

BRB No. 05-0314 BLA

JAMES BOSTIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
E F & B COAL COMPANY	)	DATE ISSUED: 09/20/2005
	)	
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 Denying Benefits of Molly W. Neal, Administrative Law Judge, United States Department of Labor.

James Bostic, Stone, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2003-BLA-5907) of Administrative Law Judge Molly W. Neal rendered on a subsequent 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).<sup>1</sup> Based on the date of

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<sup>1</sup> Claimant filed an earlier claim for benefits on July 1, 1980, which was denied by Administrative Law Judge Ronald T. Osborn on January 14, 1987 because of claimant's failure to establish total respiratory disability, although claimant established twelve years and eleven months of coal mine employment and the existence of coal workers' pneumoconiosis. 20 C.F.R. §§718.202(a)(1), 718.203(b) (2000). Director's Exhibit 1. Claimant took no

filing, February 13, 2001, the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R Part 718. Director's Exhibit 2. The administrative law judge found the newly submitted evidence of record insufficient to establish the existence of a totally disabling respiratory impairment due to pneumoconiosis and, therefore, insufficient to establish a change in an applicable condition of entitlement. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in the present appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 rational, supported by substantial evidence, and in accordance with 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Turning first to the administrative law judge's consideration of the newly submitted evidence pursuant to Section 718.204(b)(2)(i), the administrative law judge considered the newly submitted pulmonary function studies and correctly determined that the studies performed on April 25, 2001, May 31, 2001, and August 10, 2001, did not establish total respiratory disability despite their qualifying values, as he permissibly credited the opinions of Drs. Fino and Burki, that these tests were invalid due to poor effort.<sup>2</sup> Decision and Order

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further action respecting his initial claim.

<sup>2</sup> A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. See 20 C.F.R.

Denying Benefits at 4-6; Claimant's Exhibit 3; Employer's Exhibit 2; Director's Exhibits 14, 15; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge also acted within his discretion in finding that Dr. Rosenberg's pulmonary function study, dated December 8, 2003, which produced qualifying values before bronchodilators were administered, and non-qualifying values after the use of bronchodilators, did not establish the presence of a totally disabling respiratory impairment, as he rationally credited Dr. Rosenberg's opinion that the miner's response to bronchodilators was significant and reflected a reversible asthmatic lung disease, as opposed to coal workers' pneumoconiosis which is an irreversible and progressive disease process, and because claimant's lung function improved to the point it was not totally disabling. Employer's Exhibit 3; Decision and Order Denying Benefits at 4-6; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983). As the administrative law judge's findings under this subsection are supported by substantial evidence, they are affirmed.

We also affirm the administrative law judge's finding that total disability was not established at Section 718.204(b)(2)(ii) as all of the newly submitted arterial blood gas studies produced non-qualifying results.<sup>3</sup> Employer's Exhibits 2, 3; Director's Exhibits 11, 13; Decision and Order Denying Benefits at 4, 6; *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991).

Turning to the newly submitted medical reports of record at Section 718.204(b)(2)(iv), the administrative law judge found that a preponderance of the newly submitted evidence did not establish a totally disabling respiratory or pulmonary impairment. The administrative law judge accorded little weight to the opinion of Dr. King, claimant's treating physician, diagnosing totally disabling pneumoconiosis, because the physician's treatment notes indicated that claimant's respiratory symptoms were variable and inconsistent, which militated against a finding of a total disability due to pneumoconiosis, and often indicated that claimant was disabled due to various non-respiratory conditions, including severe cardiac problems. The administrative law judge also noted that the record did not contain information regarding Dr. King's credentials. Claimant's Exhibit 1; Director's Exhibit 11; Decision and Order Denying Benefits at 6-12.

Instead, the administrative law judge credited the medical reports of Drs. Fino, Hussain, and Rosenberg who found either that claimant did not have a totally disabling

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§718.204(b)(2)(i),(ii).

<sup>3</sup> The record in this case contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

respiratory or pulmonary impairment or that claimant's respiratory or pulmonary impairment was not due to pneumoconiosis. Employer's Exhibits 1-3; Director's Exhibit 12; Decision and Order Denying Benefits at 6-12.<sup>4</sup> The administrative law judge noted that while Dr. Hussain's credentials were not in the record, Drs. Rosenberg and Fino were board-certified in internal and pulmonary medicine, and Dr. Rosenberg was also board-certified in occupational medicine. Based on the superior qualifications of Drs. Rosenberg and Fino and the fact that she found their opinions better reasoned and documented than Dr. King's opinion, the administrative law judge properly concluded that claimant failed to establish a totally disabling respiratory impairment due to pneumoconiosis, 20 C.F.R. §718.204(b)(2)(iv), and failed to establish a change in an applicable condition of entitlement at Section 725.309. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).<sup>5</sup>

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<sup>4</sup> Dr. Fino concluded that claimant's total disability was due solely to coronary artery disease. Employer's Exhibit 1. Dr. Rosenberg concluded that claimant's disabling pulmonary impairment was unrelated to coal dust exposure but was due to asthma as well as multiple non-pulmonary problems connected to heart disease. Employer's Exhibit 3. Dr. Hussain concluded that claimant had a disabling pulmonary impairment resulting from coronary artery disease. Director's Exhibit 12.

<sup>5</sup> The administrative law judge also found that none of the valid pulmonary function studies or blood gas studies submitted in the prior claim yielded qualifying values and that the opinions submitted in the prior claim found claimant disabled by cardiac disease unrelated to coal dust exposure. Decision and Order at 5, 6, and 11.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge