BRB No. 02-0140 BLA

JEFFREY A. CHILDRESS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
HORN CONSTRUCTION COMPANY	)	
	)	
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 Request for Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Jeffrey A. Childress, Sr., Grundy, Virginia, *pro se*.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order Denying Request for Modification (01-BLA-0570) of Administrative Law Judge Daniel F. Solomon on a request for modification of 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 administrative law judge found that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(2000)[2]. Accordingly,

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[1]Claimant is Jeffrey A. Childress, Sr., the miner, who filed two applications for benefits. Director's Exhibits 1, 46.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

the administrative law judge found that the evidence failed to establish a change in conditions and he found that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310(2000).[3] Accordingly, the administrative law judge denied the claim.[4] On appeal, claimant generally challenges the denial of modification and of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has responded to the instant

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on January 19, 2001, and they are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]While 20 C.F.R. §725.310(c) was amended, the amended regulation applies only to claims filed after January 19, 2001, and thus, is inapplicable to the instant claim.

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

appeal.[5]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986)*; Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim, claimant must

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[5]The relevant procedural history is as follows: Claimant filed his first claim for benefits with the Department of Labor (DOL) on May 16, 1996. Director's Exhibit 1. The claim was informally denied by DOL on August 15, 1996 and on March 12, 1997. Director's Exhibits 20, 34. Following a hearing, Administrative Law Judge Ainsworth H. Brown issued a Decision and Order dated February 25, 1998, accepting employer's concession that claimant established the existence of pneumoconiosis arising out of coal mine employment, but denying benefits on the basis that the evidence failed to establish a totally disabling respiratory impairment pursuant to Section 718.204(c)(2000). Director's Exhibit 41. Following claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Childress v. Horn Construction Co.*, BRB No. 98-0885 BLA (Mar. 23, 1999)(unpub.). Director's Exhibit 45. Claimant filed a timely request for modification on January 28, 2000. Director's Exhibit 46. The administrative law judge denied the request for modification and the claim.

establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In determining whether claimant has established a change in condition on modification pursuant to Section 725.310 (2000), 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 an element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

With respect to the administrative law judge's finding at Section 718.204(c)(1)(2000), the administrative law judge correctly found that only one of the two newly submitted pulmonary function study produced qualifying values.[6] Decision and Order at 6-7; Director's Exhibit 46. He rejected the January 26, 1999 qualifying study because Drs. Michos and Fino, who reviewed the study, both opined that it was not valid because "there was less than optimal effort displayed and the results vary beyond the norm." Decision and Order at 6; Director's Exhibits 47, 50. The administrative law judge permissibly credited the invalidations by Drs. Michos and Fino on the basis that the doctors possessed superior qualifications to the registered nurse who administered the study. *See Adkins v. Director, OWCP,* 958 F. 2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). We affirm, therefore, that the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)(2000); 20 C.F.R. §718.204(b)(2)(i), and thereby, a change in conditions pursuant to Section 725.310(c)(2000) at that subsection.

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[6]The administrative law judge also correctly found that the record contained a newly submitted pulmonary function study by Dr. Castle, which produced non-qualifying values, and thus, could not establish a change in conditions. Director's Exhibit 64; Decision and Order at 7.

The administrative law judge also found that the newly submitted medical opinions of record were insufficient to establish total disability at Section 718.204(c)(4)(2000).[7] The administrative law judge correctly found that the record contained no opinion that found that claimant was totally disabled due to a respiratory or pulmonary impairment. The administrative law judge credited the opinion of Dr. Castle, who opined that claimant was "not totally and permanently disabled due to coal workers' pneumoconiosis or any other pulmonary process". Director's Exhibit 66. As the administrative law judge's finding that this opinion is legally insufficient to sustain claimant's burden of establishing total respiratory disability at Section 718.204(c)(4) (2000) is supported by substantial evidence, we affirm it. *See Beatty v. Danri Corp.,* 16 BLR 1-11 (1991), *aff'd* 49 f. 3d 993, 19 BLR 2-136 (3d Cir. 1995); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986); 20 C.F.R. §718.204(b)(2)(iv). Further, while the administrative law judge found claimant's testimony was supportive of a finding of total respiratory disability; H. Tr. 17-18, Decision and Order at 4-5, 7; lay testimony alone, without corroborative medical evidence, is legally insufficient to establish total respiratory disability under the Part 718 regulations. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987)(*en banc).* We affirm, therefore, the administrative law judge's finding that the newly submitted evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4)(2000). 20 C.F.R. §718.204(b)(2)(iv).

Inasmuch as claimant has failed to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4)(2000) based on the newly submitted evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions pursuant to Section 725.310(c)(2000).

The administrative law judge also reviewed Judge Brown's prior findings and concluded that there was not a mistake in a determination of fact pursuant to Section 725.310(c)(2000), a finding within his discretion. Decision and Order at 5. As no mistake in a determination of fact was established, we affirm this finding. *See Cole v. Director, OWCP,* 13 BLR 1-60 (1989); *Wojtowicz v. Duquesne Light Co.,* 12 BLR 1- 162 (1989).

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[7]As the record contains no new blood gas studies nor evidence relevant to cor pulmonale, we hold that, as a matter of law, a change in conditions cannot be established at 718.204(c)(2)(2000), and (c)(3)(2000). 20 C.F.R. §718.204(b)(2)(ii) and (iii).

Accordingly, the administrative law judge's Decision and Order Denying Claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge