BRB No. 03-0485 BLA

CHARLES R. RUNYON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RUNYON COAL COMPANY (Subcontractor) CLARK ELKHORN	)	DATE ISSUED: 01/30/2004
	)	
and	)	
	)	
ZEIGLER COAL HOLDING COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Charles R. Runyon, Elkhorn City, Kentucky, *pro se*.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Jennifer U. Toth (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (2001-BLA-959) of Administrative Law Judge Thomas F. Phalen, Jr. 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).[2] The administrative law judge found fifteen and one-half years of qualifying coal mine employment and that employer was the properly named responsible operator. Decision and Order at 5. The administrative law judge, based on the date of filing, noted that the instant claim was a modification request and considered entitlement pursuant to 20 C.F.R. Part 718.[3] Decision and Order at 2-3, 12-13. The administrative law judge, after considering all of the relevant evidence of record, concluded that claimant failed to establish either a mistake of fact or a change in condition pursuant to 20 C.F.R. §725.310 (2000) as the evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 13-18. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance of the administrative law

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[1]Susie Davis, a benefits counselor with the Kentucky Black Lung Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision. The Board acknowledged the instant appeal on May 2, 2003, stating that the case would be reviewed under the general standard of review.

[2]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.

[3]Claimant filed his initial application for benefits on October 26, 1987, which was denied by Administrative Law Judge Samuel Smith as claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment on June 30, 1992. Director's Exhibits 1, 83. The Benefits Review Board affirmed the administrative law judge's denial of benefits on June 30, 1994. Director's Exhibit 104. Claimant requested reconsideration on August 22, 1994, which was denied by the Board on March 13, 1996. Director's Exhibits 105, 106. Claimant filed a second application for benefits on June 3, 1996 which was construed as a modification request and finally denied by the district director, following several additional requests for modification, on April 12, 2001. Director's Exhibits 148, 152, 156, 160, 164, 166-169, 174. Claimant requested a hearing before the Office of Administrative Law Judges on April 24, 2001. Director's Exhibit 176.

judge's denial of benefits as supported by substantial evidence and asserting that the instant claim is a duplicate claim and not a modification request and that the administrative law judge erred in naming it the proper responsible operator. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to the merits but asserts that the administrative law judge properly considered the instant case a modification request and that employer can not challenge the responsible operator findings as it has not filed a cross-appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Initially, we will address employer's contention that the administrative law judge erred in considering the instant claim a modification request. Employer's Brief at 15-16. The Board affirmed the administrative law judge's denial of benefits on June 30, 1994. Claimant filed a motion for reconsideration of the Board's denial on August 22, 1994. The Board denied claimant's motion for reconsideration on March 13, 1996. Employer argues that claimant's subsequent claim, filed on June 3, 1996, was incorrectly construed as a request for modification because claimant's earlier motion for reconsideration was untimely filed.

Contrary to employer's assertion, the time limit for filing a motion for reconsideration of a Board's Decision and Order may be enlarged by the Board within its discretion. *See* 20 C.F.R. §802.407(a); *Dailey v. Director, OWCP*, 936 F.2d 241, 15 BLR 2-129 (6th Cir. 1991); Director's Exhibit 105. Consequently, claimant's second application for benefits filed on

June 3, 1996 is properly considered to be a request for modification as it was filed within one year of the Board's order denying reconsideration issued on March 13, 1996. *See* 20 C.F.R. §725.310(2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Dailey*, 936 F.2d 241; *Stanley v. Betty B coal Co.*, 13 BLR 1-72 (1990); Director's Exhibits 106, 109. We therefore reject employer's contention and hold that the administrative law judge properly addressed the evidence to determine if a basis for modification was established.[4]

The United States Court of Appeals for the Sixth Circuit held in *Worrell*, 27 F.3d 227, with respect to modification, that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been asserted by claimant.[5] Furthermore, in determining whether claimant has established a change in conditions pursuant to Section 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. *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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge can determine whether a mistake in fact in the prior decision occurred by reviewing wholly new evidence, cumulative evidence, or merely upon further reflection of the evidence initially submitted. *O'Keeffe*, 404 U.S. 254; *Kovac*, 14 BLR 1-156.

Considering the newly submitted as well as the prior evidence on modification, the administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and therefore insufficient to establish a basis for modification.[6] *See Kuchwara v. Director*,

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[4]The administrative law judge stated the June 3, 1996 claim should have been considered a duplicate claim. However, he correctly applied the regulations pursuant to petitions for modification based upon the facts in this case and the Board's consideration of claimant's motion for reconsideration. Decision and Order at 3, n.3, 4-18.

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[6]The administrative law judge properly determined that claimant's initial application for benefits had been denied because the evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order at

OWCP, 7 BLR 1-167 (1984); *Worrell*, 27 F.3d 227. The administrative law judge reviewed the relevant evidence of record in the original decision and determined that there was no mistake in determination of fact by Administrative Law Judge Smith. Decision and Order at 13, 18; *Worrell*, 27 F.3d 227; *Nataloni*, 17 BLR 1-82. In considering the newly submitted evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish that claimant was totally disabled pursuant to Section 718.204(b)(2). *Kuchwara*, 7 BLR 1-167.

The administrative law judge properly determined that the evidence was insufficient to establish total disability under Section 718.204(b)(2)(i), (ii) as the newly submitted pulmonary function study was invalid and the blood gas study was non-qualifying.[7] *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Director's Exhibits 139, 163; Employer's Exhibits 10, 12; Decision and Order at 7, 14. The administrative law judge further properly found that total disability was not established pursuant to Section 718.204(b)(2)(iii) as there is no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* Decision and Order at 14.

Moreover, the administrative law judge considered the newly submitted medical opinion evidence of record and rationally concluded that the opinions were insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv). Decision and Order at 15-17; Director's Exhibits 141, 144, 157, 163, 164; Employer's Exhibits 1, 7-12, 14; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge, in the instant case, properly considered the quality of the evidence in determining whether the opinions are supported by the underlying documentation and adequately explained. He found that the evidence established that claimant was totally disabled due to heart disease and the evidence was insufficient to establish claimant's burden of establishing a disabling respiratory impairment by a preponderance of the evidence. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 16-17; Director's Exhibits 144, 157, 163, 164. Additionally, the opinion of Dr. Baker, advising claimant to have no further exposure to dust, is insufficient to

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2, 14; Director's Exhibit 83.

[7]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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

meet claimant's burden of proof as such an opinion is insufficient to establish the existence of a totally disabling impairment. *Taylor v. Director, OWCP*, 12 BLR 1-83 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); Director's Exhibit 144.

The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see 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. *See Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge rationally found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(b)(2)(iv) and were thus insufficient to establish a basis for modification pursuant to Section 725.310 (2000).[8] *Nataloni*, 17 BLR 1-82; *Kovac*, 16 BLR 1-71; *Wojtowicz*, 12 BLR 1-162; *Clark*, 12 BLR 1-149; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Therefore, the administrative law judge's denial of claimant's petition for modification is supported by substantial evidence and is in accordance with law. *Worrell*, 27 F.3d 227. Because claimant has failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000), we affirm the denial of benefits. *Worrell*, 27 F.3d 227. Moreover, we need not address employer's remaining contention regarding the administrative law judge's responsible operator determination since we affirm the denial of benefits and, thus, this case no longer presents any real case or controversy for adjudication. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990).

[8]The administrative law judge properly found that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. Decision and Order at 14.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge