

BRB No. 00-0106 BLA

DOMINIC MARTINO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS=	)	DATE ISSUED: 10/10/2000
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Dominic Martino, Wellsburg, West Virginia, *pro se*.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order (1999-BLA-0563) of Administrative Law Judge Gerald M. Tierney denying benefits on a request for modification 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 claim, filed on July 23, 1994<sup>1</sup>, was denied by Administrative Law Judge Thomas M. Burke, because claimant did not establish total disability under 20 C.F.R. ' 718.204(c)(1)-(4). On appeal, the Board affirmed Judge Burke=s Decision and Order denying benefits. *Martino v. Director, OWCP*, BRB No. 97-1124 BLA (April 15, 1998)(unpublished). Shortly after Board=s decision, claimant submitted additional evidence requesting reconsideration of the Board=s Decision and Order. In a letter dated July 18, 1998, the Board treated claimant=s request as a request for modification and remanded the case to the district director. On remand, the district director denied claimants request for modification. The case was referred to the Office of Administrative Law Judges and Administrative Law Judge Gerald M. Tierney (the administrative law judge) found that claimant failed to establish a change in conditions or a mistake in a determination of fact in the prior denial pursuant to 20 C.F.R. ' 725.310. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge=s denial of benefits. The Director, Office of Workers= Compensation Programs, responds, urging affirmance of the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law. 33 U.S.C. ' 921(b)(3), as incorporated into the Act by 30 U.S.C. ' 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.* 380 U.S. 359 (1985).

In order to establish entitlement to benefits in a living miner=s claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-

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<sup>1</sup>Claimant initially filed an application for benefits in February of 1986, which was withdrawn at claimant=s request on June 18, 1986. Director=s Exhibit 26. In its previous Decision and Order, the Board held that claimant=s second application for benefits, filed on July 23, 1994, therefore, does not constitute a duplicate claim under 20 C.F.R. ' 725.309. *See* 20 C.F.R. ' ' 725.306(b), 725.309(d); *Martino v. Director, OWCP*, BRB No. 97-1124 BLA (April 15, 1998)(unpublished) at 1, n.1.

26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order denying benefits, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge initially noted that the earlier decision denying benefits by Judge Burke was upheld by the Board, and properly concluded that claimant has not established a mistake in a determination of fact. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). The administrative law judge further properly found that the newly submitted evidence did not provide a basis to establish a change in conditions. Decision and Order at 2. Specifically, the administrative law judge found that the newly submitted evidence consists of Dr. Suarez's opinion, an emergency room record for the claimant's visit on May 25, 1997, and one pulmonary function study. Decision and Order at 2; Claimant's Exhibit 1; Director's Exhibit 46. The administrative law judge properly found Dr. Suarez's conclusion that claimant has black lung disease not entitled to any weight because it is not explained. *Clark v. Karst-Robbins Coal Co.* 12 BLR 1-49 (1989) (*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); Decision and Order at 2. The administrative law judge further found that the emergency room record contains no helpful new evidence. In fact the emergency room record notes claimant's treatment for pneumothorax and for obstructive pulmonary disease, but contains no evidence on the issue of total disability. Claimant's Exhibit 1. The administrative law judge properly found that the only newly submitted pulmonary function study, obtained in September 26, 1998, did not establish total disability. Decision and Order at 2; Director's Exhibit 46.<sup>2</sup>

Accordingly, we affirm the administrative law judge's finding that the newly submitted evidence did not establish a change in conditions. Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish a change in conditions or a mistake in a determination of fact, we further affirm the administrative law judge's finding that claimant failed to establish modification pursuant to 20 C.F.R. '725.310, as it is supported by substantial evidence and is in accordance with law. *See Keating, supra*.

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

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<sup>2</sup>The pulmonary function study report did not provide, *inter alia*, tracings, age and height of claimant at the time of the test, name and signature of the physician supervising the test. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); 20 C.F.R. 718.103. Moreover, results of the pulmonary function study did not yield values equal to or less than the values in 20 C.F.R. 718, Appendix B, and thus the study did not produce qualifying values.

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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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge