

BRB No. 96-1395 BLA

PAULINE BROWN	)	
(Widow of HERBERT BROWN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
	)	
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 Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Pauline Brown, Oakwood, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant<sup>1</sup>, without the assistance of counsel, appeals the Decision and Order on

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<sup>1</sup>Claimant is Pauline Brown, the miner's widow. Herbert Brown, the miner, filed a claim for benefits on February 11, 1981, which was denied on May 19, 1981. Director's Exhibit 28. The miner filed a second claim for benefits on August 5, 1983. Director's Exhibit 1. The miner died on August 21, 1987 and claimant filed a survivor's claim on October 27, 1987. Director's Exhibits 47, 52. Claimant filed a petition of modification of the

Remand (90-BLA-2164) of Administrative Law Judge Joan Huddy Rosenzweig 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). This claim is before the Board for the second time. In the initial Decision and Order on the miner's claim, Administrative Law Judge Nicholas J. Laezza found that the miner established thirty-one and one-half years of qualifying coal mine employment, a material change in conditions pursuant to 20 C.F.R. §725.309 and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (2), (4) and 718.203(b), but failed to establish total respiratory disability pursuant 20 C.F.R. §718.204(c). Accordingly, benefits were denied on the miner's claim. Subsequently, the miner died and claimant filed a survivor's claim and a petition for modification in the miner's claim. On modification, Administrative Law Judge Joan Huddy Rosenzweig determined that claimant failed to establish a change in conditions in the miner's claim pursuant to Section 725.310 and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied on both the miner's claim and the survivor's claim.

On appeal, the Board affirmed the administrative law judge's findings that claimant failed to establish a change in conditions pursuant to Section 725.310 and that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c). The Board remanded the case, however, for the administrative law judge to determine whether claimant established a mistake in a determination of fact pursuant to Section 725.310. *Brown v. Island Creek Coal Co.*, BRB No. 92-1621 BLA (Mar. 30, 1995)(unpub.). On remand, the administrative law judge found that claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Pursuant to 20 C.F.R. §725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed

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miner's claim pursuant to 20 C.F.R. §725.310 on February 16, 1987. Director's Exhibit 56.

circumstances or there was a mistake in a determination of fact in the earlier decision. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In determining whether claimant has established a mistake in a determination of fact pursuant to Section 725.310, the administrative law judge must consider the evidence of record to determine if the evidence is sufficient to establish the element or elements 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), modifying 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). In the instant case, in order to establish a mistake in a determination of fact pursuant to Section 725.310, claimant must establish that the evidence of record establishes the existence of total respiratory disability pursuant to Section 718.204(c).

Upon considering all of the evidence in this case, the administrative law judge properly determined that none of the pulmonary function study or blood gas study evidence of record yielded qualifying results and that the record does not contain evidence of cor pulmonale with right sided congestive heart failure.<sup>2</sup> Decision and Order at 2; Director’s Exhibits 17, 20. Thus, we affirm the administrative law judge’s finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1)-(3).

The administrative law judge then considered the medical opinion evidence of record, which consists of the opinions of thirteen physicians, and properly found that none of these physicians opined that the miner had total respiratory disability. Director’s Exhibits 21, 22, 47- 49, 52, 54-56, 64, 65; Employer’s Exhibits 6-9. Thus, we affirm the administrative law judge’s finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4). The administrative law judge is empowered to weigh the evidence and to draw her 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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge’s finding that claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310 and the denial of benefits. *Jessee, supra*.

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

SO ORDERED.

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<sup>2</sup>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. A “non-qualifying” study exceeds those values. See 20 C.F.R. §718.204(c)(1), (2).

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge