BRB No. 02-0410 BLA

ISAAC O. MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order -- Denying Request for Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Isaac O. Miller, Williamstown, Pennsylvania, *pro se*.

Rita Roppolo (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order -- Denying Request for Modification and Denying Benefits (2001-BLA-00802) of Administrative Law Judge Paul H. Teitler 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] This is the fifth time this case

[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 effective on January 19, 2001, and are codified 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.

has been before the Board. Claimant initially filed this claim on September 5, 1990, which the district director denied. Director's Exhibits 1, 23, 31. Administrative Law Judge Ainsworth H. Brown issued a Decision and Order on May 4, 1992, crediting claimant with ten years of coal mine employment and finding the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to at 20 C.F.R. §§718.202(a)(1) and 718.203(b) (2000). Judge Brown, however, found that the evidence was insufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c) (2000) and denied benefits. *See* Director's Exhibit 57. In the first appeal, the Board affirmed Judge Brown's findings pursuant to Sections 718.202, 718.203 and 718.204(c)(2)-(3), (d)(2) (2000) as unchallenged on appeal, but vacated Judge Brown's findings at Section 718.204(c)(1) and (4) (2000) and remanded this case for further consideration. *See Miller v. Director, OWCP*, BRB No. 92-1709 (Nov. 24, 1993) (unpub.); Director's Exhibit 66.

On remand, Judge Brown again found the evidence of record insufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(1) and (4) (2000) and denied benefits. *See* Director's Exhibit 71. In the second appeal, the Board affirmed Judge Brown's findings at Section 718.204(c)(1) and (4) (2000) and the denial of benefits. *See Miller v. Director, OWCP*, BRB No. 94-3811 (Feb. 27, 1995)(unpub.); Director's Exhibit 79.

Claimant timely requested modification on June 5, 1995, which the district director denied. Director's Exhibit 97. Judge Brown issued a Decision and Order on April 9, 1997, denying modification. Judge Brown found that no mistake in a determination of fact had been made, concluded that the newly submitted evidence failed to demonstrate the presence of a totally disabling respiratory impairment, and therefore, that no change in conditions was established, and denied modification pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 114. In the third appeal, the Board affirmed Judge Brown's findings at Section 718.204(c)(1) and (4) (2000) and his denial of modification. *See Miller v. Director, OWCP*, BRB No. 97-1008 BLA (Mar. 23, 1998)(unpub.); Director's Exhibit 121.

Claimant timely requested modification for the second time on June 9, 1998 which the district director denied. *See* Director's Exhibits 122, 124. Judge Brown considered the newly submitted evidence in conjunction with the previous evidence of record at 20 C.F.R. §718.204(c) (2000), and found it insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 148. Judge Brown also reviewed all of the evidence of record and concluded that a mistake in a determination of fact had not been made. *Id*. Accordingly, he denied modification. On appeal to the Board for the fourth time, the Board affirmed Judge Brown's findings at Section 718.204(c)(1) and (4) (2000) and his denial of modification. *See Miller v. Director, OWCP*, BRB No. 98-0818 BLA (May 8, 2000)(unpub.); Director's Exhibit 154.

Claimant timely requested modification for the third time on January 3, 2001, which the district director denied. *See* Director's Exhibits 155, 158. Judge Teitler (the administrative law judge) considered the newly submitted evidence in conjunction with the previous evidence of record at 20 C.F.R. §718.204(b)(2)(i)-(iv), and found it insufficient to establish a change in condition pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also reviewed all of the evidence of record and concluded that a mistake in a determination of fact had not been made. Accordingly, he denied modification and benefits. On appeal herein, claimant generally challenges the administrative law judge's denial of modification and benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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 rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. 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*).

Claimant may establish a basis for modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000).[2] In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an 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 at least one element of entitlement which defeated entitlement in the prior decision. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53

[2] The amendments to the regulations 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. 20 C.F.R. §725.2

(3d Cir. 1995); *see Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).[3]

After consideration of the administrative law judge's Decision and Order, the arguments of the parties 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.

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

The administrative law judge found that the newly submitted pulmonary function study evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(i).[4] The administrative law judge initially noted that the district director had denied modification upon concluding that the qualifying November 2, 2000, pulmonary function study performed by Dr. Kraynak was non-conforming since the results showed a variation of greater than 5%.[5] Decision and Order at 2; Director's Exhibit 156. The administrative law judge also addressed the two remaining newly submitted pulmonary function studies. The pulmonary function study administered by Dr. Kraynak on September 13, 2001, resulted in qualifying values, but was invalidated by a highly qualified reviewing physician, Dr. Sherman.[6] Decision and Order at 3-5; Director's Exhibit 167; Claimant's Exhibit 1. The administrative law judge further found that the June 20, 2001, non-qualifying pulmonary function study by Dr. Green supports the earlier determination that the pulmonary function study evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i). Decision and Order at 3-5; Director's Exhibit 164. In making this determination, the administrative law judge permissibly credited the invalidation of the September 13, 2001, pulmonary function study by Dr. Sherman because he is "highly qualified as a pulmonary specialist" and his analysis of the values was "more accurate, better reasoned and better supported."[7] Decision and Order at 3-5; *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Bolyard v. Peabody Coal Co.*, 6 BLR 1-767 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).

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[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(iii).

[5] The November 2, 2000, pulmonary function study had been invalidated by a reviewing physician, Dr. Michos. Director's Exhibit 156. The record indicates that Dr. Michos is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 157.

[6] Dr. Kraynak is Board-eligible in family medicine. Claimant's Exhibit 3. Dr. Sherman is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 168.

[7] Although the administrative law judge did not discuss the November 2, 2000, pulmonary function study in depth, it is apparent from his discussion of the more recent studies that this study would be insufficient to carry claimant's burden of establishing a change in condition. Thus, any error on the administrative law judge's part is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In considering whether total disability was established under Section 718.204(b)(2)(ii), the administrative law judge noted that the newly submitted blood gas study was non-qualifying and found that total disability was not established thereunder. *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); Decision and Order at 5; Director's Exhibit 165.

In addition, the administrative law judge correctly found that as the record contains no evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(b)(2)(iii), establishing total disability by this method was precluded. Decision and Order at 5.

In considering whether total disability was established under Section 718.204(b)(2)(iv), the administrative law judge permissibly credited the opinion of Dr. Green, which stated that claimant was not totally disabled from a respiratory standpoint, because it was better supported by the credible objective medical evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 4-6; Director's Exhibits 163, 169. In addition, the administrative law judge reasonably determined that the medical opinion of Dr. Kraynak was entitled to little weight regarding total disability as it was not well-documented and well-reasoned since it was based on discredited pulmonary function studies and contained cursory physical findings. *See Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *see also Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 6; Claimant's Exhibits 2-3. The administrative law judge is empowered to weigh the medical evidence 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, Inc.*, 12 BLR 1-111 (1989). Moreover, since the administrative law judge rationally found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(b), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields, supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(b)(2)(iv).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to demonstrate a change in conditions pursuant to Section 725.310 (2000). Furthermore, the administrative law judge properly reviewed the entire record and rationally concluded that there was no mistake in a determination of fact in the prior denial. Decision and Order at 6.

Therefore, we affirm the administrative law judge's finding that claimant failed to establish entitlement to modification pursuant to Section 725.310 (2000) as it is supported by substantial evidence and is in accordance with law. *See Keating, supra*. Inasmuch as claimant's petition for modification was properly denied pursuant to Section 725.310, we affirm the denial of benefits.

Accordingly, the Decision and Order of the administrative law judge denying modification and benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge