



Buddy Young, Hardy, Kentucky, *pro se*.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order on Remand - Denial of Benefits (96-BLA-0770) of Administrative Law Judge Daniel J. Roketenetz with respect to 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). Claimant filed a second request for modification on February 28, 1994.<sup>1</sup> Director's Exhibit 78.

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<sup>1</sup>Claimant filed an application for benefits on June 22, 1988. Director's Exhibit 1. In a Decision and Order issued on June 26, 1990, Administrative Law Judge Charles W. Campbell determined that the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 46. Claimant filed a timely request for modification which Judge Campbell addressed in a Decision and Order issued on September 30, 1991. Director's Exhibits 47, 48, 66. Judge Campbell found, based upon the application of the true doubt rule, that claimant established a change in conditions under 20 C.F.R. §725.310(a), as the newly submitted evidence was sufficient to demonstrate the existence of pneumoconiosis under Section 718.202(a)(1). Judge Campbell further determined, however, that the evidence of record as a whole did not support a finding of total disability pursuant to Section 718.204(c)(1)-(4). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's modification finding, as it was unchallenged on appeal, and also affirmed the denial of benefits on the ground that the administrative law judge's findings on the merits under Section 718.204(c)(1)-(4) were rational and supported by

The case was assigned to Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) due to the prior administrative law judge's unavailability and the parties agreed to permit the administrative law judge to decide the case on the record. In a Decision and Order issued on June 24, 1997, the administrative law judge determined that claimant failed to establish either a change in conditions or a mistake in fact under 20 C.F.R. §725.310(a). Accordingly, benefits were denied. Claimant appealed to the Board, which vacated the administrative law judge's findings, as the administrative law judge stated erroneously that the existence of pneumoconiosis was the element of entitlement with respect to which claimant was required to demonstrate a change in conditions. *Young v. Sharondale Corp., et al.*, BRB No. 97-1846 BLA (June 12, 1998)(unpub.). The Board also instructed the administrative law judge to set forth the rationale underlying his findings regarding whether claimant established a change in conditions or a mistake in a determination of fact. *Id.*

On remand, the administrative law judge determined that claimant did not prove a change in conditions, as the newly submitted evidence did not support a finding of total disability under 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge also stated that the prior denial of benefits did not contain a mistake in a determination of fact. Accordingly, the administrative law judge denied claimant's request for modification pursuant to Section 725.310 and denied benefits. The two putative responsible operators and their carriers have responded and urge 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 will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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substantial evidence. *Young v. Sharondale Corp., et al.*, BRB No. 92-0384 BLA (June 30, 1993)(unpub.); Director's Exhibit 76.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that once a request for modification is filed, no matter the grounds stated, if any, an administrative law judge has the duty to reconsider all of the evidence of record for any mistake of fact or change in conditions.<sup>2</sup> See *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); see also *Jonida Trucking Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). Upon review of the administrative law judge's Decision and Order on Remand and the relevant evidence of record in light of this standard, we affirm the administrative law judge's findings that claimant has not established a change in conditions or a mistake in a determination of fact pursuant to Section 725.310(a), as they are supported by substantial evidence and are in accordance with relevant law.

With respect to the issue of a change in conditions, under Section 718.204(c)(1), the administrative law judge acted within his discretion in according greater weight to the two newly submitted nonqualifying studies, as the qualifying pre- and postbronchodilator studies obtained by Dr. Wells were invalidated by a reviewing physician due, in part, to poor effort and Dr. Wells did not record claimant's effort or otherwise comment on the validity of the studies.<sup>3</sup> Decision and Order on Remand at 6; Director's Exhibits 82, 94; see *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Under Section 718.204(c)(2), the administrative law judge correctly

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<sup>2</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. Director's Exhibits 2, 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup>A "qualifying" pulmonary function study or blood gas study is one that produces values equal to or less than the values set forth in the tables appearing in Appendix B and Appendix C to 20 C.F.R. Part 718. A "nonqualifying" study is one that produces values in excess of the table values.

determined that the newly submitted blood gas studies produced nonqualifying values. Decision and Order on Remand at 6; Director's Exhibits 87, 94.

With respect to Section 718.204(c)(3), the administrative law judge properly found no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order on Remand at 7. Under Section 718.204(c)(4), the administrative law judge acted within his discretion in according more weight to the opinion in which Dr. Vuskovich found that claimant is not suffering from a totally disabling respiratory or pulmonary impairment on the ground that Dr. Vuskovich's report was corroborated by the record reviews performed by Drs. Fino and Broudy. *Id.* at 7-8; Director's Exhibit 94; Employer's Exhibits 3, 4; see *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We affirm, therefore, the administrative law judge's finding that claimant has not established a change in conditions pursuant to Section 725.310.

Turning to the issue of mistake in a determination of fact, the administrative law judge noted that he had reviewed the evidence admitted into the record prior to claimant's second request for modification in conjunction with the newly submitted evidence and determined that it was insufficient to establish the presence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 4, 7-8. Thus, the administrative law judge concluded that there was no mistake in a determination of fact in the prior denial of benefits. Decision and Order at 8. We affirm the administrative law judge's finding, as it is supported by substantial evidence. All of the previously submitted objective studies are nonqualifying; the record contains no evidence of cor pulmonale with right sided congestive heart failure; and the administrative law judge's determination that the weight of the medical opinion evidence does not support a finding of total disability under Section 718.204(c)(4) is rational and accords with the evidence of record.

Inasmuch as the administrative law judge's determination that claimant failed to establish the prerequisites for modification pursuant to Section 725.310 is rational and supported by substantial evidence, it is affirmed. We must also affirm, therefore, the denial of benefits. See *Worrell, supra*. In light of our disposition of claimant's appeal, we decline to reach Loftis Coal Company's arguments regarding its status as the responsible operator and the proper scope of modification under Section 725.310, as errors, if any, committed with respect to the resolution of these issues would be harmless. See *Johnson v. Jeddo-*

*Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand  
- Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge