BRB No. 01-0197 BLA

CHESTER E. WHITED	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KOCH CARBON, INCORPORATED	)	
	)	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 Denying Modification Request of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Chester E. Whited, Raven, Virginia, *pro se*.

Laura Metcoff Klaus and Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Modification Request (1999-BLA-1374) of Administrative Law Judge Pamela Lakes Wood 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).[1] The

[1]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

administrative law judge determined that claimant timely sought modification of Administrative Law Judge Stuart A. Levin's Decision and Order denying benefits, but found that claimant failed to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. 725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of modification. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to 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

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January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In denying claimant's request for modification pursuant to Section 725.310 (2000), the administrative law judge properly determined that the sole issue was whether there was a mistake in a determination of fact in Judge Levin's Decision and Order issued on June 1, 1998, as claimant did not submit any new evidence and thus could not establish a change in conditions.[2] Decision and Order at 3; *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Inasmuch as the prior denial of benefits was premised upon Judge Levin's finding that the weight of the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), Judge Wood reviewed Judge Levin's Decision and Order and the evidence upon which it was based in order to determine whether the ultimate fact, *i.e.*, that claimant was not entitled to benefits, was mistakenly decided. *Id.*

Judge Levin found that the only evidence of record which supported a finding of total respiratory disability consisted of the qualifying results of an exercise blood gas study obtained on September 9, 1996,[3] and the medical opinion of Dr. Forehand, who specifically cited these results as the basis for his evaluation of the degree of claimant's respiratory impairment. Director's Exhibits 19, 20, 61 at 2. Judge Levin determined, however, that Dr. Forehand did not have access to the later clinical data which showed significant improvement in claimant's blood gases. Director's Exhibit 61 at 3. Judge Levin concluded that Dr. Forehand's opinion was outweighed by the contrary probative evidence, as the pulmonary function studies of record were non-qualifying; the blood gas studies obtained on December 9, 1996, produced non-qualifying values; there was no evidence of cor pulmonale with right sided congestive heart failure; and the opinions of Drs. Sargent, Branscomb, Castle and Fino, that claimant had no respiratory or pulmonary impairment, were entitled to greater weight, as

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[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) (2000).

these physicians had a more comprehensive data base upon which to evaluate claimant's condition than was available to Dr. Forehand. Director's Exhibit 61 at 2-3. Further, Judge Levin found that the record as a whole did not refute the observations of Drs. Castle, Branscomb and Sargent that the qualifying results of the exercise blood gas study obtained in September 1996 did not reflect a chronic or irreversible impairment because by December 1996, claimant had no respiratory impairment indicated by physical examination findings, pulmonary function testing or blood gas yields. Director's Exhibit 61 at 3.

Claimant contends that Judge Wood erred in finding no mistake in Judge Levin's factual findings, arguing that the non-qualifying blood gas study results obtained on exercise by Dr. Sargent on December 9, 1996, *see* Director's Exhibit 49, should not have been credited because the blood sample was drawn after, rather than during, exercise, and thus the test was not performed in accordance with the provisions at 20 C.F.R. §718.105(b) (2000). Claimant maintains that both administrative law judges should have found entitlement established based upon Dr. Forehand's 1996 opinion that claimant was totally disabled due to pneumoconiosis, which claimant asserts was well reasoned and documented because it was supported by Dr. Forehand's findings on examination, claimant's history, and his qualifying blood gas study results on exercise. Claimant essentially seeks a reweighing of the evidence, which is beyond the scope of our review. *See O'Keeffe, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988).

After consideration of Judge Wood's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and that there is no reversible error contained therein. Assuming *arguendo* that claimant is correct in his assertion that the December 9, 1996 exercise blood gas test was not performed in accordance with the provisions at Section 718.105(b),[4] any error in Judge Levin's weighing of this evidence is harmless in light of the totality of the evidence, and does not affect the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-378 (1983). Judge Wood acted within her discretion as trier of fact in finding no mistake in Judge Levin's conclusion that Dr. Forehand's 1996 opinion was outweighed by the contrary probative evidence, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); and Judge Wood additionally found that the new evidence submitted by employer, consisting of Dr. Forehand's report of his examination and testing of claimant on April 28, 1999, a pulmonary function study obtained on July 10, 1997, office notes by Dr. Peralta, and a supplemental consultative report by Dr. Fino dated May 4, 2000, provided further support for Judge Levin's denial of benefits and bolstered Judge Wood's

[4]A review of the record reveals that claimant did not raise a challenge to the validity of this evidence at any time prior to the filing of claimant's reply to employer's response brief in this appeal.

finding that no mistake in a determination of fact was demonstrated. Decision and Order at 3; Employer's Exhibits 1-4; *Jessee, supra*. Although claimant argues that Dr. Forehand's 1999 opinion, that claimant has no work-limiting respiratory impairment, should not be credited, there is no support in the record for claimant's assertion that Dr. Forehand's 1999 opinion is hostile to the Act and is equivocal in comparison to his 1996 opinion. Employer's Exhibit 1. Further, Dr. Forehand's 1999 exercise blood gas study results are non-qualifying and were interpreted as demonstrating a normal response to exercise, and there is no merit to claimant's argument that, pursuant to the provisions at Section 718.105(b), this test should not have been administered.[5] Inasmuch as Dr. Forehand has changed his assessment of disability, claimant cannot meet his burden of establishing total respiratory disability pursuant to Section 718.204(c)(1)-(4) (2000).[6] Consequently, we affirm Judge Wood's denial of modification pursuant to Section 725.310 (2000), as supported by substantial evidence and within her discretion, and affirm her denial of benefits. *Jessee, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[5]Contrary to claimant's arguments, although the regulation provides that if the results of a blood gas test at rest are non-qualifying, an exercise blood gas test shall be offered to the miner unless medically contraindicated, the regulation does not prohibit exercise testing when the results at rest are qualifying. 20 C.F.R. §718.105(b).

[6]The administrative law judge applied the disability regulation set forth at 20 C.F.R. §718.204(c) (2000). After revision of the regulations, the disability regulation is now set forth at 20 C.F.R. §718.204(b) (2001).

REGINA C. McGRANERY
Administrative Appeals Judge