BRB No. 99-1321 BLA

JOHN H. SHORT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

John H. Short, Powhatan, Virginia, *pro se*.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denying Modification (99-BLA-0204) of Administrative Law Judge Daniel F. Sutton 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). The parties stipulated to eleven years of coal mine employment. This case has been before the Board several times. Claimant's initial claim for benefits was filed on September 16, 1981, and denied by Administrative Law Judge Jeffrey Tureck on August 12, 1987, because claimant failed to establish total disability at 20 C.F.R. §718.204(c). Director's Exhibits 1, 74, 78. Claimant appealed, and in *Short v. Director, OWCP*, BRB No. 87-2249 BLA (Mar. 15, 1990)(unpub.), the Board vacated the Judge Tureck's Decision and Order and remanded the case for a *de novo* review of the evidence. Director's Exhibit 45. On May 7, 1992, Administrative Law Judge Robert J. Feldman found that claimant established the existence of pneumoconiosis arising out of coal

mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but failed to establish total disability at Section 718.204(c) and denied benefits. Director's Exhibit 78. Claimant appealed, and in *Short v. Director, OWCP*, BRB No. 92-1754 BLA (Oct. 29, 1993)(unpub.), the Board affirmed the denial of benefits. Claimant filed timely motions for reconsideration, which the Board denied in its Orders in *Short v. Director, OWCP*, No. 92-1754 BLA (Jan. 5, 1994) and *Short v. Director, OWCP*, No. 92-1754 BLA (July 6, 1994) (unpub.). Director's Exhibits 91, 93. Claimant appealed, and the United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case lies, affirmed the Board's denial of benefits in *Short v. Director, OWCP*, No. 94-1908 (Sept. 12, 1995)(unpub.). Director's Exhibit 98.

Claimant filed a timely request for modification on October 30, 1995, which Judge Tureck denied on November 12, 1996. Director's Exhibits 99, 138. Claimant appealed, and in *Short v. Director, OWCP*, No. 97-391 BLA (Nov. 25, 1997)(unpub.), the Board affirmed the denial of modification. Director's Exhibit 149. Claimant filed a timely motion for reconsideration, which the Board denied in its unpublished Order dated February 11, 1998. Director's Exhibit 154. Claimant filed another timely request for modification on February 13, 1998 and submitted new evidence. Director's Exhibit 166. Administrative Law Judge Daniel F. Sutton (the administrative law judge) reviewed the newly submitted evidence in conjunction with the earlier evidence pursuant to 20 C.F.R. §725.310 and found that the evidence fails to establish either a mistake in a determination of fact or a change in conditions, and therefore fails to establish modification. Accordingly, benefits were denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law. 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).

After careful consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. The administrative law judge properly found that as none of the pulmonary function studies or blood gas studies of record yielded qualifying results, they could not establish total disability. *See* 20 C.F.R. §718.204(c)(1), (2);

[1] 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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Schetroma v. Director, OWCP, 18 BLR 1-19 (1993). In addition, the administrative law judge properly found that as the record contained no evidence of cor pulmonale with right sided congestive heart failure, total disability pursuant to Section 718.204(c)(3) was not established. 20 C.F.R. §718.204(c)(3).

In addressing the medical opinions of record, the administrative law judge properly found that the opinions of Drs. Burke, Esau, and Spagnolo, which found no pulmonary impairment and which were the best supported of record, failed to establish total disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Turning to the other opinions, the administrative law judge found that the opinions of Drs. Lockhart, Lombana and Goodnight which found total disability were not persuasive. The administrative law judge permissibly accorded little weight to Dr. Lockhart's opinion because Dr. Lockhart failed to explain "how his biopsy findings support his conclusion that Claimant is disabled or offer any other explanation for his cursory conclusion." Decision and Order at 7; *see Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). In addition, the administrative law judge properly found Dr. Lombana's statement that claimant is not able to work in a coal mine environment insufficient to establish total disability, Director's Exhibit 161; *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd* 9 BLR 1-104 (1986); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Woody v. Valley Camp Coal Co.*, 73 F.3d 360, 20 BLR 2-113 (4th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), and that Dr. Goodnight's opinion that claimant was disabled from multiple medical problems was insufficient to establish total respiratory or pulmonary disability. Director's Exhibit 79; *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Beatty v. Danri Corp. & Triangle Enterprises*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'ing* 16 BLR 1-11 (1991). Moreover, the administrative law judge properly found that because the opinions of Drs. Lombana and Goodnight neglected "to explain how the objective medical evidence supports their conclusions," they were insufficient to establish a totally disabling respiratory impairment. Decision and Order at 7-8; *see Hobbs*, *supra*; *Carson*, *supra*. Because Dr. Guerrant did not address whether claimant was disabled, the administrative law judge properly found his opinion insufficient to establish total disability. Director's Exhibit 90; *see Budash*, *supra*. Likewise, because Dr. Johnson only stated that claimant should not return to work in the coal industry, the administrative law judge properly accorded his opinion little weight on the issue of total disability. Director's Exhibit 94; Decision and Order at 8; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice*, *supra*. Finally, the administrative law judge permissibly found that Dr. Robinette's opinion "that he was 'hard pressed' to prove total disability in light of the fact that Claimant's functional testing was normal" was, "equivocal at best," and his statement that Claimant is 'probably disabled' on the basis of other medical problems is not sufficient to establish total disability under the Act." Decision and Order at 8; Director's Exhibit 28; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Carson*, *supra*; *Beatty*, *supra*. Accordingly, the administrative law judge properly found that the medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4). We therefore

affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987), *aff'g*, 9 BLR 1-195 (1986).

As claimant failed to establish total disability at Section 718.204(c) based on a review of all the evidence, the administrative law judge properly found that claimant failed to establish a basis for modification, *i.e.*, a mistake in a determination of fact, or a change in conditions pursuant to Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Accordingly, the Decision and Order-Denying Modification of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge