

BRB Nos. 86-1227 BLA
and 87-3746 BLA

GEORGE STEFANISKO,)
)
 Claimant-Petitioner)
)
 v.)
)
LEHIGH VALLEY ANTHRACITE,) DATE ISSUED:
INCORPORATED)
)
 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 and the Order Denying Petition for Modification of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Joseph P. Semasek, McAdoo, Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Petition for

Modification (83-BLA-7390) of Administrative Law Judge John C. Holmes denying benefits on a claim filed pursuant to the *Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

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). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with more than twenty years of qualifying coal mine employment, but found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. Claimant filed a Notice of Appeal with the Board dated May 1, 1986, but subsequently filed a Petition for Modification with the administrative law judge on March 3, 1987, on the ground of a change in conditions.¹ Consequently, by Order dated June 17, 1987, the Board dismissed claimant's appeal, BRB No. 86-1227 BLA, without prejudice, and remanded this case to the administrative law judge for modification proceedings. On November 23, 1987, the administrative law judge issued an Order Denying Petition for Modification, which claimant appealed. By Order filed on November 30, 1989, the Board reinstated claimant's original appeal, BRB No. 86-1227 BLA, consolidated

¹ Claimant submitted additional evidence in support of his Petition for Modification.

it with claimant's appeal of the administrative law judge's Order Denying Petition for Modification, BRB No. 87-3746 BLA, and directed claimant to file a consolidated Petition for Review and Brief addressing the issues to be raised in each appeal pursuant to 20 C.F.R. §§802.211, 802.216. In his subsequently filed brief, claimant only challenged the administrative law judge's denial of modification pursuant to 20 C.F.R. §725.310. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.²

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

² The administrative law judge's findings pursuant to Section 718.204, and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Claimant maintains that the newly submitted medical report of Dr. Karlavage, which was not available at the time of the hearing, establishes a change in conditions sufficient to support modification pursuant to Section 725.310. Claimant further contends that the administrative law judge erred in failing to admit this new medical evidence into the record, as the parties would not be prejudiced thereby. Contrary to claimant's arguments, however, the administrative law judge reviewed the newly submitted evidence, and determined that it consisted merely of exercise test results obtained by Dr. Karlavage, without any interpretation thereof from which the administrative law judge could infer total disability due to pneumoconiosis. See generally Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986). Consequently, the administrative law judge permissibly denied claimant's request for modification pursuant to Section 725.310, as no change in conditions was demonstrated. The administrative law judge's finding pursuant to Section 725.310 is supported by substantial evidence and we hereby affirm it.³

Accordingly, the Decision and Order denying benefits and the Order-Denying Petition for Modification of the administrative law judge are affirmed.

SO ORDERED.

³ On appeal, claimant did not allege that there had been a mistake in a determination of fact.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge