BRB No. 03-0827 BLA

LAWRENCE T. GOAD, SR.	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED:_____
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Lawrence T. Goad, Sr., Radford, Virginia, *pro se*.

Helen H. Cox (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Modification (2003-BLA-00018) of Administrative Law Judge Robert D. Kaplan denying modification and 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

[1] Brenda Yates, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Yates is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995)(Order).

Act).[2] The administrative law judge noted that the instant claim was a request for modification of a duplicate claim. Decision and Order on Modification at 1-2. The administrative law judge found that the parties did not dispute the prior finding of eight years and nine months of coal mine employment and, based on the date of filing, considered entitlement in this living miner's claim pursuant to 20 C.F.R. Part 718.[3] Decision and Order on Modification at 2-4; Director's Exhibits 2, 4. The administrative law judge, noting the proper standard and that the claim had been denied as claimant failed to establish total disability, initially reviewed the prior denial of benefits and then considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and thus neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310. Decision and Order on Modification at 3-5. Accordingly, benefits were denied.

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[2] 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 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.

[3] Claimant filed his initial claim for benefits on May 29, 1980, which was denied by the Department of Labor on June 12, 1981. Director's Exhibit 21. Claimant took no further action until he filed a second application for benefits on July 27, 1988, which was denied by reason of abandonment on December 2, 1990. Director's Exhibit 21. Claimant filed a second duplicate claim on August 25, 1993, which was finally denied by Administrative Law Judge George Fath on February 6, 1995 as claimant, although establishing a material change in conditions based upon the Director's concession with respect to the existence of pneumoconiosis, failed to establish that the pneumoconiosis arose out of coal mine employment or that he was totally disabled. Director's Exhibits 1, 28. Claimant requested modification on February 2, 1996, which was denied by the district director on March 8, 1996. Director's Exhibits 34, 35. Claimant submitted additional evidence on August 23, 1996, which was construed to be a request for modification. On November 23, 1998, Administrative Law Judge Edward Terhune Miller found that although claimant established that his pneumoconiosis arose out of coal mine employment, he failed to establish the existence of total disability. Director's Exhibits 36, 50. This denial was affirmed by the Benefits Review Board on May 31, 2000. Director's Exhibits 51, 56. Claimant again requested modification on April 18, 2001, which was denied by the district director on June 25, 2001 and September 28, 2001. Director's Exhibits 61, 64. Claimant requested modification for the fourth time, the subject of the instant appeal, on August 21, 2002, which was denied by the district director. Director's Exhibits 65, 68. Claimant requested a formal hearing and the case was referred to the Office of Administrative Law Judges on October 17, 2001. Director's Exhibits 69, 70, 71.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order on Modification, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The United States Court of Appeals for the Fourth Circuit held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), with respect to modification, that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made, even where no specific allegation has been asserted.[4] Furthermore, in determining whether the requesting party has established modification pursuant to 20 C.F.R. §725.310, the 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

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 21, 49.

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.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

After considering the newly submitted and prior evidence on modification, the administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b) and therefore insufficient to establish modification.[5] *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Jessee*, 5 F.3d 723, 18 BLR 2-26. The administrative law judge reviewed the relevant evidence of record in the original decision in determining if a mistake in determination of fact was established and properly concluded that the finding of no total disability by Administrative Law Judge Miller was correct. Decision and Order on Modification at 5; *Jessee*, 5 F.3d 723, 18 BLR 2-26.

Considering the newly submitted evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. '718.204(b). *Kuchwara*, 7 BLR 1-167. The administrative law judge, after considering the newly submitted pulmonary function studies of record, properly found that the pulmonary function study evidence was unreliable and thus insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to

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[5]The administrative law judge properly determined that claimant's current application for benefits had been denied because the evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order on Modification at 3-4; Director's Exhibits 28, 50. Therefore, the administrative law judge correctly noted that the newly submitted x-rays which were positive for the existence of pneumoconiosis could not help claimant establish a change in conditions. Decision and Order at 4; Director's Exhibits 57, 59, 65; Claimant's Exhibit 1; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Section 718.204(b)(2)(i) and therefore insufficient to establish modification. *Jessee*, 5 F.3d 723, 18 BLR 2-26; Decision and Order at 4; Director's Exhibits 57, 60, 65, 66; Claimant's Exhibit 2. The administrative law judge rationally determined that the March 23, 2001 and March 22, 2002 pulmonary function studies were entitled to no probative value as they were invalidated by Dr. Michos as the flow volume loops indicated less than optimal effort, cooperation and comprehension. Decision and Order at 4; Director's Exhibits 60, 66; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge, within his discretion as fact-finder, permissibly determined that the February 13, 2003 pulmonary function study does not reliably reflect a finding of total disability as the study does not conform with the requirements set forth in 20 C.F.R. §718.103. *See* 20 C.F.R. §718.103(b), (c); Decision and Order at 4; Claimant's Exhibit 2; *Trent*, 11 BLR 1-26; *Winchester*, 9 BLR 1-177; *Lucostic*, 8 BLR 1-46; *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Consequently, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge permissibly concluded that the relevant newly submitted evidence of record does not establish that claimant is totally disabled by a respiratory or pulmonary impairment, claimant has not met his burden of proof on all the elements of entitlement. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. 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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification and his denial of benefits since the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b) as they are supported by substantial evidence and are in accordance with law.[6] *See Jessee*, 5 F.3d 723, 18 BLR 2-26; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26.

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[6] We note that claimant attempted to submit additional evidence with his Petition for Review. This evidence was subsequently returned to claimant. If claimant believes that this evidence is relevant to his claim, he may file a request for modification before the district director. *See Jessee*, 5 F.3d 723, 18 BLR 2-26; *Lee v. Consolidation Coal Co.*, 843 F.2d 159

Accordingly, the administrative law judge's Decision and Order on Modification 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

(4th Cir. 1988).