BRB No. 99-0936 BLA

RAY CURRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Ray Curry, Delbarton, West Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (98-BLA-0311) of Administrative Law Judge Daniel L. Leland 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). In the initial Decision and Order, Administrative Law Judge Peter McC. Giesey found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Judge Giesey further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20

C.F.R. §718.203(b). However, Judge Giesey found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, Judge Giesey denied benefits. By Decision and Order dated November 23, 1992, the Board affirmed Judge Giesey's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3). *Curry v. Island Creek Coal Co.*, BRB No. 90-1007 BLA (Nov. 23, 1992) (unpublished). The Board, however, vacated Judge Giesey's finding pursuant to 20 C.F.R. §718.204(c)(4) and remanded the case for further consideration. *Id.*

Due to Judge Giesey's unavailability, Administrative Law Judge Mollie W. Neal reconsidered the claim on remand. Judge Neal found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Accordingly, Judge Neal denied benefits.

Although claimant filed an appeal with the Board, he subsequently requested that the Board remand the case to the district director for initiation of modification proceedings. By Order dated January 28, 1994, the Board granted claimant's motion and dismissed his appeal. *Curry v. Island Creek Coal Co.*, BRB No. 94-0187 BLA (Jan. 28, 1994) (Order) (unpublished). The Board remanded the case to the district director for consideration of claimant's request for modification. *Id.*

Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, Administrative Law Judge Daniel L. Leland (the administrative law judge) denied claimant's request for modification. On appeal, claimant generally contends that the administrative law judge erred in denying his request for modification. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, 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. *See 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). In the prior decisions, Judges Giesey and Neal denied benefits because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c).

The administrative law judge found that the valid newly submitted pulmonary function studies did not produce qualifying values.[1] Decision and Order at 6. The record contains a non-qualifying pulmonary function study conducted on February 26, 1994. Director's Exhibit 59. The only other newly submitted pulmonary function study, a study conducted by Dr. Zaldivar on May 6, 1998, produced qualifying values before the administration of a bronchodilator, but non-qualifying values after the administration of a bronchodilator. Employer's Exhibit 2. Inasmuch as Dr. Zaldivar questioned the validity of the pre-bronchodilator portion of claimant's May 6, 1998 pulmonary function study, Employer's Exhibits 2, 11, and three reviewing physicians, Drs. Dahhan, Fino, and Morgan, also invalidated the study, *see* Employer's Exhibits 6, 7, 10, the administrative law judge permissibly found that the study was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(1). We, therefore, affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1).

Inasmuch as both of the newly submitted arterial blood gas studies are non-qualifying, the newly submitted evidence is insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(2). Director's Exhibit 59; Employer's Exhibit 2. Moreover, because the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(c)(3).

[1]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" study yields values which exceed the requisite table values.

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge properly discredited the opinions of Drs. Cox and Tan because they failed to provide a basis for their respective findings of total disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 5; Director's Exhibit 53. The administrative law judge also properly found that a registered nurse's May 30, 1990 letter was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). Decision and Order at 5-6; Director's Exhibit 53. The administrative law judge accurately noted that the nurse only indicated that claimant's shortness of breath was most likely due to a pulmonary impairment. *Id.* The remaining newly submitted medical opinions of record indicate that claimant does not suffer from a totally disabling respiratory or pulmonary impairment.[2] We, therefore,

[2]In a report dated March 1, 1994, Dr. Dahhan opined there were no objective findings to indicate any impairment in claimant's respiratory capacity. Director's Exhibit 59. Dr. Dahhan further opined that from a respiratory standpoint, claimant retained the capacity to continue his previous coal mining work. *Id.* After reviewing additional evidence, Dr. Dahhan prepared a supplemental report dated January 13, 1999, wherein he opined that claimant, from a respiratory standpoint, retained the physiological capacity to perform his

affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

Inasmuch as the administrative law judge properly found that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 is affirmed. *Nataloni, supra*.

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previous coal mining work. Employer's Exhibit 6.

In a report dated June 2, 1998, Dr. Zaldivar opined that there was no evidence of any pulmonary impairment. Employer's Exhibit 2. Dr. Zaldivar further opined that, from a pulmonary standpoint, claimant was capable of performing all coal mine work for which he had been trained including arduous manual labor. *Id.* Dr. Zaldivar reiterated his opinion during a March 17, 1999 deposition. Employer's Exhibit 11.

In a report dated January 25, 1999, Dr. Fino opined that claimant did not suffer from any respiratory impairment. Employer's Exhibit 7. Dr. Fino also opined that from a respiratory standpoint, claimant was neither partially nor totally disabled from returning to his last coal mining job. *Id.*

In a report dated February 13, 1999, Dr. Morgan opined that claimant's lung function was normal. Employer's Exhibit 10. Dr. Morgan further opined that claimant's lung function would permit him to resume his coal mine employment. *Id.*

Modification may also be based upon a mistake in a determination of fact. 20 C.F.R. §725.310. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). By Decision and Order dated November 23, 1992, the Board affirmed Judge Giesey's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3). *Curry v. Island Creek Coal Co*., BRB No. 90-1007 BLA (Nov. 23, 1992) (unpublished). Because claimant also represented himself during the previous appeal, the Board undertook a substantial evidence review in affirming Judge Giesey's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3). *Id.*

The Board vacated Judge Giesey's finding pursuant to 20 C.F.R. §718.204(c)(4) and remanded the case for further consideration. *Curry, supra*. On remand, Judge Neal found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) and, therefore, denied benefits.

In considering whether there was a mistake in a determination of fact, the administrative law judge stated:

> I note my agreement with Judge Neal that the evidence in the record at the time she issued her decision did not support a finding that the miner was totally disabled from a pulmonary standpoint. Judge Neal credited the opinions of Dr. Sobieski and Dr. Zaldivar finding no respiratory impairment based on their expertise and persuasive, well reasoned, and documented opinions. She noted that Dr. Wright's determination of total disability was based on blood gas study results that Dr. Zaldivar concluded were invalid. Judge Neal also found the opinions of Dr. Alonso and Dr. Acosta to be insufficient to support total disability as Dr. Alonso only stated that further coal mine work would worsen claimant's breathing problem, and Dr. Acosta did not provide an objective basis to support any finding of total disability. She rejected the findings of the West Virginia Occupational Pneumoconiosis Board as it did not refer to the criteria or the evidence supporting its fifteen percent pulmonary function impairment award.

Decision and Order at 5.

We find no error in the administrative law judge's determination that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *See Jessee, supra*.

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

affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge