

BRB No. 06-0834 BLA

RODERICK D. FELTNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY,	)	DATE ISSUED: 05/31/2007
INCORPORATED c/o ACCORDIA	)	
EMPLOYERS SERVICE	)	
	)	
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 – Denial of Benefits of Larry S. Merck,  
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for  
employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H.  
Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate  
Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and  
Legal Advice), Washington, D.C., for the Director, Office of Workers'  
Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6716) of Administrative Law Judge Larry S. Merck on a request for modification of the denial of a subsequent 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).<sup>1</sup> The administrative law judge noted that the parties stipulated to nineteen and one-half years of qualifying coal mine employment and found that employer was the responsible operator. Decision and Order at 5. The administrative law judge noted that claimant’s first claim was denied because claimant failed to establish total disability, and that claimant’s subsequent claim was denied because claimant failed to establish total disability. Considering the issue of total disability pursuant to claimant’s request for modification, the administrative law judge found that the evidence submitted since the denial of the first claim was insufficient to establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(v). Accordingly, claimant’s request for modification and benefits on the claim were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that the evidence submitted in support of claimant’s subsequent claim established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).<sup>2</sup> Claimant also asserts that because the administrative law judge found that Dr. Simpao’s opinion was not well reasoned, claimant was not provided with a complete, credible pulmonary evaluation sufficient to substantiate his claim as required by Section 413(b) of the Act. 30 U.S.C. §923(b). Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has filed a letter stating that claimant was provided with a complete, credible pulmonary evaluation.

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<sup>1</sup> Claimant filed his first application for benefits on September 24, 1997. That claim was denied by Administrative Law Judge Daniel J. Roketenetz because claimant failed to establish total disability on September 21, 2000. Director’s Exhibit 1. Claimant filed a subsequent claim for benefits, the instant claim, on June 12, 2002, which was denied by the district director on December 8, 2003 because claimant failed to establish total disability. Director’s Exhibits 3, 35. Claimant requested modification of that denial within one year. The district director denied the request for modification on May 7, 2004. Claimant subsequently requested a formal hearing and the claim was transferred to the Office of Administrative Law Judges. Director’s Exhibit 43.

<sup>2</sup> The administrative law judge’s finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).<sup>3</sup>

In considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310, the Board has held that 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) *modif. on recon.*, 16 BLR 1-71 (1992). Modification may also be based upon a finding of a mistake in a determination of fact. 20 C.F.R. §725.310.

Section 725.309 provides that a subsequent claim is subject to automatic denial on the basis of the prior denial, unless newly submitted evidence establishes a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

In this case, claimant's first claim for benefits was denied because claimant failed to establish total disability. Claimant filed a subsequent claim, with new evidence. This claim was also denied because claimant failed to establish total disability. Claimant requested modification of that denial.

Claimant contends that the administrative law judge should have found that the evidence submitted in support of the subsequent claim established total disability pursuant to Section 718.204(b)(2)(iv). Specifically, claimant contends:

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<sup>3</sup> The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

claimant's usual coal mine work included being a continuous miner operator, scoop operator, shuttle car operator and bolt machine operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Glen Baker (who did diagnose a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 3-4. Claimant's argument is rejected. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989)(a statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1889); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988).

We also reject claimant's argument that because pneumoconiosis is a progressive and irreversible disease, it can "be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work." Claimant's Brief at 4. An administrative law judge's findings of total disability must be based on the medical evidence of record. *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). Consequently, as claimant makes no other challenge to the administrative law judge's weighing of the medical opinion evidence of record with respect to total disability, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv) and that the evidence submitted in support of the subsequent claim does not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), overall. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *White*, 23 BLR at 1-1. We, therefore, also affirm the administrative law judge's denial of claimant's request for modification as the administrative law judge properly found that the evidence submitted in support of claimant's subsequent claim failed to establish total disability. The administrative law judge also reviewed his prior denial of the subsequent claim and found that no mistake in a determination of fact had been made.

Finally, claimant contends that, because the administrative law judge found that Dr. Simpao's opinion, which was submitted in support of the subsequent claim was not well reasoned, "the Director ... failed to provide [him] with a complete, credible pulmonary examination sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that he is only required to "provide ... miners with a complete examination, not a dispositive one," and stated that because Dr.

Simpao provided a complete pulmonary evaluation – administering the appropriate tests, recording the relevant histories, and addressing each element of entitlement – his opinion is sufficiently credible to meet the Department’s statutory obligation. 30 U.S.C. §923(b). We agree.

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. See Director’s Exhibit 13; 20 C.F.R. §§718.101(a), 718.104, 718.204(b)(2)(iv), 725.406(a). The administrative law judge did not find, nor does claimant allege, that Dr. Simpao’s report was incomplete. With respect to the issue of total disability, the element which defeated entitlement in this case, the administrative law judge credited Dr. Simpao’s opinion, but found it outweighed by the contrary evidence of record, *i.e.*, non-qualifying pulmonary function and blood gas studies, and Dr. Rosenberg’s better reasoned opinion. Decision and Order at 14; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987). We, therefore, reject claimant’s argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. See *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge