BRB No. 99-1028 BLA

WILLIAM BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHANNON POCAHONTAS MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Rejection of Claim of Edward T. Miller, Administrative Law Judge, United States Department of Labor.

William Bryant, Welch, West Virginia, *pro se*.

William T. Brotherton, III (Spilman, Thomas & Battle), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Rejection of Claim (98-BLA-1180) of Administrative Law Judge Edward T. Miller 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 involves a request for modification of a duplicate claim and is before the Board for the second time.[1] The administrative law judge considered the evidence submitted with claimant's request for modification in conjunction with the evidence submitted with the duplicate claim and found that claimant failed to demonstrate either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R.

[1]Claimant first filed for benefits on February 3, 1986, but then withdrew the claim on December 29, 1988. Director's Exhibit 75. Claimant filed a second request for benefits on March 19, 1992, which was denied on September 3, 1992, for failure to establish total disability due to pneumoconiosis. Director's Exhibit 74. Claimant filed the instant claim on September 7, 1993, and benefits were denied by an administrative law judge on March 27, 1996 for failure to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(c) or a material change in condition pursuant to 20 C.F.R. §725.309(c). Director's Exhibits 1, 56. Claimant appealed to the Board, which affirmed the administrative law judge's findings that the new evidence failed to establish that claimant is total disabled and that claimant did not establish a material change in conditions. *See Bryant v. Shannon-Pocahontas Coal Co.*, BRB No. 96-1185 (April 28, 1997)(unpub.); Director's Exhibit 67. On September 18, 1997, claimant filed a request for modification and submitted additional medical evidence. Director's Exhibit 70. On April 22, 1998, the district director denied claimant's request for modification, and on May 4, 1998, claimant requested a formal hearing before an administrative law judge. Director's Exhibits 72, 73.

§725.310 based on his finding that the new evidence submitted in support of modification failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this *pro se* appeal, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, as party-in-interest, 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. *See 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 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). 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 the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

In determining whether claimant established total disability, the administrative law judge properly considered the pulmonary function and blood gas studies submitted since the previous denial of benefits and determined they were non-qualifying.[2] Decision and Order at 7; Director's Exhibits 10, 12, 28, 70. As these findings are supported by the record, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (2). We also affirm the administrative law judge's finding that total disability

[2] A "qualifying" pulmonary function study or arterial 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 yields values that exceed the table values. 20 C.F.R. §718.204(c)(1), (c)(2).

cannot be demonstrated under Section 718.204(c)(3) as the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3); Decision and Order at 7. Lastly, at Section 718.204(c)(4), the administrative law judge permissibly found that the medical opinions fail to establish that claimant is suffering from a total respiratory disability, and that the newly submitted opinion of Dr. Jabour, stating that claimant's metabolic stress test suggested a borderline inability to do his last coal mine employment, did not address the issue of respiratory or pulmonary disability.[3] *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994), *modified on recon.*, 20 BLR 1-64 (1996); *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986), *aff'd on recon.*, 9 BLR 1-104(1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1- 4 (1986); Decision and Order at 7; Director's Exhibits 12, 28, 70. Therefore, we affirm the administrative law judge's determination that claimant failed to establish total disability pursuant to Section 718.204(c) by a preponderance of the evidence as it is supported by substantial evidence. As claimant did not establish a change in conditions or mistake in fact, the administrative law judge's denial of claimant's request for modification pursuant to Section 725.310 is affirmed.

Accordingly, the administrative law judge's Decision and Order - Rejection of Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[3]Dr. Ranavaya opined that claimant only had a mild impairment due to chronic respiratory or pulmonary disease. Director's Exhibit 12. Dr. Zaldivar opined that claimant does not have any impairment and his minimal airway obstruction did not result from his coal mine work. Director's Exhibit 28. Dr. Jabour opined that claimant suffers from a mild pulmonary impairment which would not prevent him from performing heavy labor; he also stated that based on claimant's metabolic stress test, claimant would not be able to achieve the level of exercise capacity that his job demanded, but that this was a borderline case. Director's Exhibit 70.

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge