BRB No. 98-1312 BLA

GREER C. SALYERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
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 Denying Request for Modification of a Prior Decision Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Greer C. Salyers, Clinchco, Virginia, *pro se.*

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification of a Prior Decision Denying Benefits (97-BLA-1902) of Administrative Law Judge Daniel F. Sutton 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 considered the newly submitted evidence of record, *i.e.*, that evidence submitted since the previous denial of benefits, and concluded that that evidence, considered in conjunction with the previously submitted evidence, failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4), and that inasmuch as the evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(c),

claimant was precluded from establishing entitlement to benefits. Accordingly, claimant's request for modification was denied. Employer responds to claimant's *pro se* appeal and urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has declined to file a brief 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (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).[1]

[1]Claimant's specific contentions are subsumed within our review of the administrative law judge's Decision and Order. *See McFall*, *supra*.

In considering modification pursuant to 20 C.F.R. §725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence. *Nataloni v. Director, OWCP,* 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corporation,* 14 BLR 1-56 (1990)*,modified on recon*., 16 BLR 1-71 (1992). Pursuant to the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), in order to establish modification, "claimant may simply allege that the ultimate fact...was mistakenly decided....There is no need for a smoking gun factual error, changed conditions, or startling new evidence." *Jessee*, 5 F.3d at 725, 18 BLR at 2-28. In the instant case, claimant was previously denied benefits because he failed to establish the presence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(c); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In considering modification pursuant to Section 725.310, the administrative law judge concluded that the newly submitted pulmonary function study and blood gas study evidence, *see* Director's Exhibits 60, 70, 74, was non-qualifying for demonstration of a totally disabling respiratory impairment.[2] Decision and Order at 6. The administrative law judge further found that the previous determination that claimant failed to establish a totally disabling respiratory impairment pursuant to Section 718.204(c)(1) and (2) did not constitute a mistake in a determination of fact as the weight of the previously submitted studies was non-qualifying, Director's Exhibits 17, 24, 35, 36, 40. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish modification by demonstrating the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1) and (2). *See Jessee, supra*.

We further affirm the administrative law judge's determination that claimant failed to establish modification by demonstrating the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(3) inasmuch as the record is devoid of any evidence of cor pulmonale with right-sided congestive heart failure.

[2]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. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

See 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds,* 933 F.2d 510 15 BLR 2-124 (7th Cir. 1991).

In finding that claimant failed to establish modification by demonstrating the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4), the administrative law judge considered the newly submitted evidence consisting of the opinions of Drs. Robinette, who diagnosed total disability due to low back pain, but only a mild respiratory impairment which was not totally disabling, Director's Exhibit 60; Claimant's Exhibit 2, Dr. Smiddy and Dr. Lyle, both of whom found that claimant was totally disabled, Claimant's Exhibit 1; Director's Exhibit 66, and Dr. Sargent and Dr. Hippensteel, both of whom concluded that claimant suffered from no pulmonary or respiratory impairment preventing a return to coal mine employment, Director's Exhibit 70; Employer's Exhibit 11. The administrative law judge, after noting that Dr. Lyle's status as claimant's treating physician would generally entitle that physician to greater weight, *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993), permissibly accorded less weight to the opinions of both Drs. Lyle and Smiddy, because the physicians failed to provide adequate documentation for their conclusions, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985), and further failed to provide any explanation for their conclusions, *see York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). Further, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Sargent and Hippensteel based on their superior qualifications,[3] *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985), and the fact that their opinions were the best reasoned and best supported by the underlying documentation of record, *see Clark, supra*; *Peskie, supra*; *Lucostic*, *supra*. The administrative law judge further found that the previous determination that claimant failed to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4), did not constitute a mistake in a determination of fact as the prior administrative law judge permissibly accorded greatest weight to the opinions of Drs. Sargent and Robinette, both of whom concluded that claimant did not suffer from a totally disabling respiratory impairment, Director's Exhibit 40, based on their superior qualifications.

[3]The record demonstrates that Dr. Sargent and Dr. Hippensteel are board-certified in pulmonary medicine. Director's Exhibit 60; Employer's Exhibit 10.

See Hicks, *supra*; *Akers, supra*; *Martinez, supra*; *Wetzel, supra*. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish modification by demonstrating the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). *See Jessee, supra*.

Inasmuch as claimant has failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), a requisite element of entitlement pursuant to Part 718, *see Trent, supra*; *Perry*, *supra*, we must affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification of a Prior Decision Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge