

BRB No. 04-0118 BLA

JACK W. BAILEY )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ANGELA ANN COAL COMPANY ) DATE ISSUED: 07/14/2004  
 )  
 and )  
 )  
 WEST VIRGINIA CWP FUND )  
 )  
 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 – Denial of Modification Request of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Modification Request (2002-BLA-0307) of Administrative Law Judge Richard T. Stansell-Gamm rendered 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).<sup>1</sup> In this request for modification of the denial of a duplicate claim, the administrative law judge found that the evidence again failed to establish total disability. Accordingly, benefits were again denied.<sup>2</sup>

On appeal, claimant argues that the administrative law judge erred in failing to determine the nature of claimant's usual coal mine employment and also erred in finding that the blood gas study evidence did not establish a totally disabling respiratory impairment. Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, (the Director) is not participating 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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<sup>1</sup> 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 on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup> Claimant filed his first claim for benefits in June of 1995. That claim was denied. Director's Exhibit 1. Claimant filed the instant duplicate claim on March 17, 1997. Director's Exhibit 2. Administrative Law Judge Jeffrey Tureck found the evidence insufficient to establish total respiratory disability and denied benefits on February 25, 2000. Claimant appealed. The Board affirmed the denial. *Bailey v. United Pocahontas Coal Company*, BRB No. 00-0626 BLA (May 2, 2001)(unpub.). Director's Exhibit 68. On July 17, 2001, claimant filed a petition for modification, submitting as evidence a blood gas test taken July 10, 2001.

The new blood gas study evidence in this case consists of a single study dated July 10, 2001, which resulted in non-qualifying values. Director's Exhibit 71. The administrative law judge therefore, correctly found that total respiratory disability was not established on the basis of this new blood gas study, and claimant failed, therefore, to establish a change in condition to support his modification request.

Claimant also argues that the administrative law judge erred by failing to assess the nature of claimant's usual coal mine employment in determining that total disability was not established. The administrative law judge noted that Administrative Law Judge Jeffrey Tureck correctly found in his prior decision that none of the pulmonary function study tests of record were qualifying; that although some of the blood gas studies produced qualifying values, the at-rest tests were equivocal; and that the sole exercise study was non-qualifying. Regarding the medical opinion evidence, the administrative law judge noted that Judge Tureck correctly found that the medical opinions did not establish total disability. Drs. Fino and Vasudevan found no respiratory impairment, Drs. Jabour and Rasmussen found only "10%" or "mild" pulmonary impairment, and Dr. Ranavaya, while finding a 30% pulmonary impairment, did not explain the basis of this diagnosis. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Accordingly, considering the prior evidence along with the new blood gas study, the administrative law judge concluded that claimant failed to establish total respiratory disability. This was permissible. 20 C.F.R. §718.204(b)(2)(i)-(iv); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order – Denial of Modification Request is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge