

BRB No. 97-1716 BLA

EDEAM M. MATNEY)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
ISLAND CREEK COAL COMPANY)	
)	
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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Edeam M. Matney, Vansant, Virginia, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (96-BLA-1025) 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 administrative law judge denied claimant's third request for modification after the original denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not a participant in the appeal.

The procedural history of this case is as follows: Claimant filed a claim for

benefits on November 13, 1985. Director's Exhibit 1. After a formal hearing, the claim was denied by Administrative Law Judge Robert M. Glennon on November 4, 1991. Director's Exhibit 64. Applying the regulations at 20 C.F.R. Part 718, Judge Glennon found that the evidence established the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§ 718.202, 718.203, but was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. § 718.204 (c). Within one year of the denial of benefits, claimant filed a motion for modification pursuant to 20 C.F.R. § 725.310. The modification request was denied by Administrative Law Judge Robert S. Amery, after a hearing, in a Decision and Order issued on July 13, 1993. Director's Exhibit 94. Judge Amery considered all of the evidence of record, newly submitted and previously considered, and determined that it overwhelmingly failed to establish total disability at Section 718.204(c). Claimant then submitted additional evidence and filed a second motion for modification. After consideration of the newly submitted evidence, Judge Amery, on May 22, 1995, denied the modification request as he found no change in conditions or mistake in a determination of fact. Director's Exhibit 116. Claimant then filed his third motion for modification accompanied by additional supporting evidence. The case was assigned to Administrative Law Judge Daniel F. Sutton (the administrative law judge) who issued a Decision and Order on July 30, 1997, which is the subject of the instant appeal.

In an appeal by a claimant filed 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 30 U.S. 359 (1965).

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

The administrative law judge initially noted that in a modification proceeding claimant must establish either a change in conditions since the prior denial or a mistake in a determination of fact. He stated that claimant submitted new medical evidence in support of his contention that he is totally disabled due to

pneumoconiosis. The administrative law judge then set forth the standard for determining a change in conditions. He summarized Judge Amery's May 22, 1995 decision and considered the evidence newly submitted by claimant and employer pursuant to 20 C.F.R. § 718.204 (c)(1) - (4). He found that claimant did not establish total disability due to pneumoconiosis by a preponderance of the evidence. He concluded therefore, that claimant did not establish a change in conditions and did not demonstrate any mistake in a determination of fact. Accordingly, claimant's request for modification was denied.

We affirm the administrative law judge's findings at Section 718.204(c) based on the new evidence and therefore affirm his finding that a change in conditions is not established. The administrative law judge properly found that the newly submitted pulmonary function studies and blood gas studies do not establish total disability under Section 718.204(c)(1)-(2). See Director's Exhibit 117; Claimant's Exhibit 1; Employer's Exhibits 1, 13. He also properly found that the record does not contain evidence of cor pulmonale with right sided congestive heart failure, and therefore total disability is not established under Section 718.204(c)(3).

In considering the newly submitted medical opinion evidence, the administrative law judge summarized the reports of four physicians who examined claimant after the issuance of Judge Amery's 1995 decision, and the reports of seven additional non-examining physicians who reviewed the medical evidence of record. Of these, the administrative law judge properly found that only Dr. Robinette, who examined claimant, opined that claimant suffers from a totally disabling respiratory impairment due to pneumoconiosis. Claimant's Exhibit 1. The administrative law judge properly found that Drs. Forehand, Hippensteel and Castle, who also examined claimant, each opined that claimant had no totally disabling respiratory or pulmonary impairment. Director's Exhibit 117; Employer's Exhibits 1, 13. The administrative law judge accorded little weight to the opinion of Dr. Robinette because he found it was not supported by reliable evidence. He noted that, although Dr. Robinette based his opinion on claimant's subjective complaints and a blood gas study which he interpreted as indicative of worsening hypoxemia, the blood gas studies obtained by Drs. Forehand and Castle showed normal resting pO₂ levels, and the resting levels obtained by Dr. Hippensteel demonstrated only minimal hypoxemia. The administrative law judge found that, more importantly, Drs. Hippensteel, Tuteur¹ and

¹ Dr. Tuteur is one of the seven non-examining physicians who opined that claimant does not suffer from a totally disabling respiratory impairment due to pneumoconiosis. Employer's Exhibit 4. The remaining physicians are Drs. Dahhan, Fino, Renn, Abernathy, Sargent and Morgan. Employer's Exhibits 2, 5, 6, 7, 8, 9.

Castle all stated that claimant's pO2 levels have always improved with exercise, thus demonstrating his pulmonary capacity for work. Finally, the administrative law judge found that, in contrast with the other physicians, Dr. Robinette did not discuss the other possible causes of claimant's symptoms² and relied solely on his own data which were inconsistent with the laboratory results obtained by the other physicians. The administrative law judge thus relied on the opinions of Drs. Forehand, Hippensteel and Castle as he found them reasoned opinions, supported by the objective evidence of record, and he concluded that a preponderance of the medical opinion evidence did not establish total disability at Section 718.204(c)(4). The administrative law judge is charged with making factual findings, including evaluating the credibility of witnesses and weighing contradicting evidence. *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). Since the administrative law judge's conclusion is rational and supported by substantial evidence in the record, it, and his consequent conclusion that a change in conditions is not established, is affirmed.

The administrative law judge, however, did not make a proper determination that there was no mistake in a determination of fact. While he summarized the factual findings in Judge Amery's 1995 decision, he did not review the evidence *de novo* as he is required to do on modification. *See Jessee v. Director, OWCP*, 5 F. 3d 723, 18 BLR 2-26 (4th Cir. 1993). We, therefore, remand this case in light of this error for the administrative law judge to consider all of the evidence in order to determine whether there was a mistake in a determination of fact in the prior Decision and Order.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

² Drs. Tuteur and Castle related claimant's mild airways obstruction to tobacco abuse. Employer's Exhibits 4, 13.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge