BRB No. 00-0148 BLA

ROBERT W. BARTLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Robert W. Bartley, Elkhorn City, Kentucky, *pro se*.

Michelle S. Gerdano (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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (98-BLA-1318) of Administrative Law Judge Daniel J. Roketenetz denying claimant's request for modification and 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 administrative law judge found that claimant established a coal

[1] Claimant filed his initial claim on December 20, 1979, which was finally denied in a Decision and Order issued by the Board on February 22, 1988. *Bartley v. Director, OWCP*, 12 BLR 1-89 (1988). The Board held that claimant's employment as a mine inspector was coal mine employment covered by the Act, and that claimant was still performing this employment. The Board affirmed the administrative law judge's determination that the

mine employment history of twenty-six and three-quarters years of coal mine employment, of which sixteen and three-quarters years were as a mine inspector, claimant's most recent coal mine employment. Decision and Order at 4. The administrative law judge concluded that claimant had already established the existence of pneumoconiosis. Decision and Order at 5, and that, based on claimant's length of coal mine employment history, claimant was entitled to the presumption, found at 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment and that the presumption was not rebutted. Decision and Order at 6. Finally, the administrative law judge considered the entirety of the evidence of record and concluded that claimant failed to establish the presence of a totally disabling respiratory impairment or the presence of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b). Decision and Order at 6-10. Accordingly, the administrative law judge found that claimant failed to establish a material change in conditions, pursuant to 20 C.F.R. §725.309 since the previous denial of his claim by Judge Gilday on February 4, 1986 and failed to establish or a change in conditions or a mistake in a determination of fact which would justify modification of Judge Lesniak's decision of March 11, 1996 pursuant to 20 C.F.R. §725.310. Decision and Order at 10. Accordingly, benefits were denied. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal and urges that the denial of benefits be affirmed.[2]

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evidence of record established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1), and affirmed the denial of benefits. Claimant filed a second claim on September 14, 1994, which was initially denied by the district director, because claimant failed to establish any of the elements of entitlement and thus failed to establish a material change in conditions pursuant 20 C.F.R. §725.309. Director's Exhibit 27. Subsequently, on March 31, 1994, Administrative Law Judge Michael P. Lesniak issued a Decision and Order denying benefits. Judge Lesniak found that while claimant established the existence of pneumoconiosis, the newly submitted evidence failed to establish total disability or total disability due to pneumoconiosis. Accordingly, benefits were denied. Subsequent to an appeal by claimant, the Board affirmed the denial of benefits, holding that substantial evidence supported the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Bartley v. Director, OWCP*, BRB No. 96-0689 BLA (Sept. 26, 1996) (unpublished). Director's Exhibit 44. On March 13, 1997, claimant filed a request for modification. Director's Exhibit 47. On September 22, 1999, the administrative law judge issued the Decision and Order denying modification and benefits from which claimant now appeals.

[2] Inasmuch as the administrative law judge's length of coal mine employment determination, as well as his findings that claimant established the existence of pneumoconiosis arising out of coal mine employment, are unchallenged on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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); *Stark v. Director, OWCP*, 9 BLR 1-361 (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 Part 718, claimant must establish 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 of claimant to establish any of the foregoing elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

At the outset, we recognize that the standard of review in the instant case is whether the evidence submitted in support of the duplicate claim, and the evidence submitted in support of modification, if any, is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Where, as here, a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). In its prior decision, the Board affirmed Judge Lesniak's determination that claimant failed to make the required threshold showing of a material change in conditions pursuant to Section 725.309(d). *Bartley*, slip op. at 2 n.3. Claimant timely requested modification of that determination, thereby invoking the administrative law judge's authority to consider whether the prior finding of no material change in conditions was a mistake or whether there was a change in conditions since the denial of the duplicate claim. 20 C.F.R. §725.310; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Hess, supra*; *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). However, this in no way diminished claimant's burden to prove a material change in conditions before he is entitled to adjudication of the merits of his claim. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 998, 19 BLR 2-10, 2-20 (6th Cir. 1994)(once a year has passed since the denial of his claim, no miner is entitled to benefits simply because his claim should have been granted; he must show a material change in conditions). Consequently, the issue before the administrative law judge pursuant to claimant's modification request was whether all of the evidence in the duplicate claim plus that submitted on modification established the requisite material change in conditions pursuant to Section 725.309(d). *See Hess, supra*.

In finding that the newly submitted evidence, *i.e.*, that evidence submitted since the initial denial of benefits on February 22, 1988, failed to demonstrate the presence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1) and (2), the administrative law judge correctly concluded that neither the pulmonary function study, Director's Exhibit 10, nor the blood gas study, Director's Exhibit 21, produced qualifying values.[3] *See* 20 C.F.R. §718.204(c)(1), (2). Likewise, the administrative law judge properly found that as there was no evidence of cor pulmonale with right-sided congestive heart failure, claimant was precluded from demonstrating the presence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(3). *See* 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds*, 933 F.2d 510 15 BLR 2-124 (7th Cir. 1991).[4]

The administrative law judge further found that the medical opinion evidence failed to demonstrate total respiratory or pulmonary disability at Section 718.204(c)(4). *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). The administrative law judge found that the medical opinions of Dr. Booth, Director's Exhibits 12, 16, Dr. Thompson, Director's Exhibit 19, and a physician whose signature is illegible, Director's Exhibit 13, all support a finding that claimant is totally disabled, but because of coronary reasons, not pulmonary or respiratory disease. Decision and Order at 7. The administrative law judge also found that while Dr. Page indicated that claimant suffered from chronic obstructive pulmonary disease along with his cardiac problems, Director's Exhibit 17, the physician did not explain whether claimant's pulmonary disease was totally disabling. Decision and Order at 8.

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[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. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

[4] A review of the record further demonstrates that none of the previously submitted pulmonary function studies or blood gas studies, *see* Director's Exhibit 31, produced qualifying values.

In order to establish total disability pursuant to Section 718.204(c), "a claimant must establish that the miner's respiratory or pulmonary impairment is totally disabling and that non-respiratory and non-pulmonary impairments have no bearing on establishing total disability under this provision." *Beatty*, 16 BLR at 1-15; *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-21 (1994); *see Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1262-63, 13 BLR 2-277, 2-280 (11th Cir. 1990); *see also Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040, 17 BLR 2-16, 2-21 (6th Cir. 1993). The disabling loss of lung function due to extrinsic factors, e.g., cardiac problems, does not constitute respiratory or pulmonary disability pursuant to Section 718.204(c). Inasmuch as claimant has failed to produce any medical opinion affirmatively demonstrating that he suffered from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's determination that the evidence of record failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). We thus affirm the administrative law judge's finding that claimant has failed to establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). *See Beatty*, *supra*; *see generally Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Inasmuch as the newly submitted evidence has failed to establish a totally disabling respiratory impairment, we affirm the administrative law judge's determination that claimant is precluded from establishing a material change in conditions pursuant to Section 725.309, *see Ross*, *supra*; *Hess*, *supra*, and claimant is, therefore, precluded from establishing entitlement pursuant to Part 718, *see Trent*, *supra*; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry*, *supra*.[5]

[5] Accordingly, we need not address the administrative law judge's finding regarding the cause of claimant's total disability. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*; *see also Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Accordingly, the administrative law judge's Decision and Order-Denial of 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