

BRB No. 13-0276 BLA

GUY D. SHORTRIDGE)
)
 Claimant-Petitioner)
)
 v.)
)
 PIONEER COAL COMPANY)
)
 and) DATE ISSUED: 12/11/2013
)
 VIRGINIA CASUALTY & PROPERTY)
 INSURANCE GUARANTY)
 ASSOCIATION, as statutory successor to)
 ROCKWOOD INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Guy D. Shortridge, Richlands, Virginia, *pro se*.

John S. Honeycutt (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (11-BLA-0005) of Administrative Law Judge Christine L. Kirby denying claimant's request

to modify the denial of benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case, involving a claim filed on March 20, 1986,¹ has a lengthy procedural history.

In a Decision and Order dated March 8, 2007, Administrative Law Judge Pamela Lakes Wood considered claimant's third request for modification.² Director's Exhibit 247. Judge Wood found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b), the basis for the previous administrative law judge's 2002 decision denying benefits. *Id.* Judge Wood further found that all of the evidence of record, when weighed together, did not establish total disability pursuant to 20 C.F.R. §718.204(b). *Id.* Consequently, Judge Wood found that the evidence did not demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and she denied claimant's third request for modification. *Id.*

Pursuant to claimant's appeal, the Board affirmed Judge Wood's findings that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and therefore affirmed the denial of benefits. *G.S. [Shortridge] v. Pioneer Coal Corp.*, BRB No. 07-0614 BLA (Apr. 15, 2008) (unpub.). The Board subsequently denied claimant's motion for reconsideration. *G.S. [Shortridge] v. Pioneer Coal Corp.*, BRB No. 07-0614 BLA (Sept. 16, 2009) (en banc) (unpub.). On August 17, 2010, the United States Court of Appeals for the Fourth Circuit dismissed claimant's petition for review. Director's Exhibit 257.

Claimant timely filed a fourth request for modification on September 3, 2010. Director's Exhibit 260. In a Decision and Order issued on March 1, 2013, Administrative Law Judge Christine L. Kirby (the administrative law judge) found that the evidence did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, denied claimant's request for modification.

On appeal, claimant generally contends that the administrative law judge erred in denying his request for modification. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

¹ The 2010 amendments to the Act, which became effective on March 23, 2010, do not apply to this case, since it involves a miner's claim filed before January 1, 2005.

² The Board previously set forth the procedural history of this case. *G.S. [Shortridge] v. Pioneer Coal Corp.*, BRB No. 07-0614 BLA, slip op. at 2 n.1 (Apr. 15, 2008) (unpub.).

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.³ 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 under Part 718 in a living miner’s claim, a 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 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).

The administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, “any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility.” *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

The administrative law judge considered the new evidence submitted on modification, and accurately noted that the only new medical evidence submitted by claimant was a list of prescription medications. The administrative law judge correctly found that this evidence was insufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment.⁴ See 20 C.F.R. §718.204(b)(1), (2); *Clay v. Director, OWCP*, 7 BLR 1-82, 1-84 (1984); Decision and Order at 6-7.

Claimant also submitted a document indicating that he had been awarded state workers’ compensation benefits in 1972. Claimant’s Exhibit 2. The administrative law judge, however, permissibly found that the state award was not relevant to a determination of total disability because it was not documented, as the record contained

³ The record indicates that claimant’s coal mine employment was in Virginia and West Virginia. Director’s Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

⁴ The administrative law judge also considered Dr. Castle’s medical report, submitted by employer, in which Dr. Castle reviewed the medical evidence and opined that claimant has no respiratory impairment. Employer’s Exhibit 12.

no evidence to identify the medical or legal criteria that formed the basis for the award. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc); Decision and Order at 5. Additionally, the administrative law judge considered claimant's submission of a "Notice of Initial Finding" dated September 2, 1986, wherein the district director made an initial determination that claimant was entitled to benefits. Claimant's Exhibit 1. The administrative law judge correctly determined that this document was not new evidence that claimant is totally disabled by a respiratory impairment.⁵ Decision and Order at 5.

Further, the administrative law judge examined the evidence of record that was before Judge Wood when she issued her 2007 Decision and Order, including the pulmonary function study, arterial blood gas study, and medical opinion evidence. Decision and Order at 7; Director's Exhibit 247. The administrative law judge determined that Judge Wood made no mistake in a determination of fact when she found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). *Id.* The administrative, therefore, found that claimant failed to establish that there was a mistake in a determination of fact.

Because the record supports the administrative law judge's findings, that neither the new evidence, nor the evidence as a whole, establishes total disability pursuant to 20 C.F.R. §718.204(b), they are affirmed. Consequently, we affirm the administrative law judge's findings that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28. We, therefore, affirm the administrative law judge's denial of claimant's request for modification.

⁵ The record reflects that the district director advised claimant in 1986 that the "Notice of Initial Finding" was not a final determination as employer could contest the claim. Employer, in fact, contested the claim, and benefits were denied. Director's Exhibit 31.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge