

BRB No. 00-0237 BLA

EVELYN PHILLIPS)
(Widow of FRANK G. PHILLIPS))
)
 Claimant-Petitioner)
)
 v.)
)
CLINCHFIELD COAL COMPANY)
)
 Employer-Respondent)
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED) DATE ISSUED: _____
STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Evelyn Phillips, Clintwood, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-

¹Claimant is Evelyn Phillips, widow of Frank G. Phillips, who filed his first claim for benefits on October 1, 1970. Director's Exhibit 23. On July 27, 1982, benefits were awarded on the miner's claim contingent on the termination of his employment within twelve months. *Id.* The record does not indicate that the miner stopped working within the twelve month

0788) of Administrative Law Judge Edward Terhune Miller denying modification on the miner's duplicate 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). Initially, on the duplicate claim, Administrative Law Judge Donald W. Mosser, applying the regulations at 20 C.F.R. Part 718, credited the miner with thirty-nine and one-half years of coal mine employment and found the miner established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). Director's Exhibit 58 at 8. Judge Mosser found, however, that the miner failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 58 at 10-11. Accordingly, benefits were denied.

The miner appealed to the Board, and the Board affirmed the denial of benefits. Director's Exhibits 59, 66. The miner subsequently appealed to the United States Court of Appeals for the Fourth Circuit, which denied his appeal on August 2, 1993. Director's Exhibit 68.

On March 17, 1994, the miner requested modification, which the district director denied. Director's Exhibits 69, 70, 72. When the case was transferred to the Office of Administrative Law Judges [OALJs], Judge Mosser denied modification, finding the miner failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a). Director's Exhibit 101 at 5-7. The miner appealed to the Board. Director's Exhibits 102. While his appeal was pending before the Board, the miner died on April 9, 1997. Director's Exhibit 108. The Board affirmed Judge Mosser's denial of modification on December 23, 1997. Director's Exhibit 107. Thereafter, claimant requested modification on September 22, 1998, which the district director denied. Director's Exhibits 108, 111. Claimant requested a hearing before the OALJs, where the case was assigned to Administrative Law Judge Edward Terhune Miller.

Judge Miller [hereinafter, the administrative law judge] credited the miner with at least thirty-nine years of coal mine employment. Decision and Order at 4. The administrative law judge found that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order at 5-7. Additionally, the administrative law judge found that claimant failed to establish a change in

period, and, therefore, the claim was denied and administratively closed. *Id.* The miner's second claim for benefits was filed on May 19, 1987. Director's Exhibit 1.

²Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a). Accordingly, modification was denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

Initially, the administrative law judge noted that when this case was previously adjudicated, claimant established the existence of pneumoconiosis, but failed to establish total respiratory disability due to pneumoconiosis. Decision and Order at 4-5. Therefore, the administrative law judge stated that claimant must establish total respiratory disability due to pneumoconiosis in order to establish a change in conditions. *Id.*

The administrative law judge considered the new evidence relevant to Section 718.204, which includes one non-qualifying blood gas study and medical opinions by Drs. Vanover, Caffrey, and Castle. Director's Exhibits 110, 114; Employer's Exhibit 7. Dr. Vanover, who treated the miner's cancer, noted under the heading "Past Medical History" that the miner "was in excellent health except for low back problems until 8 months prior to this [hospital] admission [on March 18, 1997]." Director's Exhibit 110. Dr. Caffrey opined that the minimal degree of simple coal workers' pneumoconiosis present in the miner would not have caused pulmonary disability. Director's Exhibit 114. Dr. Castle found the miner had no respiratory impairment from any cause after leaving the mines and prior to his development of renal cell or kidney carcinoma. Employer's Exhibit 7.

Considering this new evidence, the administrative law judge noted that the one blood gas test was non-qualifying and that both Drs. Castle and Caffrey opined that the miner did not have a disabling respiratory impairment due to pneumoconiosis. Decision and Order at 7. The administrative law judge concluded that claimant "failed to present any new medical

³A "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 Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(c)(1), (c)(2).

evidence to support [her] claim,” and, therefore, failed to establish a change in conditions pursuant to Section 725.310. *Id.* Inasmuch as this new evidence is insufficient to establish total disability due to pneumoconiosis, we affirm the administrative law judge’s finding. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 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); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990), *citing Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

In considering whether there was a mistake in fact, the administrative law judge, “[a]fter a careful review of the entire record,” found no mistake in a determination of fact. Decision and Order at 7. The administrative law judge reviewed the new evidence in conjunction with the old evidence and concluded that claimant has not established any mistake in fact in any of the prior determinations. *See* Decision and Order at 7. Based on the totality of the administrative law judge’s findings, *see Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983), we affirm the administrative law judge’s denial of modification pursuant to Section 725.310(a) inasmuch as he rationally determined that claimant failed to establish a change in conditions or a mistake in fact, *see* discussion, *supra*; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *Kovac v. BCNR Mining Corp.*, 15 BLR 1-156 (1990), *aff’d on recon.* 16 BLR 1-71 (1992).

Accordingly, the administrative law judge’s Decision and Order denying modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge