BRB No. 05-0770 BLA

HARRY E. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	DATE ISSUED: 07/03/2006
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 On Modification Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Harry E. Moore, Bluefield, Virginia, *pro se.*

Harold G. Salisbury (Kay, Kasto & Chaney, PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order On Modification Denying Benefits (04-BLA-0151) of Administrative Law Judge Linda S. Chapman on a duplicate claim filed pursuant to the provisions of Title IV of the Federal

[1]The miner died on October 8, 2004. The miner's widow informed the administrative law judge by letter dated March 15, 2005 that she is pursuing the claim.

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 at least thirty-one years of coal mine employment.[3] Decision and Order at 4. On modification, the administrative law judge found there was no mistake in fact in any previous decision, and found that Administrative Law Judge

[2]Claimant filed his original claim for benefits on July 26, 1978, which was denied by Administrative Law Judge Ronald T. Osborn on September 25, 1997. Director's Exhibit 1. The Board affirmed the denial in *Moore v. United States Steel Corp.*, BRB No. 87-3009 BLA (April 28, 1989) (unpublished). *Id.* Claimant filed duplicate claims on October 2, 1991, March 22, 1983 and January 11, 1995, all of which were denied by the district director. Director's Exhibits 2- 4. Claimant filed a duplicate claim on March 3, 1997, and benefits were awarded by the district director on July 17, 1997. Director's Exhibits 5, 25. Employer requested a hearing. Director's Exhibit 33. Administrative Law Judge Daniel F. Sutton awarded benefits in a Decision and Order issued June 26, 2000, finding that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and, thus, a material change in conditions at 20 C.F.R. §725.309(d)(2000), and that claimant was totally disabled and entitled to benefits. Director's Exhibit 44. Employer appealed, challenging the finding of total disability, but not the finding of pneumoconiosis. Director's Exhibits 45, 48. The Board affirmed Judge Sutton's finding of pneumoconiosis as unchallenged on appeal, but remanded the case on the issue of total disability for a reweighing of the relevant medical evidence. Director's Exhibit 52. On remand, Judge Sutton again found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and, thus, a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), but that claimant failed to establish that he had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c)(1) - (4)(2000) on the merits, and denied benefits. Director's Exhibit 53. Claimant appealed and the Board affirmed the denial, by Decision and Order dated October 30, 2002. Director's Exhibits 54, 59. Claimant requested reconsideration on November 26, 2002, which the Board denied in an Order dated March 12, 2003. Director's Exhibits 60, 61. Claimant sought review in the United States Court of Appeals for the Fourth Circuit, but on July 15, 2003, the Fourth Circuit affirmed the Board's decision to refuse reconsideration, finding the Board's decision based upon substantial evidence and without reversible error. Director's Exhibits 62, 63. Claimant requested modification on January 16, 2004, which was denied by the district director on April 20, 2004. Director's Exhibits 64, 66. Claimant requested a formal hearing with the Office of Administrative Law Judges on May 10, 2004. Director's Exhibit 67. However, claimant died in 2004 and his widow, pursuing his claim, requested a decision on the record from Administrative Law Judge Linda S. Chapman (the administrative law judge).

[3]Based on the date of filing, this claim has been adjudicated pursuant to 20 C.F.R. Part 718.

Daniel F. Sutton's finding of the existence of pneumoconiosis was the law of the case, since it was affirmed by both the Board and the United States Court of Appeals for the Fourth Circuit, as unchallenged on appeal. The administrative law judge also found, as Judge Sutton had in his prior decision, that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge found, however, that a change in conditions was not established, as the newly submitted evidence was insufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), the only element of entitlement previously adjudicated against claimant. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Modification may be based upon a change in conditions. The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000)[4], 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. If a change is established, the administrative law judge must then consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Nataloni v. Director, OWCP*, 17 BLR

[4]Although 20 C.F.R. §725.310 has been revised, these revisions only apply to claims filed after January 19, 2001.

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, Judge Sutton found that claimant failed to establish that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) (2000),[5] on the merits. Director's Exhibit 53.

Considering the newly submitted pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge noted that the only such study, dated June 2, 2003, produced nonqualifying values.[6] Director's Exhibit 64. The administrative law judge specifically found:

> Because the new test was taken when Mr. Moore was 77 and the Appendix B tables only give qualifying values for those age 71 and younger, Mr. Moore would need to score below the values listed for someone of his height at age 71 in order to even raise a question that he qualified for total disability. At 77 years of age and 69 inches in height, Mr. Moore achieved an FEV1 of 1.93, an FVC of 2.51, and an MVV of 72. His FEV1 and FVC clearly do not qualify, as he would have needed to score below a 1.79 and 2.31 respectively before a question could even be raised as to whether his values qualified under the regulations. His MVV was 72, which is equal to the value given in Appendix B for a man age 71. However, at age 77, Mr. Moore would have needed to score *below* this number before he could claim that he potentially qualified for total disability.

Decision and Order at 6.

The administrative law judge applied the available values for a man age 71 and 69 inches tall in the instant case. The qualifying FEV1 value for a miner age 71 and 69 inches tall is 1.79 or below, and the qualifying FVC value is 2.31 or below. The miner's FEV1 value in the instant case is 1.93 and his FVC value is 2.51. Thus, the administrative law judge rationally noted that the FEV1 and FVC values "clearly do not qualify." Decision and Order at 6. Although the regulations only provide table values

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[5]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

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

for miners up to 71 years of age, the regulations do not prohibit an administrative law judge from finding, by extrapolation, appropriate table values for miners older that 71 years of age. Thus, in the instant case, the administrative law judge rationally extrapolated from the existing table values and properly explained his finding that the results of the June 2, 2003 pulmonary function study were nonqualifying[7]. We therefore affirm the administrative law judge's finding that the newly submitted pulmonary function study fails to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Further, as the administrative law judge noted, no new blood gas studies were submitted with claimant's modification request. We therefore affirm the administrative law judge's finding that total disability is not established at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 6. Moreover, as the administrative law judge properly found that there is no evidence of cor pulmonale in the record, 20 C.F.R. §718.204(b)(2)(iii) is inapplicable in the instant case. Decision and Order at 6.

We also affirm the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv), as there is no newly submitted medical opinion evidence of record.

Because the record does not contain any other newly submitted evidence,[8] we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2), and thus, failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Nataloni*, 17 BLR at 1-82.

Modification may also be based upon a mistake in a determination of fact. In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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[7]The administrative law judge noted that the miner's MVV value was 72. Decision and Order at 6. Review of the pulmonary function study, however, indicates that the MVV value was 73. Director's Exhibit 64. The administrative law judge's error, is harmless, however, as the difference in the MVV value does not affect the conclusion that the pulmonary function study is non-qualifying. *Larioni v. Director, OWCP*, 6 BLR 1-1276.

[8]The administrative law judge agreed to consider the case on the record and admitted Director's Exhibits 1-72 and Claimant's Exhibit 1 into the record. The administrative law judge noted that the claimant had submitted no additional exhibits. Thus, although claimant's widow submitted the death certificate by letter dated April 7, 2005, it was never admitted into the record.

In considering whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge rationally reaffirmed Judge Sutton's finding of the existence of pneumoconiosis. *See United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 91950), *reh'g denied*, 339 U.S. 97 (1950); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). The administrative law judge also properly found the pulmonary function studies considered in Judge Sutton's decision insufficient to establish total disability, as all the studies produced nonqualifying values. 20 C.F.R. §718.204(b)(2)(i). The administrative law judge next noted that the previously submitted blood gas studies produced both qualifying and nonqualifying results. The administrative law judge agreed with Judge Sutton's finding that inconsistency in the results rendered the studies inconclusive and insufficient to establish total disability as "there is no discernible pattern, such as progression from nonqualifying to qualifying that would render these scores conclusive for total disability." Decision and Order at 6. "The results are mixed, and I therefore find them to be equivocal and insufficient to establish total disability under §718.204(c)(3) [sic]." *Id.* This was rational. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Upon review of the medical opinions considered by Judge Sutton, the administrative law judge rationally found that Dr. Jabour, claimant's treating physician, and the only physician to find claimant totally disabled, was not entitled to controlling weight, as Dr. Jabour's characterization of pneumoconiosis was inconsistent, as he found it "severe" in his report of June 5, 1997, but found it "mild" in his report of June 3, 1999. *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984); Director's Exhibits 16, 41. Further, as the administrative law judge found, Dr. Jabour "failed to acknowledge or discuss the effect of Mr. Moore's obesity on his disability" and "indicated that Mr. Moore's exercise program had improved his physical condition and functional capacity," which "substantiates the opinions of Dr. Hippensteel and Dr. Forehand, that Mr. Moore was not totally disabled, and that his condition would have ceased to exist with regular exercise." Decision and Order at 7; Director's Exhibits 4, 32, 41. Because the administrative law judge properly refused to credit Dr. Jabour's opinion, the only opinion of record supportive of a finding of total disability, she properly found that the previously submitted evidence fails to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). We therefore affirm the administrative law judge's finding that there was no mistake in fact in Judge's Sutton's determination that claimant failed to establish total disability pursuant to 20 C.F.R.§718.204(b).

In light of the foregoing, we affirm the administrative law judge's determination that modification is not established pursuant to 20 C.F.R. §725.310 (2000), as claimant has failed to establish a change in conditions or a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310 (2000).

Accordingly, the administrative law judge's Decision and Order On Modification Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge