

BRB No. 03-0846 BLA

CLARENCE SIZEMORE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	
CORPORATION)	
)	DATE ISSUED: 09/30/2004
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 Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (02-BLA-362) of Administrative Law Judge Edward Terhune Miller 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 instant case involves claimant’s appeal

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

of the denial of his request for modification of a duplicate claim. The complete procedural history of this case may be found in *Sizemore v. Eastern Associated Coal Co.*, BRB No. 00-0348 BLA (Nov. 29, 2000)(unpub.); Director's Exhibit 56.

In its November 29, 2000 Decision and Order, the Board affirmed the findings of Administrative Law Judge Jeffrey Tureck that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4) (2000), and that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), as these findings were unchallenged on appeal. The Board then affirmed Judge Tureck's finding that the then newly submitted evidence was insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and the Board affirmed the administrative law judge's finding that claimant failed to demonstrate a material change in conditions at 20 C.F.R. §725.309 (2000). Thus, the Board affirmed Judge Tureck's denial of benefits. *Sizemore*, BRB No. 00-0348 BLA (Nov. 29, 2000)(unpub.); Director's Exhibit 56.

On May 21, 2001, claimant filed a Petition for Modification. On September 11, 2003, Administrative Law Judge Edward Terhune Miller (the administrative law judge) issued the Decision and Order – Denying Benefits, which is the subject of this appeal. The administrative law judge noted that this case involved a modification of a duplicate claim. He detailed the evidence submitted since the last denial and found that claimant did not establish a change in conditions, or a mistake in a determination of fact. Consequently, the administrative law judge found that claimant failed to establish a basis for modification.

On appeal, claimant maintains that the administrative law judge erred in weighing the evidence regarding the existence of complicated pneumoconiosis. Claimant also asserts that the administrative law judge erred by not performing an “equivalency determination.” Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.²

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.

² We affirm the administrative law judge's findings that the evidence does not demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4), or 20 C.F.R. §718.204(b)(2)(i)-(iv), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's finding at Section 718.304, that the evidence fails to establish the existence of complicated pneumoconiosis, is supported by substantial evidence and is in accordance with law. We first affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions. The administrative law judge properly considered the qualifications of the physicians interpreting the x-ray evidence, as well as the quantity of the x-ray evidence, in finding that the newly submitted evidence does not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 11; Director's Exhibit 63; Employer's Exhibits 2-5. Moreover, the administrative law judge properly determined that none of the other newly submitted medical evidence of record supports a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) or (c). Employer's Exhibits 1-2, 6-8.

In addition, we hold that the administrative law judge properly evaluated the evidence in finding that there was no mistake in a determination of fact in Judge Tureck's prior consideration of the evidence at Section 718.304. Decision and Order at 8. Although the record considered by Judge Tureck contains one medical opinion that is probative of the issue of complicated pneumoconiosis, namely the opinion of Dr. Gaziano, Director's Exhibit 13, the administrative law judge reasonably found this opinion to be equivocal and unreasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 8. Consequently, as there is no evidence in the record that would require the administrative law judge to make an equivalency determination, *see Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), the administrative law judge did not err in failing to make such a determination.

Because claimant has failed to establish a change in conditions or a mistake in a determination of fact, we affirm the administrative law judge's determination that claimant has not established a basis for modification pursuant to 20 C.F.R. §725.310 (2000). *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge