id*. In a medical report dated September 29, 1997, Dr. Chatterjee stated that claimant has severe cardiomyopathy, atrial fibrillation and a left bundle branch block.[2] Director's Exhibit 77. In a hospital report dated March 21, 1997, Dr. McMartin diagnosed ischemic cardiomyopathy, probably idiopathic, with recurrent congestive heart failure. *Id*. In a subsequent hospital report dated March 23, 1997, Dr. McMartin diagnosed organic heart disease. *Id*. Dr. Ouseph evaluated claimant for an orthotopic heart transplant. *Id*. Lastly, in a discharge summary dated March 25, 1997, Dr. McMartin diagnosed congestive cardiomyopathy, possibly secondary to systemic arterial hypertension with biventricular failure and chronic atrial fibrillation. *Id*. Thus, inasmuch as none of the newly submitted evidence is probative with respect to the issues of the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310. *See Nataloni, supra*; *Kovac, supra*.

Furthermore, we affirm the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Based upon his review of Judge Jansen's Decision and Order, the administrative law judge found that "no mistake in [a] determination of fact was made in the prior Decision." Decision and Order at 6.

[2]Dr. Chatterjee noted that "[a] chest x-ray done today at our office did not show any infiltrates." Director's Exhibit 77.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge