BRB No. 01-0855 BLA

CARSON WARREN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SANDY FORK MINING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
TRAVELERS 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 - Denying Modification and Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Carson Warren, Flat Lick, Kentucky, *pro se*.

Tommie L. Weatherly (Weatherly Law Offices), London, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order -

[1] Claimant is Carson Warren, who filed his first application for benefits on July 6,

Denying Modification and Benefits (00-BLA-0748) of Administrative Law Judge Daniel J. Roketenetz on a duplicate 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).[2]

1989. Director's Exhibit 26. By Decision and Order dated June 12, 1992, Administrative Law Judge Robert L. Hillyard denied benefits. Claimant appealed and the Benefits Review Board (the Board) vacated the denial and remanded the case because Administrative Law Judge Hillyard mischaracterized medical opinion evidence. *Warren v. Sandy Fork Mining Co., Inc.*, BRB No. 92-1947 BLA (Jul. 13, 1993) (unpub.); Director's Exhibit 26. On remand, Administrative Law Judge Hillyard again denied benefits on October 22, 1993 and claimant's request for reconsideration on June 28, 1994. Director's Exhibit 26. Claimant filed a duplicate application for benefits on August 5, 1994, which was treated as a petition for modification as it was filed within one year of the June 1994 denial. The district director finally denied the August 1994 claim on December 5, 1994. *Ibid*. Subsequently, claimant filed a third application for benefits on September 5, 1995. In response, the district director sent claimant a letter on September 12, 1995 inquiring as to whether claimant was seeking modification of the August 1994 claim or filing a new claim. Claimant did not respond to the September 1995 correspondence. Thereafter, claimant filed a fourth application for benefits on March 20, 1996. Director's Exhibit 1. The district director treated the March 1996 application as a duplicate claim, denying benefits on September 5, 1996 and January 24, 1997. Director's Exhibits 16, 24. Administrative Law Judge Hillyard denied claimant's subsequent request for a formal hearing and adjudicated claimant's March 1996 claim as a request for modification because it was filed within one year of the district director's September 12, 1995 correspondence. In a Decision and Order issued on February 11, 1998, Administrative Law Judge Hillyard denied modification. Director's Exhibit 34. Claimant appealed to the Board and submitted additional evidence. Director's Exhibit 35. The Board deemed claimant's submission as a petition for modification and remanded the case to the district director. *Warren v. Sandy Fork Mining Co., Inc.*, BRB No. 98-0839 BLA (May 7, 1998) (unpub. Order); Director's Exhibit 28. After a denial at the district director level, Administrative Law Judge Hillyard similarly denied modification on August 13, 1999. Director's Exhibit 56. Claimant timely appealed the denial to the Board, but then requested modification before the district director on October 13, 1999. *Ibid*. The Board remanded the case, the district director denied again modification and, per claimant's timely request for a hearing, the case was assigned to Administrative Law Judge Daniel J. Roketenetz.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Hence, the administrative law judge concluded that because claimant failed to establish either a mistake in a determination of fact or a change in conditions since the August 1999 denial, *see* n.1 *supra*, claimant failed to establish modification. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this *pro se* appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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).

After careful consideration of the administrative law judge's Decision and Order 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 because the administrative law judge properly found that the evidence of record failed to establish modification. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Relevant to Section 718.204(b)(2)(i), there is one newly submitted pulmonary function study taken on December 15, 1999, which yielded non-qualifying values.[3] Director's Exhibit 56. The administrative law judge properly found that this pulmonary function study produced non-qualifying values, and therefore, failed to demonstrate total disability. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 10. Likewise, the administrative law judge properly determined that the one newly submitted arterial blood gas study dated December 15, 1999 produced non-qualifying values. Director's Exhibit 56. Hence, we affirm the administrative law judge's finding that total disability was not demonstrated under Section 718.204(b)(2)(ii). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 10. Similarly, we affirm the

[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 yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

administrative law judge's determination that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated by that means. 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 10.

Relevant to Section 718.204(b)(2)(iv), the newly submitted medical opinion evidence consists of one report by Dr. Baker dated December 15, 1999, who opined that claimant has a Class II impairment based on a pulmonary function study value for FEV_1 between 60 and 69 percent of predicted. Further, Dr. Baker relied on the *Guides to the Evaluation of Permanent Impairment*, 4th Ed., by additionally opining that claimant's pulmonary impairment is based on the presence of pneumoconiosis because "although a Pneumoconiosis may cause no physiological impairment, its presence usually requires the person's removal from the dust causing condition. This would imply the patient is 100% occupationally disabled for working as a coal miner... ." Director's Exhibit 56. The administrative law judge permissibly found that Dr. Baker's opinion was entitled to little weight because Dr. Baker's total disability assessment was based on non-qualifying pulmonary function and blood gas studies, lacked an explanation reconciling the non-qualifying tests with his conclusion, and was based on a flawed analysis, *i.e.*, that because a diagnosis of pneumoconiosis necessitates removal from a dust environment, it results in 100% occupational disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); Decision and Order at 11. The administrative law judge rationally found that Dr. Baker's opinion merely addressed the inadvisability of claimant's return to coal mine employment and lacked a discussion regarding whether claimant's pulmonary condition prevented claimant from engaging in his usual coal mine employment or similar work, thus rendering it insufficient to demonstrate total disability. *See Bentley v. Director, OWCP*, 7 BLR 1-612, 1-614 (1984); *Wheatley v. Peabody Coal Co.*, 6 BLR -1214, 1-1216 (1984); *New v. Director, OWCP*, 6 BLR 1-597, 1-600 (1983). Accordingly, because the administrative law judge's discounting of Dr. Baker's opinion because it was neither well reasoned nor well documented is rational, we affirm that finding. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark*, *supra*; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11. Consequently, the administrative law judge properly determined that the newly submitted medical opinion evidence failed to demonstrate that claimant was totally disabled pursuant to Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); Decision and Order at 10-11. Furthermore, we affirm the administrative law judge's discounting of Dr. Baker's opinion, that claimant's "pulmonary impairment is caused, at least in part, if not significantly so, by his exposure to coal dust," under Section 718.204(c)(1) based on the aforementioned reasons contained in the total disability analysis because this determination is rational and supported by substantial evidence. Hence, we affirm the administrative law

judge's Section 718.204(c)(1) determination. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); Decision and Order at 12; Director's Exhibit 56.

Inasmuch as the administrative law judge properly found that claimant failed to satisfy his burden of establishing a change in conditions or a mistake in a determination of fact, we affirm the administrative law judge's finding that claimant failed to demonstrate modification. *See Worrell*, *supra*; *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-14-15 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); Decision and Order at 12.

Accordingly, the Decision and Order - Denying Modification and Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge