

BRB No. 98-1108 BLA

STEPHEN BARNA)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

Respondent)

DATE ISSUED: 5/27/99

DECISION AND ORDER

Appeal of the Decision and Order Denying Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (97-BLA-1242) of Administrative Law Judge Ainsworth H. Brown 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). The administrative law judge determined that this claim involved a request for modification, pursuant to 20 C.F.R.

§725.310, of his Decision and Order - Denying Benefits issued on October 16, 1995, and affirmed by the Board on October 17, 1996.¹ In considering claimant's

¹ Claimant filed his original application for benefits on November 11, 1974. On October 1, 1979, the district director informed claimant that the evidence was insufficient to establish entitlement to benefits and that he had sixty days in which to submit additional evidence or request a formal hearing, and that if he did not act within sixty days the claim would be considered abandoned. Director's Exhibit 20. Claimant filed a request for additional time on May 14, 1980, which was granted by the district director, allowing an additional sixty days in which to provide additional evidence. *Id.* No further action was taken on that claim until claimant's new counsel submitted a Notice of Appearance on August 9, 1989, at which time he was informed that the 1974 claim was closed as abandoned. *Id.*

Claimant filed a second application for benefits on September 15, 1989 and also challenged the closure of the initial claim. Director's Exhibit 1. By Decision and Order dated December 11, 1990, Administrative Law Judge Paul H. Teitler found that claimant's 1974 was finally denied by reason of abandonment. Addressing the merits of claimant's 1989 duplicate claim, Judge Teitler found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and also insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Teitler denied benefits. Director's Exhibit 28. On appeal, the Board affirmed Judge Teitler's denial of benefits by Decision and Order issued June 15, 1992. In particular, the Board affirmed Judge Teitler's finding of abandonment of the 1974 claim. Additionally, the Board affirmed Judge Teitler's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) and also that claimant failed to establish total disability pursuant to Section 718.204(c). *Barna v. Director, OWCP BRB No. 91-0597 BLA (June 15, 1992)(unpub.)*; Director's Exhibit 34.

Claimant filed a timely petition for modification on May 10, 1993. Director's Exhibit 35. By Decision and Order dated October 10, 1995, Administrative Law Judge Ainsworth H. Brown (the administrative law judge) denied benefits. Initially, the administrative law judge found a change in conditions established pursuant to 20 C.F.R. §725.310, based on the concession of the Director, Office of Workers' Compensation Programs, as to the existence of pneumoconiosis arising out of claimant's coal mine employment. However, the administrative law judge found the medical evidence of record, old and new, insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(c). Director's Exhibit 66. On appeal, the Board affirmed the administrative law judge's finding that claimant

request for modification dated November 20, 1996, the administrative law judge found the newly submitted medical evidence of record insufficient to establish a total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that the newly submitted evidence failed to establish a change in conditions pursuant to Section 725.310. In addition, the administrative law judge found that the evidence does not support a finding that the previous decision contains a mistake in a determination of fact pursuant to Section 725.310. Accordingly, the administrative law judge denied claimant's request for modification.

In challenging the administrative law judge's denial of modification, claimant contends that the administrative law judge erred in finding the newly submitted

established a change in conditions pursuant to Section 725.310 and the existence of pneumoconiosis arising out of claimant's coal mine employment. However, the Board affirmed the administrative law judge's denial of benefits, holding that the administrative law judge rationally found the medical evidence of record insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(c).

In addition, the Board rejected claimant's challenge to the Board's affirmance, in its 1992 Decision and Order, of Judge Teitler's finding that claimant's 1974 claim was finally denied based on abandonment, holding that this finding constitutes the law of the case inasmuch as claimant did not challenge the Board's previous decision and, therefore, is precluded from raising this issue in the current appeal. *Barna v. Director, OWCP*, BRB No. 96-0268 BLA (June 27, 1996)(unpub.). On October 17, 1996, the Board denied claimant's motion for reconsideration. *Barna v. Director, OWCP*, BRB No. 96-0268 BLA (Oct. 17, 1996)(Order on Reconsideration)(unpub.).

pulmonary function study evidence insufficient to establish a totally disabling respiratory or pulmonary impairment and, thus, insufficient to establish a change in conditions pursuant to Section 725.310. In response, the Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's denial of claimant's request for modification.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established pursuant to Section 725.310, 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). Moreover, the fact-finder has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *see also O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In challenging the administrative law judge's finding that the newly submitted medical evidence was insufficient to establish a change in conditions,² claimant contends that the administrative law judge erred in finding the newly submitted pulmonary function study evidence insufficient to establish total disability pursuant to Section 718.204(c)(1). Specifically, claimant contends that he submitted a

² As the administrative law judge correctly stated, the newly submitted medical evidence consists of two readings of the August 13, 1997 film, one of which was read as positive for the existence of pneumoconiosis and the other of which was read as negative for the existence of pneumoconiosis. Decision and Order at 1; Director's Exhibit 75; Claimant's Exhibit 1. In addition, the record contains a blood gas study dated October 9, 1997, Claimant's Exhibit 1, and the pre-bronchodilator portion of a pulmonary function study dated October 9, 1997 and an invalidation report dated November 12, 1997, Claimant's Exhibit 1; Director's Exhibit 73.

pulmonary function study dated October 9, 1997, in which the pre-bronchodilator portion of the study was non-qualifying but the post-bronchodilator portion of that study yielded qualifying values. In addition, claimant contends that the administrative law judge erred in crediting the invalidation report of Dr. Sahillioglu, a reviewing physician, over the report of the administering physician, Dr. Aquilina, arguing that Dr. Sahillioglu failed to provide the rationale for his conclusion and, therefore, did not provide a credible opinion. Consequently, claimant contends that he has submitted adequate evidence to establish a change in conditions. We disagree.

Contrary to claimant's contention, the record does not contain the results of a post-bronchodilator study performed on October 9, 1997. Rather, as the administrative law judge correctly determined the record only contains the pre-bronchodilator portion of the October 9, 1997 study, which yielded non-qualifying results.³ Decision and Order at 2; Claimant's Exhibit 1; 20 C.F.R. §718.204(c)(1). Inasmuch as claimant concedes that the pre-bronchodilator portion of this pulmonary function study yielded non-qualifying values⁴ and this is the only new evidence relevant to Section 718.204(c)(1), we need not address his other challenges to the administrative law judge's finding that this study failed to establish total disability, since the non-qualifying pre-bronchodilator values are insufficient, as a matter of law, to establish total disability pursuant to Section 718.204(c)(1). Claimant's Exhibit 1; Claimant's Brief at 8; 20 C.F.R. §718.204(c)(1).

In addition, we affirm the administrative law judge's finding that the lone newly submitted blood gas study, dated October 9, 1997, produced non-qualifying values and, therefore, was not indicative of total disability. Decision and Order at 2; Claimant's Exhibit 1; 20 C.F.R. §718.204(c)(2). Inasmuch as the administrative law judge properly considered all of the relevant newly submitted evidence, we affirm his finding that the record does not support a finding of a change in conditions pursuant to Section 725.310. 20 C.F.R. §725.310; see *Nataloni, supra*; see also *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994). Moreover, we affirm the administrative

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, C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (2).

⁴ The pre-bronchodilator portion of the October 9, 1997 pulmonary function study yielded an FEV1 value of 1.72. In order to qualify under Part 718, for a claimant who is 70 years of age and 67 inches in height, the FEV1 value must be equal to or less than 1.66. Claimant's Exhibit 1; 20 C.F.R. Part 718, Appendix B; 20 C.F.R. §718.204(c)(1).

law judge's finding that the evidence of record does not support a finding that there was a mistake in a determination of fact in the previous decision. Decision and Order at 2; see *Keating, supra*; *Nataloni, supra*; see also *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Since claimant has failed to establish a change in conditions or mistake in a determination of fact in this modification case, an award of benefits is precluded. See *Keating, supra*; *Nataloni, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge