BRB No. 03-0125 BLA

GUY SHORTRIDGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIONEER COAL COMPANY	)	
	)	DATE ISSUED: 09/17/2003
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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Timothy W. Gresham (PennStuart), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Rejection of Claim (2002-BLA-249) of Administrative Law Judge Edward Terhune Miller with respect to 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 relevant procedural history of this case is as follows. Claimant, a living miner, filed an application for benefits on March 20, 1986. Director's Exhibit 1. This claim was denied by Administrative Law Judge John H. Bedford in a Decision and Order issued on June 4, 1990. Judge Bedford determined that claimant established the existence of pneumoconiosis, but found that the evidence of record did not support a finding of total respiratory or pulmonary disability.

Accordingly, benefits were denied. Director's Exhibit 91. Upon consideration of claimant's appeal, the Board affirmed Judge Bedford's findings and the denial of benefits in a Decision and Order dated October 23, 1991. *Shortridge v. Pioneer Coal Co.*, BRB No. 90-1705 BLA (Oct. 23, 1991)(unpub.); Director's Exhibit 101. Claimant appealed to the United States Court of Appeals for the Fourth Circuit, which remanded the case for reconsideration of whether Dr. Baxter's opinion contained a diagnosis of a totally disabling respiratory or pulmonary impairment.[1] *Shortridge v. Pioneer Coal Co.*, No. 91-1234 (4th Cir. June 26, 1992); Director's Exhibit 106.

On remand, the case was assigned to Administrative Law Judge Robert L. Hillyard because Judge Bedford had left the Office of Administrative Law Judges (OALJ). In a Decision and Order issued on June 11, 1993, Judge Hillyard determined that the medical opinions of record were insufficient to prove that claimant suffered from a totally disabling respiratory or pulmonary condition. Accordingly, benefits were denied. Director's Exhibit 111. The Board affirmed Judge Hillyard's findings and the denial of benefits in a Decision and Order dated July 26, 1994. *Shortridge v. Pioneer Coal Co.*, BRB No. 93-1820 BLA (July 26, 1994)(unpub.); Director's Exhibit 121. Upon consideration of claimant's appeal, the Fourth Circuit affirmed the Board's Decision and Order in an unpublished opinion. *Shortridge v. Pioneer Coal Co.*, No. 94-2044 (4th Cir. July 21, 1995); Director's Exhibit 124.

Claimant filed his first request for modification within one year of the date of the Fourth Circuit's decision and submitted new evidence. In a Decision and Order dated July 7, 1998, Judge Hillyard determined 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. Director's Exhibit 167. The Board affirmed the denial of benefits in a Decision and Order dated September 20, 1999 and denied claimant's subsequent request for reconsideration in an Order dated April 12, 2000. *Shortridge v. Pioneer Coal Co.*, BRB No. 98-1387 BLA (Sept. 20, 1999)(unpub.); *Shortridge v. Pioneer Coal Co.*, BRB No. 98-1387 BLA (Apr. 12, 2000)(unpub. Order); Director's Exhibits 176, 179. The Fourth Circuit dismissed claimant's appeal of the Board's Order denying his request for reconsideration because the Board's Order was not subject to appellate review. *Shortridge v. Pioneer Coal Co.*, No. 00-1679 (4th Cir. October 25, 2000); Director's Exhibit 181.

Claimant submitted new evidence to the district director within one year of the date of the Fourth Circuit's decision. Director's Exhibit 182. The district director construed claimant's submission as a request for modification and issued a Proposed

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Decision and Order Denying Request for modification. Director's Exhibit 185. At claimant's request, the case was transferred to the OALJ for hearing and assigned to Administrative Law Judge Edward Terhune Miller (the administrative law judge).

In the Decision and Order that is the subject of this appeal, the administrative law judge noted that the issue before him was whether claimant established either a mistake of fact in the prior denial of his claim or a change in conditions pursuant to Section 725.310 (2000).[2] The administrative law judge found that total respiratory or pulmonary disability was the element of entitlement with respect to which claimant was required to demonstrate a change in conditions. The administrative law judge determined that claimant did not establish the presence of a mistake in a determination of fact in the prior denial of benefits nor did he prove that he is now totally disabled pursuant to 20 C.F.R. §718.204(b)(2).[3] Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the newly submitted blood gas study evidence under Section 718.204(b)(2)(ii). Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief in this appeal.[4]

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=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The record on modification includes the results of six blood gas studies obtained since the prior denial of benefits. Employer's Exhibits 1, 6-8. The administrative law

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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). The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. §725.310, do not apply to requests for modification of claims filed before January 19, 2001. 20 C.F.R. §725.2.

[3] The regulations pertaining to proof of the existence of a totally disabling respiratory or pulmonary impairment, previously set forth in 20 C.F.R. §718.204(c) (2000), are now set forth in 20 C.F.R. §718.204(b).

[4] We affirm the administrative law judge's finding that claimant did not establish a mistake of fact in the prior denial of benefits and his finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i), (iii), and (iv), as claimant has not challenged these determinations on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge indicated correctly that all of the exercise studies produced nonqualifying values, while the most recent resting blood gas study was qualifying. The administrative law judge determined that:

> While the qualifying resting study is the most recent study of record, it is not entitled to determinative weight because the study occurred only one month after an entirely nonqualifying study (E-7), because the study produced normal results after exercise, and because Dr. Forehand, who administered the study, opined that it did not evidence a respiratory impairment of a gas exchange nature (E-6). Accordingly, because the majority of the resting arterial blood gas studies produced normal values, and because the entirety of the exercise studies produced normal values, this tribunal finds that Claimant has not established total disability by a preponderance of the evidence pursuant to §718.204(b)(2)(ii).

Decision and Order at 8. Claimant argues that the administrative law judge did not properly consider the qualifying study, as the values it produced indicate that claimant's respiratory disease has progressed, no subsequent studies suggest that the results of this study are not valid, and the regulations do not mandate that a nonqualifying exercise study is more credible than a resting study obtained on the same date.

These contentions are without merit. The administrative law judge rationally determined that the qualifying blood gas study did not support a finding of total disability based upon the administering physician's conclusion that it did not indicate the presence of an impairment and upon the administrative law judge's correct determination that the preponderance of the blood gas studies of record, including a contemporaneous study, produced nonqualifying values. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991). We affirm, therefore, the administrative law judge's finding that the newly submitted blood gas studies of record are insufficient to establish total disability pursuant to Section 718.204(b)(2)(ii). Thus, we also affirm his finding that claimant has not established the requisite change in conditions pursuant to Section 725.310.

Accordingly, the Decision and Order – Rejection of Claim of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER S. GABAUER, Jr.
Administrative Appeals Judge