BRB No. 98-0931 BLA

JOHN T. CATLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 4/12/99
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

John T. Catlett, Mount Hope, West Virginia, *pro se.*

Roger Pitcairn (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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1500) of Administrative Law Judge Lawrence P. Donnelly 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

[1]Claimant initially filed for benefits on March 29, 1973. Director's Exhibit 22. This claim was denied on September 18, 1973, May 8, 1974, April 2, 1979 and October 10, 1980. *Id.* Claimant took no further action on this claim. Claimant's second claim, filed on November 27, 1984, was denied by the district director on May 7, 1985. Director's

administrative law judge determined that claimant was advised of his right to seek legal representation and accepted Marsha Phipps as his lay representative. The administrative law judge noted that this is a modification case in which the district director denied benefits because claimant failed to establish total disability due to pneumoconiosis. Further, the administrative law judge found that the current record is insufficient to establish total disability due to pneumoconiosis, and, therefore, determined that claimant did not establish a "material" change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, the Director, Office of Workers' Compensation Programs, argues that the administrative law judge's denial

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Exhibit 21. Claimant took no further action on this claim. Claimant applied for benefits again on September 27 and 30, 1991, and on January 15, 1992. The district director denied benefits on March 20, 1992. Director' Exhibit 20. Claimant did not take any further action until he filed the instant duplicate claim on October 4, 1995. Director's Exhibit 1. The district director denied benefits on December 19, 1995, Director's Exhibit 16 and on February 1, 1996, the district director amended the denial to reflect that the evidence established the existence of pneumoconiosis arising out of coal mine employment but not total disability due to pneumoconiosis. Director's Exhibit 17. The case was transferred to the Office of Administrative Law Judges. Administrative Law Judge Stuart A. Levin convened a hearing and, upon receipt of additional medical evidence, Judge Levin remanded the case to the district director for further development of the evidence. Director's Exhibit 29. The district director denied benefits, Director's Exhibit 34. Upon claimant's request, the district director transferred the claim to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 36.

of benefits is supported by substantial evidence.

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'Keeffe v. Smith, Hinchman & Grills Associates, Inc.,* 380 U.S. 359 (1985).

Initially, based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented by an attorney, *see* 20 C.F.R. §725.362(b), and a valid approval of Marsha Phipps as claimant's lay representative, *see* 20 C.F.R. §725.363(b). Moreover, we hold that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Decision and Order at 3; Director's Exhibit 24, 29; Hearing Transcript dated October 10, 1996; Hearing Transcript dated November 4, 1997.

After consideration of the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. We note that this is a duplicate claim and that the administrative law judge mischaracterized this claim as a request for modification under Section 725.310.[2] However, we hold that his analysis of the newly submitted evidence comports with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises. *See Lisa Lee Coal Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *revg* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). In *Rutter,* the court held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), claimant must establish by a preponderance of the newly submitted evidence at least one of the elements of entitlement that formed the basis for the denial of the

[2]The administrative law judge concluded that claimant's duplicate claims of September 30, 1991 and November 27, 1994 were finally denied on March 19, 1992 and May 7, 1995, and consequently claimant's current application filed on October 4, 1995 was a petition for modification. However, claimant's prior claims filed January 15, 1992, September 30, 1991 and September 27, 1991 were denied by the district director on March 20, 1992. Director's Exhibit 20. A review of the record did not indicate a denial dated May 7, 1995, nor an application for benefits dated November 27, 1994.

prior claim. Accordingly, in this case, in order to establish a material change in conditions under Section 725.309(d), claimant must establish, by a preponderance of the newly submitted evidence, the existence of total disability under 20 C.F.R. § 718.204. *Id.* The administrative law judge determined that the current record did not establish total disability, the element of entitlement not established in the prior claim. Decision and Order at 9.

Because there is no evidence of complicated pneumoconiosis in this living miner's claim, *see* 20 C.F.R §718.304, the administrative law judge properly found that claimant failed to establish total disability thereunder. *See* 20 C.F.R. §718.204(b). Decision and Order at 8. Under Section 718.204(c)(1), the administrative law judge properly found that claimant failed to establish total disability as the only newly submitted pulmonary function study of record, performed by Dr. Villanueva on April 2, 1997[3], was invalidated by Dr. Ranayava.[4] *Id;* Director's Exhibits 27, 32, 33. Based upon Dr. Ranayava's superior qualifications as NIOSH-certified in spirometry, the administrative law judge permissibly found that Dr. Ranayava's opinion invalidates the qualifying values reported by Dr. Villanueva, who is a family practitioner with no relevant specialty involving the pulmonary system. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR

[3]The administrative law judge interchangeably uses the dates April 2, 1996 and April 2, 1997 when referring to this pulmonary function study, *see* Decision and Order at 5, 8. The correct date is April 2, 1997. Director's Exhibit 32.

[4]The administrative law judge properly found that Dr. Ranayava opined that the values reported are not acceptable due to less than optimal effort, cooperation and comprehension. Decision and Order at 8; Director's Exhibit 27, 33.

1-139 (1985); Decision and Order at 8; Director's Exhibits 27, 32, 33. In addition, the administrative law judge correctly found that none of the blood gas studies of record yielded qualifying values[4] under Section 718.204(c)(2), and correctly noted that the record is devoid of any evidence regarding the existence of cor pulmonale with right sided congestive heart failure under Section 718.204(c)(3). Decision and Order-Denying Benefits at 8; Director's Exhibits 10, 15, 20.

[4]A "qualifying" blood gas study under 20 C.F.R. §718.204(c)(2) is one that produces values equal to or less than the values set forth in the tables appearing in Appendix C to 20 C.F.R. Part 718. A "nonqualifying" study is one that produces values in excess of the table values.

Finally, under Section 718.204(c)(4), the administrative law judge properly found that the medical opinions of record do not support a finding that claimant is totally disabled. The administrative law judge noted that Dr. Villanueva reported on February 25, 1997 that claimant was "unable to work because of multiple problems." Decision and Order at 8; Director's Exhibit 31. The administrative law judge also noted that Dr. Villanueva, in a letter dated April 14, 1997, reported that claimant was disabled and unable to work due to chronic obstructive pulmonary disease with emphysema and pneumoconiosis. Decision and Order at 8; Director's Exhibit 32. The administrative law judge properly found that Dr. Villanueva did not report the objective medical findings upon which he based his assessment of claimant's degree of disability. Therefore, the administrative law judge permissibly regarded Dr. Villanueva's reports, the only newly submitted medical opinion which determined that claimant was unable to work, as unreasoned.[5] *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 8.

Because claimant failed to establish total disability, by a preponderance of the newly submitted evidence under Section 718.204, the element that formed the basis for the denial of the prior claim, we affirm the administrative law judge's finding that claimant did not establish a material change in conditions under Section 725.309(d). 20 C.F.R. §725.309(d); *Rutter, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief

[5]The administrative law judge also noted Dr. Villanueva's letter dated October 27, 1996, which reported that claimant's main problem was chronic obstructive pulmonary disease with emphysema. Decision and Order at 7. However, an assessment of degree and etiology of disability was not made by Dr. Villanueva. Director's Exhibit 27. With respect to the other newly submitted medical reports, the administrative law judge noted that Dr. Kumar diagnosed bronchial asthma. Dr. Kumar however, made no assessment of the degree or etiology of claimant's respiratory condition. Decision and Order at 8; Director's Exhibit 27. Referring to the non-qualifying pulmonary function study performed by Dr. J.M. Daniel, the administrative law judge noted that the physician observed a mild obstructive defect. Decision and Order-Denying Benefit at 9; Director's Exhibits 8, 9. Dr. Daniel also diagnosed pneumoconiosis with no evidence of significant pulmonary impairment. Director's Exhibit 9.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge