

BRB No. 98-0815 BLA

WILLIAM O'NEAL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	DATE ISSUED:
	)	
Employer	)	
	)	
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 Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1544) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits 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). This case has a lengthy procedural history. Claimant's third claim, filed on April 22, 1991, was denied by the district director on September 27, 1991, on the grounds that claimant failed to establish a material change in his condition, pursuant to 20 C.F.R. §725.309, since the denial of his earlier two claims, and that the evidence of record was insufficient to establish that claimant was totally disabled by pneumoconiosis. Claimant filed the present claim on August 1, 1994, and in support thereof submitted three x-ray interpretations which were positive for simple pneumoconiosis and a medical report by Dr. Rasmussen, who reviewed the evidence submitted in conjunction with, and dating

from, claimant's previously denied claim in 1991. Following an evidentiary hearing, Administrative Law Judge Jeffrey Tureck issued a Decision and Order on June 13, 1996. The administrative law judge credited claimant with ten years and eleven months of qualifying coal mine employment pursuant to the stipulation of the parties, and determined that the present claim was subject to the duplicate claim provisions at 20 C.F.R. §725.309, inasmuch as no action was taken within one year of the denial of claimant's third claim. The administrative law judge then found that the new evidence submitted in support of the instant duplicate claim was insufficient to establish a material change in conditions under Section 725.309. Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's finding that the evidence was insufficient to establish a material change in conditions pursuant to Section 725.309. *O'Neal v. U.S. Steel Mining Co.*, BRB No. 96-1253 BLA (Feb. 21, 1997) (unpublished). Claimant subsequently filed a request for modification with the district director pursuant to 20 C.F.R. §725.310 on the basis of a mistake in a determination of ultimate fact, and the case was assigned to Administrative Law Judge Richard T. Stansell-Gamm for hearing.

On February 23, 1998, the administrative law judge issued a Decision and Order, finding that, inasmuch as Administrative Law Judge Tureck properly determined that the evidence was insufficient to establish a material change in conditions at Section 725.309, modification pursuant to Section 725.310 was not warranted.

In the present appeal, claimant challenges the administrative law judge's findings pursuant to Section 725.310. Employer and the Director, Office of Workers' Compensation Programs (the Director), have 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).

Claimant contends that the administrative law judge erred in denying modification pursuant to Section 725.310. Specifically, claimant maintains that the prior denials were based on claimant's failure to establish that he was totally disabled by pneumoconiosis, and that Dr. Rasmussen's report is sufficient to establish a mistake in a determination of ultimate fact pursuant to Section 725.310

because it shows that claimant's pneumoconiosis prevents him from performing his usual coal mine employment.<sup>1</sup> Claimant thus argues that the administrative law judge should have adjudicated the merits of claimant's entitlement to benefits after consideration and weighing of all of the evidence of record. Claimant's arguments are without merit. Because the present claim is a duplicate claim, and the district director's denial of claimant's third claim is "final" in a legal sense, the administrative law judge properly determined that he was required to accept the correctness of the district director's conclusion that the evidence was insufficient to establish claimant's entitlement to benefits as of September 27, 1991. Decision and Order at 9; see *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). The administrative law judge thus properly reviewed the evidence submitted in support of the present claim and the underlying decision of Administrative Law Judge Tureck in order to determine whether modification was appropriate based on a change in conditions or a mistake in a determination of fact, as required by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge accurately determined that Dr. Rasmussen's opinion, that the medical evidence developed as of July 1991 showed that claimant was totally disabled, was submitted too late to change the outcome of the third claim which was finally denied on September 27, 1991, and the opinion had no evidentiary value in the present claim because it did not address claimant's respiratory condition after that date. Decision and Order at 9; see *Rutter, supra*. Consequently, the administrative law judge permissibly found that modification pursuant to Section 725.310 was not appropriate because no mistake in a determination of fact had been made, *i.e.*, the evidence submitted in support of the present duplicate claim was insufficient to establish a material change in conditions pursuant to Section 725.309. Decision and Order at 5-9; see *Rutter, supra*; *Jessee, supra*. The administrative law judge's findings pursuant to Sections 725.309 and 725.310 are supported by substantial evidence, in accordance with applicable law, and thus are affirmed.

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<sup>1</sup> Dr. Rasmussen determined that the record contained evidence of pneumoconiosis, and opined that it seemed "likely" that claimant would be incapable of performing his last coal mine job as a beltman because of his obesity and "possibly" his pneumoconiosis. Director's Exhibit 32.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge