BRB No. 10-0306 BLA

ARNOLD L. TURNMIRE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHISHOLM COAL COMPANY,	)	
INCORPORATED	)	DATE ISSUED: 01/31/2011
	)	
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 Denial of Request for Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denial of Request for Modification (2008-BLA-05600) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C.

§§921(c)(4) and 932(*l*)) (the Act). Claimant filed his current subsequent claim on January 21, 2004,[1] which was denied by Administrative Law Judge Thomas F. Phalen, Jr., on September 18, 2006, on the grounds that the newly submitted evidence failed to establish total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309. Claimant appealed and employer cross-appealed, Judge Phalen's decision to the Board. Claimant, however, also filed a request for modification with the district director on November 7, 2006. Pursuant to a motion filed by claimant, the Board dismissed, without prejudice, the appeals of claimant and employer and remanded the case to the district director for consideration of claimant's modification request. The district director issued a Proposed Decision and Order denying modification on February 15, 2008. Claimant requested a hearing, and the case was ultimately assigned to Judge Solomon (the administrative law judge).

In a Decision and Order issued on January 15, 2010, the administrative law judge credited claimant with at least thirty-one years of coal mine employment, as stipulated by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the evidence submitted in conjunction with the modification request failed to establish total disability and, therefore, failed to demonstrate a change in conditions. The administrative law judge also concluded that there was no mistake in a determination of fact with regard to Judge Phalen's denial of benefits. Accordingly, the administrative law judge denied modification pursuant to 20 C.F.R. §725.310 and denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find good cause established for claimant to submit a May 13, 2008 pulmonary function study, performed by Dr. Rasmussen, in excess of the evidentiary limitations at 20 C.F.R. §725.414 or, in the alternative, failing to allow claimant to question Dr. Rosenberg about this pulmonary function study. Claimant further argues that the administrative law judge erred in finding that claimant did not establish total disability, based on his weighing of the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), and the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[2] Employer responds, urging

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[1] Claimant first filed a claim for benefits on April 10, 1995, which was denied by the district director on February 15, 1996, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on February 9, 2001, which was denied by the district director on December 17, 2001, because the evidence was insufficient to establish total disability. Director's Exhibit 2. Claimant filed another subsequent claim on January 21, 2004, which is the subject of this appeal. Director's Exhibit 4.

[2] On appeal, claimant also argues that Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims, is

affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. EVIDENTIARY LIMITATIONS

Claimant argues that the administrative law judge erred in refusing to admit into the record a May 13, 2008 pulmonary function test conducted by Dr. Rasmussen. The regulations at 20 C.F.R. §§725.414 and 725.310(b) establish combined evidentiary limitations. *See* 20 C.F.R. §§725.2(c), 725.414, 725.310(b); *Rose v. Buffalo Mining Co*., 23 BLR 1-221, 1-227 (2007). Pursuant to 20 C.F.R. §725.414(a), each party may submit, in support of his affirmative case, no more than two chest x-ray interpretations, two pulmonary function studies, two arterial blood gas studies, one report of autopsy, no more than one report of each biopsy, and no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). The regulation at 20 C.F.R. §725.310(b) further provides that, in a modification proceeding, each party shall be entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical report as

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applicable to this claim. Claimant's Brief in Support of Petition for Review at 10. Employer, and the Director, Office of Workers' Compensation Programs, have responded and assert that Section 1556 is not applicable to this claim because it was filed before January 1, 2005. Based upon the parties' responses and our review of the record, we hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the current claim was filed before January 1, 2005. Director's Exhibits 1, 2, 4.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the evidence submitted in conjunction with claimant's January 21, 2004 claim, and the modification request, is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

affirmative case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b). Additionally, the regulations provide that if any evidence exceeding the limitations is offered by a party, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

In conjunction with his January 21, 2004 claim, claimant submitted, in support of his affirmative case, two pulmonary function studies, one by Dr. Forehand, dated August 24, 2004, and one by Dr. Rosenberg, dated September 12, 2005. Director's Exhibits 41, 51, 63. Employer submitted, in support of its affirmative case, two pulmonary function studies, both by Dr. Rosenberg, dated April 20, 2004 and September 12, 2005. Director's Exhibits 51, 64. In support of his modification request, claimant submitted one additional pulmonary function study by Dr. Baker, dated July 11, 2008. Claimant's Exhibit 1. Employer also submitted one additional pulmonary function study by Dr. Rasmussen, dated April 3, 2008. Employer's Exhibit 4.

During a deposition held on May 29, 2009, Dr. Rosenberg testified that, based on the April 3, 2008 pulmonary function study by Dr. Rasmussen, it was his opinion that claimant was not totally disabled. Employer's Exhibit 3 at 8. On cross-examination, claimant's counsel questioned Dr. Rosenberg about whether he had the opportunity to review a May 13, 2008 pulmonary function study, which was also administered by Dr. Rasmussen. *Id*. at 18-19. Employer objected to claimant's counsel's reference to this study, noting that the May 13, 2008 study had not been designated by the parties as evidence, and instructed Dr. Rosenberg not to answer the question. *Id*.

During a telephone conference conducted on June 10, 2009, claimant indicated that he wished to submit a May 13, 2008 pulmonary function study by Dr. Rasmussen, in rebuttal to employer's designation of Dr. Rasmussen's earlier April 3, 2008 pulmonary function study. Claimant asserted that he should be allowed to question Dr. Rosenberg about Dr. Rasmussen's later pulmonary function study, even if it was not admissible under the evidentiary limitations, as it constituted impeachment evidence. The administrative law judge indicated that he would rule on the admissibility of the May 13, 2008 pulmonary function study at a later date, but that claimant could submit written questions for Dr. Rosenberg to answer. At the June 23, 2009 hearing, the administrative law judge instructed the parties to file post-hearing briefs addressing both the admissibility of Dr. Rasmussen's May 13, 2008 pulmonary function study and its validity as impeachment evidence against Dr. Rosenberg. *See* Hearing Transcript at 5-10, 27-31.

In his post-hearing brief, claimant argued that, because he was taking medication at the time he underwent the April 3, 2008 pulmonary function study, it did not reflect a "true and accurate" picture of his respiratory disability, in comparison to the May 13, 2008 study, which showed lower values. Claimant's September 4, 2009 Post-Hearing

Brief at 2-3. Alternatively, claimant argued that there was good cause to admit the May 13, 2008 pulmonary function study, based on its recency and based on the need for full and fair disclosure of the issues. *Id*. at 16.

In his Decision and Order, the administrative law judge rejected claimant's arguments and concluded that Dr. Rasmussen's May 13, 2008 pulmonary function study was inadmissible. Decision and Order at 20. Claimant asserts in this appeal that the administrative law judge erred in finding that the May 13, 2008 pulmonary function study was not admissible as rebuttal evidence or, in the alternative, claimant asserts that he demonstrated good cause for admitting the test in excess of the evidentiary limitations. We disagree.

An administrative law judge is empowered to conduct formal hearings and is given broad discretion in resolving procedural matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Thus, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *Clark*, 12 BLR at 1-153. Based on the facts of this case, we hold that claimant has not met this burden.

Contrary to claimant's contention, the administrative law judge correctly found that the May 13, 2008 pulmonary function study was not admissible as rebuttal evidence. Pursuant to 20 C.F.R. §725.414(a), each party is entitled to submit, in rebuttal, one physician's interpretation of *each* pulmonary function study submitted by the opposing party as part of its affirmative case. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) (emphasis added). Because employer submitted, in support of its affirmative case, three pulmonary function studies dated April 20, 2004, September 12, 2005 and April 3, 2008, claimant's rebuttal was limited to having each of those studies interpreted by a physician of his choosing. Director's Exhibits 51, 64. As the administrative law judge correctly noted, the May 13, 2008 study is not an interpretation of the studies submitted by employer. "Rather, it is a completely different study not submitted by any other physician." Decision and Order at 19. Because claimant is not permitted to submit a new pulmonary function study in rebuttal to employer's evidence, we affirm the administrative law judge's finding that the May 13, 2008 pulmonary function study is inadmissible, pursuant to 20 C.F.R. §725.414(a)(3)(ii).

We also affirm the administrative law judge's finding that claimant failed to demonstrate good cause for admitting the May 13, 2008 pulmonary function study in excess of the evidentiary limitations. *See Dempsey*, 23 BLR at 1-62. The administrative law judge properly exercised his discretion in rejecting claimant's assertion that, because the study was relevant, based on its recency, it was necessary for a full and fair disclosure

of the issue of total disability.[5] *Id*.; Decision and Order at 19. The administrative law judge noted that "[t]he 'later evidence rule' may apply when considering evidence within the evidentiary limitations. However, the rule does not permit expansion of the evidentiary limitations to accommodate more recent evidence." Decision and Order at 19. Additionally, we reject claimant's argument that the administrative law judge erred in not allowing him to question Dr. Rosenberg about the May 13, 2008 pulmonary function study, on the ground that the study constitutes impeachment evidence. The administrative law judge properly addressed this issue as follows:

> Prior to the hearing, the [e]mployer was ordered to allow [claimant] to ask Dr. Rosenberg the questions he was not permitted to answer on cross-examination. As of the date of the hearing, [claimant] had not submitted any interrogatories or requests to schedule a second deposition to have Dr. Rosenberg answer his questions.

Decision and Order at 19; *see Dempsey*, 23 BLR at 1-62; *Clark*, 12 BLR at 1-153. Furthermore, at the hearing, the administrative law judge advised the parties to brief the issue of whether Dr. Rasmussen's May 13, 2008 study should be considered as impeachment evidence of Dr. Rosenberg's testimony. Hearing Transcript at 27. Claimant filed a post-hearing brief, but did not address this issue, as requested by the administrative law judge. In light of these facts, we hold that claimant has not demonstrated an abuse of discretion by the administrative law judge in rendering his evidentiary rulings in this case. *Dempsey*, 23 BLR at 1-62; *Clark*, 12 BLR at 1-153.

II. MERITS OF ENTITLEMENT

In order to establish entitlement to benefits, with respect to his January 21, 2004 subsequent claim, claimant is required to establish that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because claimant's prior claim, filed on February 9, 2001, was denied by the district director because the evidence did not establish a totally disabling respiratory or pulmonary impairment, claimant must establish, based on the newly submitted evidence, that he is totally disabled, in order to obtain review of the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2), (3).

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[5] The administrative law judge correctly noted that the May 13, 2008 pulmonary function study was non-qualifying for total disability and would not aid claimant in establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19.

Additionally, because this case also involves a request for modification, the administrative law judge is required to determine whether any new evidence submitted with the request for modification, considered in conjunction with the evidence developed in the subsequent claim, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §§725.309(d), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The administrative law judge must also consider whether there was a mistake in a determination of fact with respect to the most recent denial of benefits, which in this case was based on Judge Phalen's determination that the evidence was insufficient to establish total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). If the evidence establishes a change in conditions, by showing a change in an applicable condition of entitlement, or a mistake in a determination of fact, the administrative law judge must then consider whether claimant has established entitlement to benefits, based on all of the record evidence. *Hess*, 21 BLR at 1-143.

The administrative law judge concluded that there was no mistake in a determination of fact with regard to Judge Phalen's denial of benefits. Decision and Order at 23. He further found that claimant failed to establish a change in an applicable condition of entitlement, as all of the evidence submitted in conjunction with the subsequent claim, including the evidence on modification, did not show that claimant is totally disabled. Claimant asserts that the administrative law judge erred in finding that the pulmonary function study evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). We disagree.

The administrative law judge correctly noted that there were four pulmonary function studies considered by Judge Phalen. A pulmonary function study administered by Dr. Hussain, on March 3, 2004, yielded non-qualifying pre-bronchodilator and non-qualifying post-bronchodilator values. Director's Exhibit 13. Two pulmonary function studies, administered on April 20, 2004 and September 12, 2005, by Dr. Rosenberg, both yielded qualifying values pre-bronchodilator, but non-qualifying values post-bronchodilator. Director's Exhibit 51. An August 24, 2004 pulmonary function study administered by Dr. Forehand also yielded qualifying values pre-bronchodilator, but non-qualifying values post-bronchodilator. Director's Exhibit 41.

The record also contains the two pulmonary function studies admitted on modification, dated April 3, 2008 and July 11, 2008. Employer submitted the April 3, 2008 pulmonary function study of Dr. Rasmussen, which yielded non-qualifying pre-bronchodilator and post-bronchodilator values. Employer's Exhibit 1. Claimant submitted the July 11, 2008 pulmonary function study of Dr. Baker, which yielded non-qualifying values pre-bronchodilator, but was not administered post-bronchodilator. Claimant's Exhibit 1. The administrative law judge determined that the studies submitted

in conjunction with claimant's January 21, 2004 claim "are, at best, in equipoise, and most likely indicate that [c]laimant is not disabled." Decision and Order at 20. The administrative law judge also found that "both tests submitted on modification yielded non-qualifying pre-bronchodilator results." *Id.* After noting that pneumoconiosis is considered to be a progressive disease, the administrative law judge indicated that he assigned greater weight to the more recent pulmonary function studies and concluded that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Claimant argues that the administrative law judge erred in finding that Dr. Baker's July 11, 2008 pulmonary function study was non-qualifying for total disability, since Dr. Baker stated in an addendum to his July 11, 2008 report that "[o]n the basis of the federal disability standard, [claimant] has a totally disabling impairment as his FEV1 is below the standard level. On this basis, he could no longer work in the coal mining industry." Claimant's Exhibit 1; *see* Claimant's Petition for Review and Brief at 9. Contrary to claimant's argument, however, the regulations provide that, in order for a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R §718.204(b)(2)(i), the test must produce *both* a qualifying FEV1 value and either an FVC or MVV equal to or less than those values appearing in the tables set forth in Appendix B, or it must produce an FEV1 to FVC ratio equal to or less than 55 percent. 20 C.F.R. §718.204(b)(2)(i)(A)-(C). According to Appendix B of Part 718, the qualifying FVC value for an individual of claimant's age and height, as recorded by Dr. Baker, is 2.47, and the qualifying MVV value is 77. The July 11, 2008 pulmonary function study produced an FVC value of 2.97 and an FEV1/FVC ratio of 57 percent. Claimant's Exhibit 1. No MVV value was reported for this test. *Id.* Because Dr. Baker's July 11, 2008 pulmonary function study did not satisfy the requirements of Appendix B, the administrative law judge properly found that Dr. Baker's study was non-qualifying for total disability. *See* 20 C.F.R. §718.204(b)(2)(i); *Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984); *Tischler v. Director, OWCP*, 6 BLR 1-1086 (1984); *Sexton v. Peabody Coal Co.*, 7 BLR 1-411, 1-412 n.2 (1984); *Bolyard v. Peabody Coal Co.*, 6 BLR 1-767 (1984). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability, based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i).

Claimant next contends that the administrative law judge erred in his consideration of the medical opinions of Drs. Baker and Rosenberg at 20 C.F.R. §718.204(b)(2)(iv). Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Baker's opinion was not adequately explained, as the doctor did not discuss why claimant would be unable to perform his usual coal mine work based on his FEV1 value. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark*, 12 BLR at 1-151. The administrative law judge also noted that Dr. Baker did not

explain the basis for his notation of a "Class 3 respiratory impairment." Decision and Order at 23 .

With regard to Dr. Rosenberg, claimant specifically argues that the administrative law judge erred in finding that his opinion was insufficient to establish total disability, as "Dr. Rosenberg states in most of his testimony and reports that [claimant] is totally disabled." Claimant's Petition for Review and Brief at 9. While claimant is correct that Dr. Rosenberg initially diagnosed that he is totally disabled, he later revised his opinion, based on his review of the two more recent pulmonary function studies of record.[6] Director's Exhibits 51, 61, 69, 106, 111; Employer's Exhibits 3, 5. The administrative law judge explained:

> I afford Dr. Rosenberg's initial opinion that [claimant] is probably borderline disabled less weight because the pulmonary function studies he conducted and initially relied on were submitted without the proper tracings. As such, their reliability is questionable. However, I afford significant weight to Dr. Rosenberg's more recent opinion that [claimant's] pulmonary impairment is no longer severe, and that as of April 3, 2008[,] [claimant] is not disabled, because I find this opinion to be based on valid spirometry.

Decision and Order at 23 (internal citations omitted). We affirm the administrative law judge's finding that Dr. Rosenberg's more recent opinion, that claimant is not totally disabled, is entitled to controlling weight, as it is supported by the two most recent non-qualifying pulmonary function studies and the non-qualifying arterial blood gas studies. *Id.*; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe,* 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-149. Therefore, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7]

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[6] Dr. Rosenberg issued supplemental reports dated February 7, 2006, July 5 2007, October 10, 2007 and January 16, 2008 and was deposed on February 17, 2006 and November 12, 2007. Director's Exhibits 61, 69, 106, 111; Employer's Exhibit 5.

[7] The administrative law judge assigned less weight to the opinions of Drs. Forehand and Martin, diagnosing that claimant is totally disabled. Although claimant summarizes the opinions of Drs. Forehand and Martin, he does not allege specific error by the administrative law judge in weighing their opinions. We, therefore, have no basis for reviewing the credibility determinations of the administrative law judge with regard to these physicians. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Lastly, we reject claimant's contention that this case should be remanded because "[t]here is some questioning [sic] as to whether [employer] stipulated to the issue of . . . total disability." Claimant's Petition for Review and Brief at 3. Following the June 23, 2009 hearing, the administrative law judge issued an Interim Order on November 16, 2009, advising the parties to identify the contested issues. Upon consideration of the parties' responses to that Interim Order,[8] the administrative law judge rationally determined that legal pneumoconiosis and total disability were not established in claimant's prior claims, and that employer had not stipulated to either issue in this subsequent claim. Decision and Order at 3; *see also* Hearing Transcript at 36. Thus, we see no basis to remand this case, and affirm the administrative law judge's overall finding that claimant has failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).[9]

In conclusion, we affirm the administrative law judge's finding that there was no mistake in a determination of fact with respect to the prior denial of benefits by Judge Phalen. Because claimant failed to establish total disability, we affirm the administrative law judge's finding that he failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Thus, we affirm the administrative law judge's determination that claimant did not establish a basis for modification at 20 C.F.R. §725.310, and we further affirm the administrative law judge's denial of benefits.

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[8] Employer asserted that the contested issues were total disability, legal pneumoconiosis and dependency. *See* Employer's December 7, 2009 Motion for Reconsideration of Interim Order at 2. Claimant asserted that total disability was not an issue. *See* Claimant's December 14, 2009 Response to Employer's Motion at 1-2.

[9] Because we have affirmed the administrative law judge's finding that the evidence is insufficient to establish total disability, an essential element of entitlement, claimant's arguments regarding the issue of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), need not be addressed.

Accordingly, the administrative law judge's Decision and Order Denial of Request for Modification 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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BETTY JEAN HALL
Administrative Appeals Judge