

BRB No. 99-0483 BLA

JOHN H. WILDER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	DATE ISSUED:
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmund Collett, Hyden, Kentucky, for claimant.

Harold Rader (Law Offices of Neville Smith), Manchester, Kentucky, for employer.

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-0559) of Administrative Law Judge Joseph E. Kane 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). Administrative Law Judge Gerald M. Tierney originally found that the parties stipulated to twenty one years of coal mine employment, and based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. He found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), and accordingly denied benefits. Claimant appealed, and in *Wilder v.*

Shamrock Coal Co., Inc., BRB No. 97-0137 BLA (Aug. 13, 1997)(unpub.), the Board affirmed the denial of benefits. Claimant filed a request for modification on October 8, 1997. Director's Exhibit 47. Pursuant to claimant's request for modification, Administrative Law Judge Joseph E. Kane (the administrative law judge) found that the record supports the parties stipulation and he found twenty-one years of coal mine employment. In considering the newly submitted evidence in conjunction with previously submitted evidence, the administrative law judge determined that claimant failed to establish a change in condition as he failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) and (4), or total disability at Section 718.204(c). The administrative law judge further found that claimant failed to establish a mistake in fact. Accordingly, modification was denied and benefits were again denied. Claimant appeals, contending that the administrative law judge erred in failing to find that modification was established as the newly submitted evidence establishes the existence of pneumoconiosis and total disability. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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).

Claimant argues that the administrative law judge erred in not finding total disability established at Section 718.204(c)(4) based on Dr. Bushey's opinion.¹ The new evidence of record contains the opinions of two physicians, Drs. Bushey and Broudy. Dr. Bushey found that claimant has coal workers' pneumoconiosis and stated, "This man is totally disabled." Director's Exhibit 47. Dr. Broudy, who reviewed Dr. Bushey's opinion and the normal results of 1996 and 1997 pulmonary function studies, stated that Dr. Bushey does not explain the basis for his conclusion, and further states that there is nothing in his own examination which would lead one to conclude that claimant was totally disabled from a respiratory standpoint. Director's Exhibit 49. The administrative law judge properly determined that Dr. Bushey did not explain the basis for his finding of total disability, and that none of the newly submitted objective evidence from Dr. Bushey supports a finding of total disability, Decision and Order at 8. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Peabody v. Hill*, 123 F.3d 412, 416,

¹ We affirm the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

21 BLR 2-192, 2-197 (6th Cir. 1997). We therefore affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at Section 718.204(c), and is therefore insufficient to establish a change in condition pursuant to 20 C.F.R. §725.310. Further, the administrative law judge properly found that as none of the newly submitted evidence established total disability and as none of the previously submitted evidence established total disability, claimant had failed to establish a change in condition or a mistake in fact and that modification must therefore be denied. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

As we affirm the administrative law judge's finding that claimant failed to establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of modification and subsequent denial of benefits. *Worrell, supra; Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).²

² As we affirm on this basis, we need not address claimant's contentions at 20 C.F.R. §718.202(a).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge