

BRB No. 99-1150 BLA

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

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

James Humphrey, Hilliard, Ohio, *pro se*.

Helen H. Cox (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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (96-BLA-1724) of Administrative Law Judge Daniel J. Roketenetz 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 case is before the Board for the second time. Claimant's initial claim for benefits was filed on March 21, 1990. Director's Exhibit 1. Pursuant to that claim, Administrative Law Judge Rudolf L. Jansen found that the parties stipulated to ten years and five months of coal mine employment, and further found that claimant established the existence of pneumoconiosis arising from coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b). Judge Jansen, however, found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c) and accordingly denied benefits. Director's Exhibit 42. Claimant appealed, and in *Humphrey v. Director, OWCP*, BRB No. 94-0386 BLA (June 20, 1994)(unpub.), the Board affirmed the denial.

Director's Exhibit 46. Claimant filed a motion for reconsideration which the Board denied on December 8, 1994. Director's Exhibit 48. Claimant then requested modification and submitted new evidence. Director's Exhibit 49. On modification, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge), considered the newly submitted evidence in conjunction with the prior evidence and found that claimant failed to establish modification by establishing a totally disabling respiratory impairment. 20 C.F.R. §§718.204(c), 725.310. 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), replies, 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).

In considering the evidence on modification, the administrative law judge found that the newly submitted evidence consisted of two physicians' opinions, as well as two pulmonary function studies and two blood gas studies.¹ The administrative law judge properly determined that none of the newly submitted or previously submitted pulmonary function studies² or blood gas studies yielded qualifying results pursuant to 20 C.F.R. §718.204(c)(1) and (c)(2).³ Director's Exhibits 54, 65. Likewise, the administrative law

¹ In considering modification the administrative law judge adopted the standard set forth in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), which was adopted by the United States Court of Appeals for the Sixth Circuit in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

² The administrative law judge stated that the patient's cooperation on the September 5, 1995 pulmonary function study was "lacking," whereas the administrator of the test indicated "fair to good cooperation and comprehension." Decision and Order at 5; Director's Exhibit 65. Any error that the administrative law judge may have committed, however, is harmless, as the test is nonetheless nonqualifying. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

³ 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

judge found the record devoid of any evidence of cor pulmonale with right sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3).

Considering the newly submitted physicians opinions, the administrative law judge found that Dr. Shareef diagnosed hypertension and cardiomegaly, due to arteriosclerotic heart disease. The record shows that Dr. Shareef found no impairment due to pulmonary conditions, but found approximately 20% impairment caused by hypertension and cardiomegaly. Director's Exhibit 54. The administrative law judge found that Dr. Knight diagnosed chronic asthmatic bronchitis and pneumoconiosis, caused by exposure to coal dust in the course of his former employment and opined that claimant was totally and permanently disabled due to respiratory complaints. Director's Exhibit 65.

In a permissible exercise of his discretion, the administrative law judge accorded less weight to Dr. Knight's opinion, as it was inconsistent with the tests he had conducted which were non-qualifying and according to the doctor, showed "normal volume and no apparent obstruction." Decision and Order at 5; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Thus, the administrative law judge permissibly accorded more weight to Dr. Shareef's opinion because it was consistent with and supported by the nonqualifying objective medical evidence. *Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Further, considering the weight of the medical opinion evidence submitted in conjunction with the prior denial, the administrative law judge found that claimant did not establish total disability. Likewise, the administrative law judge found, upon reviewing the prior Decision and Order, that a mistake in a determination of fact had not been established.

We, therefore, affirm the administrative law judge's finding that the evidence fails to establish total disability at Section 718.204(c), and therefore fails to establish a mistake in determination of fact or a change in conditions pursuant to Section 725.310. See *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). As claimant has failed to establish modification pursuant to *Worrell*, the administrative law judge properly denied benefits.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

C.F.R. §718.204(c)(1), (c)(2).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge