BRB No. 00-1184 BLA

HAROLD COOPER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
IDA MAE COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ron Carson (Stone Mountain Health Services), Vansant, Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (00-

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative

BLA-0282) of Administrative Law Judge Linda S. Chapman 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, the

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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 Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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

administrative law judge considered the newly submitted evidence and the evidence from the prior claims together, and found it insufficient to establish total disability, and thus insufficient to establish a change in conditions. The administrative law judge also found that no mistake in a determination of fact had been made in the previous adjudication of this claim.[3] *See* 20 C.F.R. §§718.204(b)(2)(i)-(iv); 725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the findings of the administrative law judge. Employer has not filed a brief in this appeal. 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

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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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot arguments made by the parties regarding the impact of the challenged regulations.

[3] Since the miner's last coal mine employment took place in Virginia, the Board will apply the law as set forth by the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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).

In order to establish entitlement to benefits under 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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*).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. Further, if claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits. *Jessee v. Director, OWCP*, 5 F.3d 723, BLR 2-26 (4th Cir. 1993).

In determining whether claimant has established modification pursuant to Section 725.310 (2000), the administrative law judge's 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 an element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992); *Wojtowicz v. Dusquesne Light Co.*, 12 BLR 1-162 (1989); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

After consideration of the administrative law judge's Decision and Order, the arguments raised 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 correctly found that the newly submitted pulmonary function studies were non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. § 718.204(b)(2)(i); Director's Exhibits 47, 49. Likewise, the administrative law judge correctly found that inasmuch as the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(iii).

Turning to the other new evidence, the administrative law judge rationally concluded

that Dr. Jones's opinion fell short of evidence necessary to establish a totally disabling respiratory impairment because Dr. Jones concluded that both cigarette smoking and coal mine employment may contribute to the mild obstructive impairment shown by claimant's pulmonary function study and Dr. Jones conceded that she had only "limited contact," with claimant. *See* Director's Exhibit 47; *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge therefore properly found that the medical opinion evidence did not establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv), and that the newly submitted medical evidence, considered in conjunction with previously submitted evidence, did not establish a totally disabling respiratory impairment, an essential element of entitlement, and a basis for modification. *See Jessee*, *supra*; *see also Fields*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge