

BRB No. 99-0393 BLA

WILLIAM R. COLWELL)
)
 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-Denying Benefits of Donald W. Mosser,
Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative
Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-0801) of
Administrative Law Judge Donald W. Mosser 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 involves a request for modification pursuant to 20 C.F.R. §725.310 and is before the
Board for the second time.¹ The administrative law judge credited claimant with two years of coal
mine employment and found that claimant did not establish a mistake in a determination of fact
pursuant to Section 725.310. The administrative law judge then considered the new evidence

¹Claimant filed his application for benefits on June 24, 1994. Director's Exhibit
1. The district director denied the claim on November 22, 1994, for failure to
establish any element of entitlement. Director's Exhibit 24. Claimant requested a
hearing on December 1, 1994, and a Decision and Order denying benefits was
issued by an administrative law judge on October 28, 1996. Director's Exhibits 25,
36. Claimant appealed to the Board, which affirmed the administrative law judge's
determination that claimant failed to establish total disability, and consequently,
affirmed the denial of benefits. *Colwell v. Director, OWCP*, BRB No. 97-0318 BLA
(Oct. 29, 1997); Director's Exhibit 44. Claimant requested modification of the
decision in his claim on February 2, 1998. Director's Exhibit 45.

submitted by claimant with his request for modification, in conjunction with the old evidence in the record, and found that claimant did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) or 718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in calculating the number of years of coal mine employment and in finding that claimant did not establish the existence of totally disabling pneumoconiosis.² The Director, Office of Workers' Compensation Programs, responds, urging the Board to affirm the finding that claimant has not established total disability pursuant to Section 718.204(c).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

²The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(c)(1) - (3), as well as his determination that claimant did not establish modification on the basis of a mistake in fact pursuant to 20 C.F.R. §725.310 are affirmed as these findings are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In determining whether claimant has established a change in conditions pursuant to Section 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 evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision.³ *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Moreover, an administrative law judge is not required to make a preliminary determination regarding whether claimant has established a basis for modification of the district director's denial of benefits prior to reaching the merits of entitlement. Rather, such a determination is subsumed into the administrative law judge's decision on the merits. Thus, the administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. See *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

After consideration of the administrative law judge's Decision and Order, 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 that there is no reversible error contained therein. Claimant generally challenges the administrative law judge's findings at Section 718.204(c)(4), contending that the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine employment as a truck driver in conjunction with claimant's physical limitations. Claimant's Brief at 9 - 10. Claimant also contends that his age, education, work history, and the progressive nature of pneumoconiosis support a finding that he is totally disabled.

³On modification, claimant submitted a pulmonary function study and medical opinion by Dr. Bushey. Dr. Bushey diagnosed chronic lung disease with pulmonary fibrosis, compatible with pneumoconiosis 2/2, q/p, and stated that claimant shows signs of increased respiratory problems. Dr. Bushey also stated that claimant becomes short of breath with walk of 300 yards on level ground. Director's Exhibits 45, 47.

We agree with claimant that if the evidence is sufficient to allow a proper comparison between a miner's usual employment and his impairment, then the administrative law judge should consider whether the physical limitations listed by a physician constitute a diagnosis of total disability. See *Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). However, in the instant case, the record contains no description of the exertional requirements of claimant's usual coal mine employment as a coal truck driver, and claimant bears the burden to establish the exertional requirements of his usual coal mine employment. See generally *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); see also *Cregger v. United States Steel Corp.*, 6 BLR 1-1219 (1984). As claimant failed to provide a basis for the administrative law judge to compare the limitations listed by Dr. Bushey with claimant's usual coal mine employment, we hold that the administrative law judge committed no reversible error in determining that Dr. Bushey's most recent opinion fails to establish total disability, and thus, that claimant failed to establish a change in conditions pursuant to Section 725.310.⁴ See *Nataloni, supra*; *Onderko, supra*; *Cregger, supra*. Moreover, age, education, work experience and the progressive nature of pneumoconiosis are not relevant factors in establishing total disability pursuant to Section 718.204(c)(4). See 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1- 19 (1987). Therefore, as the administrative law judge's finding is supported by substantial evidence, we affirm his finding that claimant is not totally disabled. Since claimant has failed to establish a necessary element of Part 718 entitlement, an award of benefits is precluded. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We decline to address claimant's contentions regarding the findings at Section 718.202(a)(1) and (a)(4), and regarding the years of coal mine employment, as error therein is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

⁴Drs. Dahhan and Baker opined that claimant retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 10, 12, 13. Dr. Bushey's 1994 opinion lists limitations as a result of claimant's back injury, and his 1995 opinion lists a limitation of shortness of breath at 100 yards of walking on a level ground. Director's Exhibits 11, 33.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge