BRB No. 02-0312 BLA

LAWRENCE GRIFFITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	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 on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Lawrence Griffith, Raven, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Remand (2000-BLA-767) of Administrative Law Judge John C. Holmes denying modification and 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

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

Act).[2] This case has been before the Board previously. The administrative law judge, in his prior Decision and Order, properly noted that the parties agreed to a decision on the record and that the instant claim was a modification request of a previous denial.[3] Decision and Order dated August 9, 2000 at 1-2. The administrative law judge, after noting that the prior claims were denied because claimant failed to establish total disability, concluded that the new medical evidence strongly confirms the previous judicial determinations. Decision and Order dated August 9, 2000 at 1. Accordingly, benefits were denied. On appeal, the Board vacated the administrative law judge's denial of modification and benefits and remanded the case for complete consideration and evaluation of the newly submitted and prior medical evidence and to specifically address whether there has been a change in condition or a mistake in fact of the prior decision.

On remand, the administrative law judge, noting the proper standard and that the claim had been denied as claimant failed to establish total disability, initially reviewed the prior denial of benefits and then considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310 (2000).[4] Decision and Order on Remand at 1-2.

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[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Griffith v. Dominion Coal Corp.*, BRB No. 98-0531 BLA (January 5, 1999)(unpublished), which is incorporated herein by reference.

[4]The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

Accordingly, benefits were denied. In the instant appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the Decision and Order on Remand of the administrative law judge as supported by substantial evidence. 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. *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). 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).

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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order on Remand, 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 United States Court of Appeals for the Fourth Circuit held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), with respect to modification, that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made, even where no specific allegation has been asserted.[5] Furthermore, in determining whether the requesting party has established modification pursuant to 20 C.F.R. §725.310 (2000), the 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 the element or elements of entitlement which defeated

[5]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*); Director's Exhibit 2.

entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(b) and therefore insufficient to establish modification.[6] *Jessee, supra; Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Considering the newly submitted and prior evidence to determine if a basis for modification was established, the administrative law judge permissibly found that the evidence was insufficient to establish total disability under Section 718.204(b)(2)(i), (ii) as all of the pulmonary function and blood gas study evidence of record was non-qualifying.[7] *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Director's Exhibits 10, 12, 53; Employer's Exhibits 1, 2; Decision and Order on Remand at 2. The administrative law judge further properly found that total disability was not established pursuant to Section 718.204(b)(2)(iii) as there is no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* Decision and Order on Remand at 2.

Moreover, the administrative law judge considered the newly submitted and prior medical opinion evidence of record and rationally concluded that the opinions were insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*. The administrative law judge properly determined that the medical opinions of record were insufficient to establish total disability as none of the physicians stated that claimant was totally disabled. *Clark v.*

[6]The administrative law judge properly determined that claimant's prior claim was denied because the evidence of record was insufficient to establish total disability. Decision and Order on Remand at 1; Director's Exhibits 39, 46, 53.

[7]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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Gee, supra*; *Perry, supra;* Decision and Order on Remand at 2; Director's Exhibits 11, 47, 53; Employer's Exhibits 1-3. The administrative law judge permissibly concluded that the opinion of Dr. Modi, advising claimant to have no further exposure to dust and fumes, was insufficient to meet claimant's burden of proof as such an opinion is insufficient to establish the existence of a totally disabling impairment. *Taylor v. Director, OWCP*, 12 BLR 1-83 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); Decision and Order on Remand at 2; Director's Exhibit 47.

The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge rationally found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(b)(2)(iv) and were thus insufficient to establish a basis for modification pursuant to Section 725.310 (2000).[8] *Nataloni, supra*; *Wojtowicz, supra*; *Kovac, supra*; *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Therefore, the administrative law judge's denial of claimant's petition for modification is supported by substantial evidence and is in accordance with law. *Jessee, supra*. Inasmuch as claimant has failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000), we affirm the denial of benefits. *Jessee, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying modification and benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[8]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge