

BRB No. 02-0624 BLA

BOBBY J. MATNEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BEATRICE POCOHONTAS 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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Bobby J. Matney, Grundy, Virginia, *pro se*.

Kathy L. Snyder, Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order (01-BLA-0582) of Administrative Law Judge Edward Terhune Miller 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).² In this request for modification

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² The Department of Labor has amended the regulations implementing the Federal

of the denial of a duplicate claim, the administrative law judge found that the evidence of record supported a finding of twelve years of coal mine employment, but that the evidence failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis, elements previously adjudicated against claimant.³ Accordingly, benefits were denied.

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Claimant filed his first claim on July 17, 1978. Administrative Law Judge John H. Bedford denied the claim on June 4, 1990, after finding that claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 77-79. The Board affirmed that denial on January 13,

1992. Director's Exhibit 77-85. Claimant filed a duplicate claim on Sept. 14, 1995. Director's Exhibit 1. Administrative Law Judge Frederick D. Neusner denied benefits on April 11, 1997, finding that the evidence again failed to establish the existence of pneumoconiosis or a totally disabling pulmonary or respiratory impairment due to pneumoconiosis and, therefore, found that claimant failed to establish a material change in conditions. Director's Exhibit 54. The Board affirmed that decision on March 18, 1998. Director's Exhibit 61. Claimant requested modification on July 14, 1998. At the hearing before Administrative Law Judge Daniel Solomon, claimant qualified his request for modification as one grounded on a change in conditions based on a February 24, 1999 pulmonary function study indicating a pulmonary impairment. Employer agreed with claimant that the basis of the request for modification was a change in conditions, not a mistake in a determination of fact (which had not been alleged by either party), but pointed out that the only evidence submitted by claimant in support of a change in conditions was a 1997 report by Dr. Modi, and that the February 24, 1999 pulmonary function study to which claimant referred had not been submitted. Judge Solomon, therefore, remanded the claim to the district director to allow claimant to submit his February 24, 1999 pulmonary function study results. Director's Exhibit 86. Claimant submitted the February 24, 1999 pulmonary function study results by letter dated November 10, 2000. On December 18, 2000 the district director, having considered the new evidence, again denied modification, and forwarded the claim to the Office of Administrative Law Judges for hearing.

On appeal, claimant generally challenges the findings of the administrative law judge. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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 prove 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, 718.204. Failure to establish any one 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 on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge considered the evidence submitted by claimant in support of a change in conditions on modification: Dr. Modi's opinion and a qualifying pulmonary function study. The administrative law judge rejected Dr. Modi's opinion, that claimant has totally disabling coal workers' pneumoconiosis, as neither reasoned nor documented because Dr. Modi failed to identify the objective testing on which he relied in forming his opinion. This was rational. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-732 (1985). Citing *Boyd v. Clinchfield Coal Co.*, 4 F.3d 1122, 1995 WL 10226 (4th Cir. 1995), the administrative law judge also properly determined that Dr. Modi's 1988 tax evasion conviction, based upon repeated perpetration of fraud on the Black Lung Program, warranted rejection of the doctor's opinion. Decision and Order at 7.

Considering the pulmonary function study dated February 24, 1999, the administrative law judge permissibly credited the six invalidations of the February 24, 1999 pulmonary function study by better qualified reviewing physicians, who were Board-certified in internal and pulmonary medicine, to find that the pulmonary function study did not establish total disability. This was rational. Decision and Order at 7; Director's Exhibits 110, 111, 115,

116A; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge concluded, therefore, that neither item of evidence submitted by claimant in support of his request for modification based on a change in conditions was of probative value. Additionally, the administrative law judge reviewed the evidence considered by Administrative Law Judge Frederick D. Neusner in denying the previous duplicate claim and determined that no mistake in a determination of fact had been made. Further, considering new evidence submitted by employer on modification, the administrative law judge found that it also failed to establish either a change in conditions or to reveal a mistake in a determination of fact in Judge Neusner's prior denial. Consequently, the administrative law judge properly denied claimant's request for modification. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998).⁴

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁴ Because this case involved a request for modification of a duplicate claim, the evidence submitted on modification should be considered along with the evidence submitted with the duplicate claim to determine whether claimant had established a material change in conditions since the previous denial. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998). However, inasmuch as the administrative law judge stated that he reviewed the evidence considered by Judge Neusner in the duplicate claim, and considered the evidence submitted on modification, and found that this evidence failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis, elements adjudicated against claimant in his first claim, the administrative law judge's denial of modification in this case is affirmed. *See Hess, supra*.

REGINA C. McGRANERY
Administrative Appeals Judge