BRB No. 97-1091 BLA

VERLIN CLAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BERACHAH, MINING INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	Date Issued:
	)	
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 of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Verlin Clay, Branchland, West Virginia, *pro se*.

K. Keian Weld (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the aid of counsel, the Decision and Order (96-BLA-1461) of Administrative Law Judge Vivian Schreter-Murray 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 administrative law judge found thirty-eight years of coal mine

employment established and adjudicated the instant, duplicate claim pursuant to 20 C.F.R. Part 718.[1] After considering only the newly submitted evidence of record, the administrative law judge found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1) and that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant's appeal, herein, followed. The carrier of employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to his appeal.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1985). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to establish a material change in conditions in a duplicate claim pursuant to 20 C.F.R. §725.309, a claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him," *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Although the administrative law judge did not specifically consider the instant claim pursuant to Section 725.309(d) in accordance with the standard enunciated in *Rutter*, inasmuch as the administrative law judge properly considered only the relevant, newly submitted evidence and properly found, as discussed *infra*, that it was insufficient to establish total disability, an element of entitlement previously adjudicated against claimant, *see* Director's Exhibit 23, any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[1]Claimant originally filed a claim on June 19, 1992, which was denied on November 16, 1992, inasmuch as claimant failed to establish pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis, Director's Exhibit 23. Claimant filed a second, duplicate claim on April 28, 1995, Director's Exhibit 1, at issue herein.

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).[2] Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986).

After consideration of the administrative law judge's Decision and Order and the evidence of record, the Decision and Order of the administrative law judge is supported by substantial evidence, contains no reversible error, and, therefore, is affirmed. As the administrative law judge found pursuant to Section 718.204(c), all of the relevant pulmonary function study evidence under Section 718.204(c)(1), *see* Director's Exhibit 9; Claimant's Exhibit 1; *see also* Director's Exhibit 23, and blood gas study evidence of record under Section 718.204(c)(2), Director's Exhibit 11; Claimant's Exhibit 1; *see also* Director's Exhibit 23, is non-qualifying.[3] Decision and Order at 3. Furthermore, there is no evidence in the record of cor pulmonale with right-sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the opinions of the three physicians who provided medical reports. Dr. Ranavaya found no respiratory or pulmonary impairment, Director's Exhibit 10; *see also* Director's Exhibit 23. Dr. Stevens, claimant's treating physician, noted in claimant's treatment records in March, 1996, that claimant suffered from moderately severe chronic obstructive pulmonary disease and noted in November, 1995, that claimant had no significant compromise of respiratory function, Claimant's Exhibit 2. Finally, Dr. Rasmussen found that claimant suffered from a moderate ventilatory impairment which,

[2]The presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim, filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1.

[3]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

the administrative law judge properly noted, Dr. Rasmussen believed would render claimant totally disabled only for performing very heavy manual labor, Claimant's Exhibit 1.

The administrative law judge found, based on all of the relevant evidence of record, that claimant had a mild to moderate respiratory impairment which did not significantly compromise claimant's respiratory function or preclude work activity apart from heavy manual labor, Decision and Order at 4. Thus, the administrative law judge found no evidence of any totally disabling respiratory or pulmonary impairment, *id*. The administrative law judge had previously and correctly noted that for the last twenty-four years of claimant's coal mine employment he had worked above ground in a coal preparation plant sorting and loading coal into cars under the tipple by "depressing buttons on a console," Decision and Order at 2; *see also* Hearing Transcript at 13-19; 32-33; 36-38. We affirm, therefore, the administrative law judge's finding, by inference, that Dr. Rasmussen's opinion was insufficient to establish total disability as supported by substantial evidence, *see* 20 C.F.R. §718.204(c)(4); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*)*; Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984)*; Cregger v. United States Steel Corp.*, 6 BLR 1-1219 (1984); *see also Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309 (1984).[4] Thus, we affirm the administrative law judge's finding that total

[4]Where the record contains an opinion providing an assessment of physical limitations due to pulmonary disease or an assessment of the degree of a miner's respiratory impairment, as well as evidence of the exertional requirements of the miner's usual coal mine employment, the evidence may be sufficient to allow the administrative law judge to infer a finding on the issue of total disability, by comparing the physician's opinion as to the miner's physical limitations or extent of impairment to the exertional requirements of the miner's usual coal mine employment, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash, supra; see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985). The ultimate finding regarding total disability is a legal determination to be made by the administrative law judge, not the physician, through consideration of the exertional requirements of the miner's usual coal mine employment in conjunction with the physician's opinion regarding the miner's physical abilities, *see Hvizdzak, supra*; *see also Aleshire, supra*.

disability was not established pursuant to Section 718.204(c)(1)-(4) as supported by substantial evidence. Consequently, inasmuch as total disability, a requisite element of entitlement, was not established, entitlement under Part 718 is precluded, *see Trent, supra; Perry, supra*.[5]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]Inasmuch as the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c) is affirmed, we need not address the administrative law judge's findings pursuant to Section 718.202(a), *see Trent, supra*.