

BRB No. 00-0110 BLA

EUGENE FELTNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	
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 Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen Chartered), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (99-BLA-0132) of Administrative Law Judge Daniel J. Roketenetz 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). Claimant filed a claim for benefits on June 21, 1973, which was finally denied by the district director on December 14, 1979. Director’s Exhibit 19. Claimant filed a duplicate claim on October 14, 1988. Director’s Exhibit 1. In an initial Decision and Order dated January 27, 1992, Administrative Law Judge Donald W. Mosser credited claimant with fifteen years of coal mine employment and properly considered the claim under the permanent regulations at 20 C.F.R. Part 718. Judge Mosser determined that claimant established a material change in conditions under 20 C.F.R. §725.309 and, consequently, considered the claim on the merits. Judge Mosser found the x-ray evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), found that claimant was entitled to the rebuttable presumption that his

pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and determined that there was insufficient evidence to rebut the presumption. Judge Mosser concluded, however, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) and, accordingly, denied benefits. Claimant appealed. The Board affirmed Judge Mosser's coal mine employment finding and findings under Sections 725.309, 718.202(a)(1), 718.203(b) and 718.204(c)(2) and (c)(3). *Feltner v. Whitaker Coal Corp.*, BRB No. 92-0994 BLA (May 24, 1993)(unpublished). The Board vacated, however, Judge Mosser's findings at Section 718.204(c)(1) and (c)(4) and remanded the case for further consideration. *Id.*

In a Decision and Order on Remand dated September 29, 1993, Judge Mosser again found the evidence insufficient to establish total disability under Section 718.204(c)(1) and (c)(4) and, accordingly, denied benefits. Claimant appealed. The Board affirmed Judge Mosser's findings on remand at Section 718.204(c)(1) and (c)(4) and, therefore, affirmed the denial of benefits. *Feltner v. Whitaker Coal Corp.*, BRB No. 94-0274 BLA (Feb. 17, 1995)(unpublished). On June 19, 1995, claimant filed additional evidence, seeking modification pursuant to 20 C.F.R. §725.310. In a Decision and Order dated December 30, 1996, Judge Mosser found that claimant failed to establish total disability under Section 718.204(c)(1)-(4) and failed, therefore, to establish a change in conditions. Judge Mosser also stated that, based upon his review of the record and his previous findings, claimant failed to establish a mistake in a determination of fact. Judge Mosser thus found that claimant failed to establish modification pursuant to Section 725.310, and denied benefits. Claimant appealed. The Board affirmed Judge Mosser's findings and consequent denial of benefits. *Feltner v. Whitaker Coal Corp.*, BRB No. 97-0565 BLA (Dec. 23, 1997)(unpublished).

On February 10, 1998, claimant again submitted new evidence seeking modification under Section 725.310. After denying modification, the district director forwarded the case to the Office of Administrative Law Judges, where the case was reassigned to Judge Roketenetz (the administrative law judge), who conducted a hearing on April 13, 1999.<sup>1</sup> In his Decision and Order dated September 22, 1999, after noting that claimant had previously established the existence of pneumoconiosis arising out of coal mine employment, the administrative law judge found that the newly submitted evidence considered in conjunction with the previously submitted evidence of record was insufficient to establish total disability under Section 718.204(c)(1)-(4). The administrative law judge found that claimant thus failed to establish a change in conditions or a mistake in a determination of fact under Section 725.310. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in not finding total disability established under Section 718.204(c)(4). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's

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<sup>1</sup>The case was reassigned to Judge Roketenetz as Judge Mosser was no longer available.

Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

On appeal, claimant asserts that the administrative law judge erred in failing to discuss the exertional requirements of his usual coal mine employment involving work as a motorman and roof bolter before making his determination that claimant is not totally disabled. Claimant further suggests that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant’s contentions lack merit. Claimant has the burden of submitting evidence to establish entitlement to benefits, and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. See *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero Director, OWCP*, 7 BLR 1-860 (1985). In the instant case, the administrative law judge properly found that the new evidence on modification does not contain any medical opinion evidence which could, if credited, support a finding of total disability under Section 718.204(c)(4). Specifically, the administrative law judge correctly stated that Dr. Bushey did not address whether claimant is totally disabled and did not indicate claimant’s physical limitations, if any. Decision and Order at 7-8; Director’s Exhibit 91. Such an opinion need not be discussed in terms of claimant’s former job duties. See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also correctly found that hospitalization records submitted by claimant do not indicate whether claimant is totally disabled, and claimant does not argue otherwise. Decision and Order at 7-8; Director’s Exhibit 95. Furthermore, the administrative law judge correctly found that Dr. Dahhan opined that, from a pulmonary standpoint, claimant was capable of returning to his usual coal mine employment or similarly arduous, manual labor. Decision and Order at 7-8; Director’s Exhibit 71; Employer’s Exhibit 1. We thus affirm the administrative law judge’s finding that the new evidence on modification was insufficient to establish total disability under Section 718.204(c)(4).<sup>2</sup> Additionally, as claimant does not challenge the administrative law judge’s finding that the new evidence was insufficient to establish that claimant is totally disabled pursuant to Section 718.204(c)(1)-(3), this finding is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6-7. Accordingly, we affirm the administrative law judge’s finding that claimant failed to establish a change in conditions under Section 725.310. We further affirm, as unchallenged on appeal, the administrative law judge’s determination that inasmuch as the new evidence, reviewed in conjunction with the previously submitted evidence of record, did not establish that claimant is totally disabled pursuant to Section 718.204(c), claimant failed to establish a mistake in a

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<sup>2</sup>While claimant also argues that the administrative law judge erred in failing to consider claimant’s age, education and work experience in determining that he was not totally disabled, those factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4). See 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

determination of fact under Section 725.310. *Id.* We thus affirm the administrative law judge's finding that claimant failed to establish modification pursuant to Section 725.310. 20 C.F.R. §725.310; see *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge