

BRB No. 88-4300 BLA

LEE HORNBUCKLE)
)
 Claimant-Petitioner)
)
 v.)
)
 USX CORPORATION)
)
 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 of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Charles S. Murry, Bessemer, Alabama, for claimant.

James N. Nolan (Lange, Simpson, Robinson & Somerville), Birmingham, Alabama, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and FEIRTAG, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (88-BLA-1486) of Administrative Law Judge A. A. Simpson, Jr., denying claimant's request for modification 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). In a Decision and Order *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).

issued on October 28, 1986, Administrative Law Judge Parlen L. McKenna credited claimant with forty-five years of qualifying coal mine employment and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). Judge McKenna further found, however, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c), and accordingly denied benefits. Director's Exhibit 39. Claimant filed a request for modification on August 10, 1987 on the ground of a change in conditions, and submitted new evidence in support thereof. Director's Exhibit 40, Claimant's Exhibits 1-3. After a hearing and de novo review of the new evidence, Administrative Law Judge Simpson found that claimant failed to establish total disability pursuant to Section 718.204(c), and thus the administrative law judge denied claimant's request for modification pursuant to 20 C.F.R. §725.310.

Claimant appeals, challenging the administrative law judge's findings pursuant to Sections 718.204(c) and 725.310. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this

appeal.

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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Claimant maintains that the newly submitted evidence establishes total disability pursuant to Section 718.204(c), and thus establishes a change in conditions sufficient to support modification pursuant to Section 725.310. Contrary to claimant's arguments, however, the administrative law judge properly determined that all of the newly submitted pulmonary function study and blood gas study results

were non-qualifying,¹ and that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. See Claimant's Exhibits 1, 3. The administrative law judge thus reasonably found that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(1) - (c)(3). Decision and Order at 3. In evaluating the newly submitted medical opinions of Drs. Vincent and Harding and records from South Highland Hospital pursuant to Section 718.204(c)(4), the administrative law judge properly found that only Dr. Vincent rendered an opinion as to disability.² Decision and Order at 4; Claimant's Exhibits 1-3. Inasmuch as Dr. Vincent opined that claimant was totally disabled due to his pulmonary condition, his report is sufficient, if fully credited, to establish a change in conditions pursuant to Section 725.310. See generally Spese v. Peabody Coal Co., 11 BLR 1-174 (1988); Searls v. Southern Ohio Coal Co., 11 BLR 1-161 (1988). The administrative law judge, however, permissibly accorded little weight to the opinion

¹ A "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 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

² Claimant maintains that the administrative law judge could infer total disability pursuant to Section 718.204(c)(4), as set forth in Black Diamond Coal Mining Co. v. Benefits Review Board, [Raines], 758 F.2d 1532, 7 BLR 2-209 (11th Cir.), reh'g denied, 768 F.2d 1353 (11th Cir. 1985), from the South Highland Hospital records, which reflect episodes of acute shortness of breath. Claimant's Exhibit 2. We disagree. A medical opinion of "acute shortness of breath" describes merely a symptom, and does not constitute a diagnosis of respiratory impairment. See generally Clay v. Director, OWCP, 7 BLR 1-82 (1984); Parsons v. Director, OWCP, 6 BLR 1-272 (1983).

of Dr. Vincent, as the physician did not explain how he reached his assessment of total disability in light of the non-qualifying objective tests he relied on, see generally Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); Oggero v. Director, OWCP, 7 BLR 1-860, 1-865 (1985); and as his report does not reflect any knowledge of the nature of claimant's usual coal mine employment duties. See Newland v. Consolidation Coal Co., 6 BLR 1-1286 (1984). The administrative law judge further acted within his discretion in finding that the opinion of Dr. Branscomb, who concluded that claimant could perform his usual coal mine employment from a respiratory standpoint, was entitled to determinative weight as it was supported by the objective evidence of record. Director's Exhibit 23; see King v. Consolidation Coal Co., 8 BLR 1-262 (1985); Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); Lucostic, supra. Consequently, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(c)(4), and thus denied claimant's request for modification pursuant to Section 725.310 as no change in conditions was demonstrated. See Kovac v. BCNR Mining Corp., 14 BLR 1-156 (1990). The administrative law judge's findings pursuant to Sections 718.204(c) and 725.310 are supported by substantial evidence and we hereby affirm them. Inasmuch as claimant has failed to establish a requisite element of entitlement, i.e., total disability, claimant is precluded from entitlement to benefits under Part 718. See Trent, supra.

Accordingly, the administrative law judge's Decision and Order denying claimant's request for modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ERIC FEIRTAG
Administrative Law Judge