BRB Nos. 97-0735 BLA
and 97-0735 BLA-A

CHARLIE J. PECK	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MAVERICK MINING CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Charlie J. Peck, Grundy, Virginia, *pro se*.

Curtis McKenzie (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals and employer/carrier (employer) cross-appeals the Decision and Order (94-BLA-1601) of Administrative Law Judge Edward Terhune Miler 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 initially found that claimant's 1985

duplicate claim was timely filed.[1] The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(2). Further, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge found the evidence insufficient to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310,[2] and thus,

[1]The administrative law judge stated "that the three year limitation cited by employer does not apply to duplicate claims as alleged, because of the explicit regulatory authority for filing such claims when specified conditions are met." Decision and Order at 5. Moreover, the administrative law judge stated "that when such conditions are met, and a material change in conditions is established, the principles of *res judicata* and collateral estoppel do not apply." *Id*.

[2]Claimant filed his initial claim on February 5, 1981. Director's Exhibit 58. This claim was denied by the Department of Labor on July 2, 1981. *Id*. Claimant filed another claim on May 14, 1985. Director's Exhibit 1. On October 25, 1988, Administrative Law Judge

he denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. On cross-appeal, employer contends that the administrative law judge erred by finding that the three year period of limitation for filing a claim after a medical determination of total disability due to pneumoconiosis has been communicated to a miner does not apply to duplicate claims. The Director, Office of Workers' Compensation Programs, has declined to participate in these appeals.[3]

Nicholas J. Laezza issued a Decision and Order - Awarding Benefits. Director's Exhibit 34. In response to employer's appeal, the Board held that as a matter of law the evidence was sufficient to establish a material change in conditions at 20 C.F.R. §725.309. The Board also affirmed Judge Laezza's finding of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (a)(2), and 718.203, and no total disability at 20 C.F.R. §718.204(c)(1)-(3). However, the Board vacated Judge Laezza's finding of total disability at 20 C.F.R. §718.204(c)(4), and remanded the case for further consideration of the evidence. *Peck v. Maverick Mining Corp.*, BRB No. 88-3979 BLA (Feb. 27, 1991)(unpub.). On remand, Administrative Law Judge Frederick D. Neusner issued a Decision and Order dated May 15, 1992, which denied benefits. Director's Exhibit 36. The sole basis of Judge Neusner's denial was claimant's failure to establish total disability at 20 C.F.R. §718.204(c)(4). *Id*. Subsequently, claimant requested modification on July 17, 1992. Director's Exhibit 37.

[3]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (a)(2), which are not adverse to this *pro se* claimant, are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

After consideration of the Decision and Order and the relevant evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence and, therefore, it is affirmed. Initially, we affirm the administrative law judge'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) since none of the newly submitted pulmonary function or arterial blood gas studies of record yielded qualifying[4] values.[5] Director's Exhibits 37, 47, 49; Employer's Exhibit 1. Further, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record does not contain evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 8.

In finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4), the administrative law judge considered the relevant newly submitted medical opinions of record. Drs. Castle, Dahhan, Fino and Shoukry opined that claimant does not suffer from a totally disabling respiratory impairment. Employer's Exhibits 2-5. Drs. Baxter, Fulchiero, Herzog and Thakkar did not render opinions with regard to total disability. Director's Exhibits 37, 49; Claimant's Exhibits 4, 5; Employer's

[4]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).

[5]The record includes two newly submitted pulmonary function studies, Director's Exhibit 47; Employer's Exhibit 1, and seven newly submitted arterial blood gas studies, Director's Exhibits 37, 47, 49; Employer's Exhibit 1.

Exhibit 1. Thus, since none of the newly submitted medical reports of record indicates that claimant suffers from a total respiratory disability, we affirm the administrative law judge's finding that it is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4), as supported by substantial evidence. Moreover, since the administrative law judge properly found that the newly submitted evidence of record is insufficient to establish total disability at 20 C.F.R. §718.204(c), we affirm the administrative law judge'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 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 Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge properly based his conclusion that claimant failed to establish a mistake in a determination of fact on the administrative law judge's "review and assessment of the prior determination that Claimant was not suffering from a disabling respiratory or pulmonary impairment." Decision and Order at 13.

Finally, in view of our disposition of this case, we decline to address employer's contention on cross-appeal, that the administrative law judge erred by finding that the three year period of limitation for filing a claim after a medical determination of total disability due to pneumoconiosis has been communicated to a miner, *see* 20 C.F.R. §725.308(a), does not apply to duplicate claims.

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

JAMES F. BROWN
Administrative Appeals Judge