BRB No. 98-1561 BLA

WILBURN STACY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
D & F MINING COMPANY	)	DATE ISSUED: 7/14/99
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Alexander Karst, Administrative Law Judge, United States Department of Labor.

Wilburn Stacy, Wolford, 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 (97-BLA-1530) of Administrative Law Judge Alexander Karst 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 found that

the instant case was a request for modification and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 2. The administrative law judge initially determined that the evidence excluded from the record before the prior administrative law judge was also excluded for purposes of modification. Decision and Order at 2; Director's Exhibits 38, 52, 53. The administrative law judge further excluded two letters dated October 6, 1980 from Dr. James Merchant and Mr. Joseph LaMonica as claimant failed to submit them before the district director. Decision and Order at 3; Director's Exhibits 52, 55, 58. The administrative law judge then concluded that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant generally contends that the evidence is sufficient to establish entitlement to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and consistent 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).

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,

[1]Claimant filed his initial claim for benefits on July 22, 1991, which was finally denied by the Department of Labor on July 7, 1993 as the evidence failed to establish that claimant was totally disabled. Director's Exhibit 43. The Benefits Review Board affirmed this denial on January 27, 1995. Director's Exhibit 57. Claimant filed a modification request on March 4, 1995. Director's Exhibit 55.

718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Initially, we address the administrative law judge's exclusion of evidence in this case. The administrative law judge noted that the evidence contained in Director's Exhibits 38, 52 and 53 was excluded from the record by the administrative law judge in the prior denial of benefits and affirmed by the Benefits Review Board. Decision and Order at 2. The administrative law judge further found that two letters dated October 6, 1980 from Dr. James Merchant and Mr. Joseph LaMonica should be excluded from the record as claimant offered no reason for his failure to provide the evidence to the district director prior to the hearing. Decision and Order at 3; Director's Exhibits 52, 55, 58. Pursuant to the pertinent provisions of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and subject to the constraints of 20 C.F.R. §725.456, the administrative law judge is required to admit all timely developed evidence. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). However, in the instant case, we discern no abuse of discretion by the administrative law judge in declining to admit the evidence into the record. The administrative law judge properly concluded that evidence which has been permissibly excluded in a prior decision cannot form the basis for a subsequent modification request. *See Wilkes v. F & R Coal Co.*, 12 BLR 1-1 (1988). Moreover, the administrative law judge properly determined that the two letters dated October 6, 1980 should be excluded from the record as they were in existence while the claim was before the district director and claimant offered no explanation for his failure to provide the evidence at that time. Thus, claimant failed to establish extraordinary circumstances to justify their admission into the record. *See* 20 C.F.R. §725.456(d); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, issued *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), holding that the administrative law judge must determine whether a mistake of fact has been made even where no specific allegation has been made by claimant. Furthermore, in determining whether claimant has established a change in conditions pursuant to Section 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, to

determine if the weight of the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c) and therefore insufficient to establish modification.[2] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Jessee*, *supra*.

Considering the newly submitted evidence to determine if a change in conditions was established under Section 718.204(c)(1), the administrative law judge properly determined that inasmuch as all of the newly submitted pulmonary function study evidence was invalidated by the administering physician or by highly qualified consulting physicians based upon claimant's suboptimal effort, the pulmonary function studies were not probative evidence of a respiratory disability. Decision and Order at 5-6; Director's Exhibits 58, 59, 60, 63, 68, 69, 70, 72,78, 82, 85, 89; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). The administrative law judge further properly found that the newly submitted blood gas study evidence of record was non-qualifying and thus total disability was not established pursuant to Section 718.204(c)(2).[3] *See* Decision and Order at 4-6; Director's Exhibits 63, 82, 89. Additionally, the record indicates that no physician diagnosed cor pulmonale with right sided congestive heart failure and thus, total disability cannot be established pursuant to Section 718.204(c)(3). *Newell v. Freeman United Coal Mining Co.,* 13 BLR 1-37 (1989).

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[2]The administrative law judge properly determined that claimant's prior claim was denied because the evidence of record was insufficient to establish total disability. Decision and Order at 4; Director's Exhibits 43, 57.

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

In considering whether total disability was demonstrated by the newly submitted evidence pursuant to Section 718.204(c)(4), the administrative law judge permissibly accorded less weight to the medical opinion of Dr. Smiddy, that claimant was not physically capable of engaging in coal mine employment, as his diagnosis was unreasoned and based upon unreliable medical data which undermined the reliability of the physician's opinion. *Clark, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); Decision and Order at 6; Director's Exhibit 89. In addition, the administrative law judge reasonably determined that the medical opinions of Drs. Fino and Castle, that claimant did not have a totally disabling respiratory impairment, were entitled to the greatest weight since these physicians possessed qualifications superior to those of Dr. Smiddy.[4] *Clark*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 6; Director's Exhibit 82; Employer's Exhibit 1. The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*,12 BLR 1-20 (1988). Consequently, the administrative law judge properly found that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) and were thus insufficient to establish a change in conditions pursuant to Section 725.310.[5] *Nataloni, supra*; *Wojtowicz, supra*; *Kovac, supra*; *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Finally, we note that the administrative law judge properly considered the previously submitted evidence and rationally concluded that there was no mistake in fact in the original denial of benefits. Decision and Order at 5; *Jessee, supra*; *Nataloni*, *supra*. Therefore, the administrative law judge's denial of claimant's petition for modification is supported by substantial evidence and is in accordance

[4]In considering the medical opinion evidence of record, the administrative law judge noted that Dr. Sargent declined to give an opinion on the existence of a respiratory impairment owing to claimant's suboptimal effort on ventilatory studies. Decision and Order at 6; Director's Exhibit 63.

[5]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

with law. *Jessee, supra*. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Jessee*, *supra*.

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

REGINA C. McGRANERY
Administrative Appeals Judge