BRB No. 00-0164 BLA

ROY J. COX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FAIRPOINT COAL COMPANY	)	
	)	DATE ISSUED:
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 David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Sexton, Cullen & Jones, P.C.), Birmingham, Alabama, for claimant.

Gregory K. Johnson (Ohio Bureau of Workers' Compensation), Columbus, Ohio, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0495) of Administrative Law Judge David W. Di Nardi 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).[1] The administrative law judge

[1]Claimant is Roy J. Cox, the miner, whose initial claim for benefits was filed on November 25, 1985 and administratively denied on March 20, 1986 because claimant failed to establish any of the elements of entitlement. Director's Exhibit 27. Claimant filed the instant claim on September 4, 1990. Director's Exhibit 1. This claim was determined to be a duplicate claim and denied by Associate Chief

considered the evidence submitted after the denial of the initial claim in conjunction with the evidence submitted with claimant's petition for modification and found that claimant established at least twenty-five years of qualifying coal mine employment but failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(c), and, consequently, neither a mistake in a determination of fact nor a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find that he established a change in conditions pursuant to Section 725.310. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to 20 C.F.R. §725.310, a party may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in determining whether claimant has established a mistake in a determination of fact pursuant to Section 725.310, the administrative law judge must consider all of the evidence of record to determine if the evidence is sufficient to establish the element or elements

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Administrative Law Judge James Guill because claimant failed to establish a material change in conditions pursuant to 20 C.F.R.§725.309. Director's Exhibit 42. The Board affirmed the denial of benefits in a Decision and Order issued on April 9, 1997. *Cox v. Fairpoint Coal Co.*, BRB No. 96-0916 BLA (Apr. 9, 1997)(unpub.). Claimant filed the instant petition for modification on April 6, 1998. Director's Exhibit 48.

which defeated entitlement in the prior decision. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying* 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The court also held that the scope of modification extends to whether the "ultimate fact (disability due to pneumoconiosis) was wrongly decided...." *Worrell, supra.* Where, as here, a claimant requests modification, pursuant to Section 725.310, of a previously denied duplicate claim, the administrative law judge must consider whether the newly submitted modification evidence along with the duplicate claim evidence is sufficient to establish a material change in conditions pursuant to Section 725.309. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The instant claim was initially denied because claimant failed to establish either the existence of pneumoconiosis or total respiratory disability. Director's Exhibits 41.

Claimant initially contends that the administrative law judge erred in failing to find that Dr. Kreitzer's newly submitted office notes are sufficient to establish the existence of pneumoconiosis and total respiratory disability pursuant to Sections 718.202(a)(4) and 718.204(c)(4). Claimant's Brief at 4-10. Dr. Kreitzer, in office notes dating from February 22, 1994 to June 24, 1998, listed claimant's problems as pneumoconiosis, chronic obstructive pulmonary disease, coronary artery spasm, history of hemoptysis and hypertension. Claimant's Exhibit 1. Dr. Kreitzer further indicated that he performed physical examinations of claimant, but provided no discussion of his diagnosis of pneumoconiosis or the degree of any impairment that claimant may have. *Id.* In a letter dated November 12, 1997, Dr. Kreitzer opined that:

> [Claimant's] disability is...on the basis of his history of pneumoconiosis, chronic obstructive pulmonary disease, coronary artery spasm. His most recent pulmonary function test revealed no evidence of restrictive lung disease but definite fixed obstructive ventilatory defect. This obstructive ventilatory defect that is fixed and is associated with a diffusing capacity when corrected for alveolar ventilation of only 67% predicted suggests functionally pneumoconiosis.

Director's Exhibit 48. Dr. Kreitzer concluded that claimant "certainly fits the pulmonary function criteria for pneumoconiosis but there is no obvious profusion of nodules that one would like to see make a chest roentgenographic diagnosis." *Id.* In a letter dated March 30, 1998, Dr. Kreitzer wrote that claimant "meets the criteria for about 70% of disability." *Id.*

Pursuant to Section 718.202(a)(4), the administrative law judge acted within his discretion in assigning Dr. Kreitzer's opinion regarding the existence of pneumoconiosis no "significant weight" because it is not well-reasoned inasmuch as Dr. Kreitzer did not provide a complete rationale for his diagnosis, as he did not distinguish between the pulmonary indications of pneumoconiosis and the effects of claimant's heart problems. Decision and Order at 12-13; *Lafferty v. Cannelton Industries, Inc.* 12 BLR 1-190 (1989)*; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Similarly, pursuant to Section 718.204(c)(4), the administrative law judge considered Dr. Kreitzer's statement that claimant meets the criteria for about 70% of disability and rationally found it insufficient to establish total respiratory disability because it is conclusory and Dr. Kreitzer does not provide a rationale for his opinion. Decision and Order at 14; *Lafferty, supra; Clark, supra; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record does not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) or total respiratory disability pursuant to Section 718.204(c)(4).

Finally, claimant contends that the administrative law judge erred in failing to find that the newly submitted pulmonary function studies, dated August 15, 1994, October 11, 1996, July 11, 1997 and June 24, 1998, are sufficient to support a finding total respiratory disability pursuant to Section 718.204(c)(1) because they produced qualifying results.[2] Claimant's Brief at 4. The administrative law judge considered these pulmonary function tests and properly found that three of them did not produce qualifying results because the "FVC value and the FEV1 value divided by the FVC value both exceed qualifying values." 20 C.F.R. §718.204(c)(1)(I), (iii); Decision and Order at 14; Claimant's Exhibit 2; *Lafferty, supra.* While the administrative law judge properly stated that the FVC values of the four pulmonary function tests identified by claimant are all non-qualifying, the August 15, 1994 study produced results which, when the FEV1 value is divided by the FVC value, yielded qualifying results pursuant to Section 718.204(c)(1)(iii). 20 C.F.R. 718.204(c)(1)(iii). Inasmuch as the preponderance of the newly submitted studies yielded non-qualifying results, however, any error in the administrative law judge's consideration of that evidence is harmless. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As a result, we affirm the administrative law judge's findings that the newly submitted pulmonary function study evidence is not

[2]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.

sufficient to support a finding of total respiratory disability pursuant to Section 718.204(c)(1). We affirm, therefore, the administrative law judge's finding that claimant failed to establish a material change in conditions and , therefore, a change in conditions pursuant to Section 725.310. We also affirm the administrative law judge's unchallenged determination that claimant did not demonstrate a mistake in a determination of fact in the denial of his duplicate claim. *See Larioni*, *supra*. Thus, we affirm the denial of benefits. *See Worrell*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge