

BRB No. 93-0576 BLA

DENNIS R. WILLIAMSON)
)
Claimant-Petitioner)
)
v.)
)
RACE FORK COAL CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
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 George A. Fath, Administrative Law Judge, United States Department of Labor.

Dennis Williamson, Hurley, Virginia, *pro se*.

Laurie Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (92-BLA-0346) of Administrative Law Judge George A. Fath 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). This case is before the Board for the second time. Claimant initially filed a claim for benefits on May 21, 1973, which was denied on December 5, 1980. Claimant filed a second claim for benefits on September 22, 1986. Upon considering this claim pursuant to 20 C.F.R. Part 718, the Administrative Law Judge John S. Patton determined that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 and at least thirteen years of coal mine employment. The administrative law judge then found that claimant established total disability due to pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(c)(3) and (4). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings that claimant established a material change in conditions pursuant to Section 725.309 and that claimant failed to establish total disability pursuant to Section 718.204(c)(1) and (2). The Board then reversed the administrative law judge's findings that claimant established total disability pursuant to Section 718.204(c)(3) and (4). Accordingly, the administrative law judge's Decision and Order awarding benefits was reversed. *See Williamson v. Race Fork Coal Corp.*, BRB No. 88-3460 BLA (Apr. 30, 1990)(unpub.). On January 22, 1991, claimant filed a request for modification of the Board's Decision and Order pursuant to 20 C.F.R. §725.310. Upon considering the request for modification, Administrative Law Judge Fath found that claimant failed to establish a change in

conditions or a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were denied. Claimant appeals this denial. Employer responds in support of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Upon considering a request for modification pursuant to Section 725.310, the administrative law judge must conduct an independent assessment of the newly submitted evidence to determine whether the newly submitted evidence, including any evidence submitted subsequent to the prior determination, is sufficient to establish the requisite change in conditions or mistake in a determination of fact. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990). As the Board denied the present claim on April 30, 1990 because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c), the administrative law judge properly considered the evidence

submitted subsequent to April of 1990 to determine if claimant established total disability pursuant to Section 718.204. See *Kovac, supra*. Upon considering this evidence, the administrative law judge properly found that the two newly submitted pulmonary function studies were non-qualifying pursuant to Section 718.204(c)(1). See Decision and Order at 4; Director's Exhibits 65, 77. The administrative law judge then considered the arterial blood gas study evidence and found that of the three tests submitted, only one was qualifying. See Decision and Order at 4. As the record indicates that seven arterial blood gas studies were submitted subsequent to the Board's Decision and Order, the administrative law judge erred in finding that only three arterial blood gas studies were submitted. See Director's Exhibits 55, 58, 65, 77. However, the administrative law judge properly found that only one of the arterial blood gas studies produced qualifying results pursuant to Section 718.204(c)(2). See Director's Exhibit 55. Thus, any error is harmless as the administrative law judge permissibly found that the one qualifying arterial blood gas studies is outweighed by the numerical superiority of the non-qualifying arterial blood gas studies. See Decision and Order at 4; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge next considered the evidence pursuant to Section 718.204(c)(3) and properly determined that the record does not contain any evidence that claimant suffers from cor pulmonale with right sided congestive heart failure. See Decision and Order at 4.

The administrative law judge then considered the medical opinion evidence of record, as well as several hospital records, which were submitted subsequent to April 1990 and concluded that they were insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). See Decision and Order at 5-6.

This finding is supported by substantial evidence. See Director's Exhibit 77; Employer's Exhibits 1-4.¹ As a result, the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to Section 725.310 is affirmed as it is supported by substantial evidence. The administrative law judge further properly found that the record contains no evidence of a mistake in a determination pursuant to Section 725.310. As a result, the administrative law judge's denial of claimant's request for modification is affirmed as it is supported by substantial evidence.

¹In making his findings pursuant to 20 C.F.R. §718.204, the administrative law judge failed to make a specific finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4). However, any error is harmless as the weight of the medical opinion evidence supports a finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4). See Employer's Exhibits 1, 2; *Larioni, supra*. Drs. Castle and Dahhan state that claimant retains the respiratory capacity to perform his previous coal mine employment. See Employer's Exhibits 1, 2. Dr. Tuteur, however, states that claimant has impairment of gas exchange which would prevent him from performing the tasks necessary during work in the coal mine. He also states that this impairment is not due in whole or in part to coal workers' pneumoconiosis or to dust exposure in coal mine employment. See Employer's Exhibit 1.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge