BRB No. 99-0217 BLA

BIILY R. VANDYKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
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 After Remand - Benefits Denied of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Billy Vandyke, Grundy, Virginia, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order After Remand - Benefits Denied (96-BLA-0015) of Administrative Law Judge Frederick D. Neusner 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985)(Order).

718.[2] On remand, pursuant to the Board's instructions, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and thus, was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not 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

[2] Claimant filed his initial claim for benefits on April 17, 1991, which was denied by the district director on April 7, 1992. Director's Exhibit 32. Claimant filed the instant claim on August 10, 1994, which was denied by the district director on June 7, 1995. Director's Exhibits 1, 17. Following a hearing, the duplicate claim was denied as claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. On appeal, the Board affirmed the administrative law judge's finding that the new evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but vacated the administrative law judge's decision and remanded the case as the administrative law judge failed to make any findings concerning total disability pursuant to 20 C.F.R. §718.204(c). The Board noted that if total disability was established pursuant to 20 C.F.R.§718.204(c) based on the new evidence, a material change in conditions would be established pursuant to 20 C.F.R. §725.309, and the record would have to be considered *de novo* to determine entitlement pursuant to 20 C.F.R. Part 718. *Vandyke v. Island Creek Coal Co.*, BRB No. 97-1099 BLA (May 6, 1998)(unpub.).

evidence. *McFall v. Jewell Ridge Coal Corp.*, 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 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 to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge, in the instant case, rationally determined that the newly submitted evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge permissibly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as the pulmonary function studies and blood gas studies of record referred to in the physicians' opinions produced nonqualifying values[3] and there was no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 11, 13, 33; Decision and Order on Remand at 2-3; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge properly considered the medical opinion evidence of record and permissibly found that total disability was not established based on this evidence. Director's Exhibits 4, 12, 33; Decision and Order at 5; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish total disability pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law. We therefore affirm the administrative law judge's finding that claimant failed to

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

establish a material change in conditions pursuant to Section 725.309. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1985).

Accordingly, the administrative law judge's Decision and Order After Remand - Benefits Denied is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge