

BRB No. 92-1574 BLA

ROGER KENNEDY)
)
 Claimant-Petitioner)
)
 v.)
)
 U.S. STEEL MINING COMPANY,)
 INCORPORATED)
) 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 of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Roger Kennedy, Largo, Florida, *pro se*.

Howard G. Salisbury, Jr. (Kay, Casto, Chaney, Love & Wise), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (91-BLA-1436) of Administrative Law Judge Robert G. Mahony 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). This case involves a duplicate claim issue. Claimant's first claim was filed on October 29, 1985

and denied on February 6, 1986, as the district director found the evidence of record insufficient to establish the existence of pneumoconiosis arising from claimant's coal mine employment or total disability due to pneumoconiosis. Claimant filed the present claim on February 23, 1987 and the administrative law judge considered it pursuant to 20 C.F.R. Part 718. The administrative law judge then considered the evidence submitted subsequent to the prior denial and determined that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(a) and (c) and thus failed to

establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. Claimant appeals this denial. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

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 making his finding of no material change in conditions, the administrative law judge considered the evidence that was submitted subsequent to the prior denial, which consists of four x-ray interpretations, two pulmonary function studies, two blood gas studies, and three medical reports. The x-ray evidence consists of four interpretations of three x-rays. See Director's Exhibits 4, 10-12. Of these four interpretations, only one was positive for the existence of pneumoconiosis. See Director's Exhibit 10. Upon considering this evidence, the administrative law judge concluded that it was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. This finding is in error, however, as the newly submitted positive x-ray interpretation is sufficient, if fully credited, to change the prior administrative result. See Decision and Order at 4; Director's Exhibit 10; *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988). This error is harmless, however, as the evidence of record is sufficient to support the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). None of the pulmonary function study and blood gas study evidence yielded qualifying results. See Director's Exhibits 4, 5, 9. Of the three medical opinions, only Dr. Zaldivar, in a report dated June 26, 1986, diagnosed simple pneumoconiosis. Dr. Zaldivar further found that, from a pulmonary standpoint, claimant is fully capable of performing all mine work for which he has been trained including general mine labor if such were required. See Director's Exhibit 7. Dr. Smith, in a report dated September 3, 1984, diagnosed right inguinal hernia and benign prostatic hypertrophy. See Director's Exhibit 6. Dr. Kreitzer, in a report dated April 5, 1988, diagnosed small airways disease, history of myocardial infarction, and systematic hypertension. He further stated that the etiology for claimant's condition was arterosclerotic coronary artery disease and forty years of cigarette smoking. See Director's Exhibit 8. As a result, the administrative

law judge's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c) is affirmed as it is supported by substantial evidence.¹ See *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). Further, as claimant has not established total disability due to pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, the administrative law judge's denial of benefits is affirmed. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹The evidence submitted with claimant's first claim consists of one pulmonary function study, one blood gas study, and one medical report. Neither the pulmonary function study nor the blood gas study produced qualifying results. See Director's Exhibit 24. In his medical report, dated November 15, 1985, Dr. Kreitzer diagnosed: "1.) tobacco abuse; 2.) consistent with restrictive lung disease but this must be confirmed by formal determination of total lung capacity by helium dilution techniques; 3.) chest roentgenographic evidence of small opacities." He then checked "yes" for relation to coal mine employment and stated that this was based on the x-ray and the pulmonary function test. See Director's Exhibit 24.