BRB No. 01-0358 BLA

HUGH T. GRIGG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Hugh T. Grigg, Wheatcroft, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order on Remand (98-BLA-0284) of Administrative Law Judge Donald W. Mosser

denying benefits on a duplicate claim[1] 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).[2] This case is before the Board for a second time. In its prior Decision and Order, the Board affirmed in part and vacated in part the administrative law judge's Decision and Order denying benefits. *Grigg v. Peabody Coal Co.*, BRB No. 99-0530 BLA (Apr. 26, 2000)(unpublished). The Board remanded the case to the administrative law judge for reconsideration of the newly submitted pulmonary function study and medical opinion evidence relevant to the existence of pneumoconiosis and a totally disabling respiratory impairment. *Id*. On remand, the administrative law judge denied benefits, finding that the evidence was insufficient to establish either the existence of pneumoconiosis or a totally disabling respiratory condition, and thus did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Claimant appeals the administrative law judge's denial of benefits. Employer has filed a response brief and asserts that the denial of benefits should be affirmed. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not intend to participate in this 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). The Board 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. Section 921(b)(3), as incorporated by 30 U.S.C. Section

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[1]The relevant procedural history is outlined in our previous Decision and Order. *See Grigg v. Peabody Coal Co.*, BRB 99-0530 BLA (Apr. 26, 2000)(unpublished), slip opinion at 2.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001).

932 (a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under Part 718, a claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any one of the requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Moreover, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, the fact finder must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one element of entitlement previously adjudicated against him. *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc* rehearing), *modifying*, 94 F.3d 369 (7th Cir. 1996). In the present case, claimant's first application for benefits was denied on the grounds that claimant did not demonstrate any of the elements of entitlement. Director's Exhibit 17 at 1.

After consideration of the administrative law judge's Decision and Order on Remand, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that the newly submitted medical evidence does not establish a material change in conditions pursuant to Section 725.309(d) (2000). With respect to the medical opinion evidence relevant to 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge first addressed the validity of the documentation underlying Dr. Traughber's diagnosis of pneumoconiosis. The administrative law judge rationally found that the May 20, 1997 pulmonary function study administered by Dr. Traughber is invalid based on Dr. Burki's opinion that claimant's effort was poor, as demonstrated by the shape of the curves on the tracings, and based on the opinion of Dr. Traughber, that the study did not "meet the intratest reliability criteria." Decision and Order on Remand at 3; Director's Exhibits 5, 7; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). In addition, the administrative law judge rationally found that the July 14, 1997 pulmonary function study was invalid based on Dr. Burki's opinion that claimant's effort was poor, according to the tracings, and based on Dr. Traughber's observation that claimant's comprehension and cooperation were fair. Decision and Order on Remand at 3; Director's Exhibit 6; *see Trent*, *supra*; *Casella*, *supra*. Furthermore, the administrative

law judge acted within his discretion in giving greater weight to Dr. Burki's opinion regarding the May 20, 1997 and July 14, 1997 pulmonary function studies because of his superior qualifications as a Board-certified internist and pulmonologist.[3] Decision and Order on Remand at 3; *see Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983).

The administrative law judge reasonably concluded, therefore, that the opinions of Drs. Burki and Traughber "question the validity of the [July 14, 1997] pulmonary function study." Decision and Order on Remand at 3. Based upon these appropriate findings, we affirm the administrative law judge's determination to give less weight to Dr. Traughber's opinion diagnosing the existence of pneumoconiosis because he relied upon invalid pulmonary function study evidence. We also affirm the administrative law judge's finding that the contrary opinions of Drs. Gallo, Fino and Branscomb are entitled to greater weight as they are more well-reasoned and well-documented. Decision and Order on Remand at 3-4; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). Therefore, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and, thus, insufficient to establish a material change in conditions pursuant to Section 725.309(d) (2000).

Inasmuch as the administrative law judge rationally found that the pulmonary functions studies administered by Dr. Traughber are invalid, as discussed *supra,* and the other newly submitted pulmonary function studies were properly discredited by the administrative law judge, *see Grigg v. Peabody Coal Co.*, BRB No. 99-0530 BLA (Apr. 26, 2000)(unpublished), slip opinion at 4, we affirm his finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability under 20 C.F.R. §718.204(c)(1) (2000). Decision and Order on Remand at 4. Under 20 C.F.R. §718.204(c)(4) (2000), the administrative law judge properly gave less weight to the opinion of Dr. Traughber because he did not identify the medical evidence on which he relied in finding claimant totally disabled and the pulmonary function studies he administered to claimant produced invalid results. Decision and Order on Remand at 4; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Additionally, the administrative law judge reasonably found Dr. Houser's opinion, that claimant was totally

[3]The administrative law judge found that Dr. Traughber's qualifications are not in the record. Decision and Order at 3.

disabled, "questionable" because he based his opinion on pulmonary function studies which produced normal values with poor effort. Decision and Order on Remand at 4. Thus, the administrative law judge, rationally found the opinions of Drs. Traughber and Houser, the only newly submitted medical opinions that diagnosed total disability, insufficient to establish the existence of a totally disabling respiratory impairment under Section 718.204(c)(4) (2000). We also affirm the administrative law judge's determination to accord greater weight to the contrary opinions of Drs. Branscomb and Fino because their opinions were more consistent with the objective medical evidence of record. *See Clark, supra; Fields, supra.* In addition, we affirm the administrative law judge's finding that the contrary evidence outweighs the evidence supportive of a finding that claimant suffers from a totally disabling respiratory impairment pursuant to Section 718.204(c) (2000) and, thus, that claimant has failed to establish a material change in conditions pursuant to Section 725.309(d) (2000). Decision and Order on Remand at 4; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-4 (1986).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge