

BRB No. 98-1587 BLA

LONZO LESTER)
)
 Claimant-Petitioner)
)
 v.)
)
 DOMINION COAL COMPANY) DATE ISSUED: 9/28/99
)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Lonzo Lester, Grundy, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (98-BLA-0348) of Administrative Law Judge Joseph E. Kane 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). The instant case involves a 1993 duplicate claim.¹ In a Decision and Order dated August 23, 1995, Judge De

¹The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on

Gregorio found, *inter alia*, that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge De Gregorio denied benefits. By Decision and Order dated October 8, 1996, the Board affirmed Judge De Gregorio's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Lester v. Dominion Coal Co.*, BRB No. 95-2264 BLA (Oct. 8, 1996) (unpublished). The Board, therefore, affirmed Judge De Gregorio's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. Based upon a *de novo* review of the record, Administrative Law Judge Joseph E. Kane (the administrative law judge) found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish

January 23, 1974. Director's Exhibit 35. The SSA denied the claim on July 1, 1974. *Id.* The Department of Labor denied the claim on July 3, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1974 claim.

Claimant filed a second claim on February 10, 1993. Director's Exhibit 1.

any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The administrative law judge properly noted that all of the pulmonary function and arterial blood gas studies of record are non-qualifying.² Decision and Order at 11; Director's Exhibits 9, 11, 28, 35; Employer's Exhibit 1. We, therefore, affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(2).

Inasmuch as there is no evidence of record indicating that claimant suffers from cor pulmonale with right sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(c)(3). Decision and Order at 11.

In his consideration of whether the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge found that there was no medical opinion evidence supportive of a finding of total disability. Decision and Order at 11. The Board previously held that the opinions of Drs. Fritzhand, Shoukry, Stewart and Baxter were insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). See *Lester, supra*; Director's Exhibits 10, 28, 35, 37. The only new medical opinion is that of Dr. Fino. Dr. Fino examined claimant on December 2, 1997. In a report dated January 9, 1998, Dr. Fino found that no respiratory impairment was present. Employer's Exhibit 1. Dr. Fino further opined that claimant, from a respiratory standpoint, was neither partially nor totally disabled from returning to his former coal mine employment. *Id.* Consequently, Dr. Fino's opinion does not support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

²A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. See 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" study yields values which exceed the requisite table values.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. See *Trent, supra*; *Gee, supra*; *Perry, 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge