

BRB No. 99-0719 BLA

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

Appeal of the Decision and Order-Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Barry H. Joyner (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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-BLA-1002) of Administrative Law Judge Rudolf L. Jansen 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).<sup>1</sup> The administrative law judge found that

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<sup>1</sup> Claimant's initial Part B claim was denied by the Social Security Administration on March 31, 1976. Director's Exhibit 18. Claimant filed a subsequent Part C claim on August 24, 1976, which was denied by Administrative Law Judge Glenn R. Lawrence on February 22, 1982, Director's Exhibit 19. Claimant filed a subsequent claim on April 20, 1982, which was deemed a request for modification pursuant to 20 C.F.R. §725.310 and denied by the

the parties stipulated to a coal mine employment history of nineteen and one-half years and that the stipulation was supported by substantial evidence. Decision and Order at 3. The administrative law judge concluded that the newly submitted medical evidence, *i.e.*, that medical evidence submitted since the most recent denial of benefits, failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and thus failed to establish a material change of conditions pursuant to the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, in

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district director on January 25, 1983, Director's Exhibit 21. Claimant filed his next claim on August 25, 1986, Director's Exhibit 21. After the claim was denied by Administrative Law Judge Daniel J. Roketenetz, the Board affirmed the denial of benefits. *Napier v. Director, OWCP*, BRB No. 91-1341 BLA (Feb 25, 1993)(unpub.). Claimant took no further action until the filing of the instant claim on November 3, 1994. Director's Exhibit 1. After the claim was denied by the district director, Director's Exhibit 16, and by Administrative Law Judge Michael Lesniak, claimant appealed the denial to the Board. The Board affirmed Judge Lesniak's conclusion that the evidence of record was insufficient to establish the presence of a totally disabling respiratory impairment at Section 718.204(c), but, pursuant to a motion filed by the Director, Office of Workers' Compensation Programs (the Director), remanded the case for the Director to provide claimant with a complete pulmonary evaluation. *Napier v. Director, OWCP*, BRB No, 97-0569 BLA (Dec. 22, 1997)(unpub.). On April 2, 1999, the administrative law judge issued the Decision and Order denying benefits from which claimant now appeals.

*Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Decision and Order at 3-7. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the presence of a totally disabling respiratory impairment inasmuch as the administrative law judge failed to address claimant's decreased pulmonary function values in conjunction with the exertional requirements of claimant's usual coal mine employment. Claimant further asserts that the administrative law judge erred in failing to address claimant's age, education and work experience and asserts that because considerable time has passed since the initial diagnosis of pneumoconiosis, claimant's condition should be presumed to have worsened. The Director, Office of Workers' Compensation Programs responds, and urges affirmance of the denial of benefits.<sup>2</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We reject claimant's assertions and affirm the administrative law judge's determination that the newly submitted evidence has failed to establish a material change in conditions pursuant to Section 725.309. *See Ross, supra*. The existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), has been previously established in this case. *See Napier*, BRB No. 91-1341 BLA, slip op. at 1. Claimant was previously denied benefits on the basis of having failed to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c). *See Napier*, BRB No. 91-1341 BLA, slip op. at 2-4. In the instant case, the administrative law judge considered the entirety of evidence submitted subsequent to that previous denial.<sup>3</sup> In considering this evidence, the administrative law judge properly concluded that claimant failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1), (2) as the newly submitted evidence, Director's Exhibits 4, 6, 14, 21 31, was non-qualifying.<sup>4</sup> *See* 20 C.F.R. §718.204(c)(1), (2). Further, the administrative law judge properly

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<sup>3</sup> The instant claim was previously remanded by the Board in order to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(en banc); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). The administrative law judge's analysis consists of a review of the evidence submitted prior to our remand and the evidence submitted subsequent to that remand.

<sup>4</sup> 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).

found that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(3) inasmuch as the record is devoid of any evidence of cor pulmonale with right sided congestive heart failure. 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).

Finally, the administrative law judge concluded that the medical opinion evidence failed to support a finding of total disability pursuant to Section 718.204(c)(4). The newly submitted medical opinions consist of the opinions of Dr. Clarke, that claimant was totally disabled, Director's Exhibit 13, Dr. Baker who concluded that claimant suffered from a mild to minimal impairment, Director's Exhibit 5, and Dr. Wicker, who found that claimant maintained the respiratory capacity to return to his most recent coal mine employment, Director's Exhibit 38. The administrative law judge adopted the findings of Administrative Law Judge Lesniak and again concluded that the opinions of Drs. Clarke and Baker failed to carry claimant's burden of demonstrating total disability at Section 718.204(c)(4).<sup>5</sup> Decision and Order at 5-6. With regard to the opinion of Dr. Wicker, the administrative law judge found that the opinion does not support a finding of total disability and is entitled to great weight because it is well-reasoned and well-supported by underlying documentation. Decision and Order at 6.

We reject claimant's generalized assertions that the evidence at Section 718.204(c)(4) supports a finding of total disability. In order to establish total disability at Section 718.204(c)(4), claimant must affirmatively demonstrate that the miner's impairment was totally disabling and non-respiratory and non-pulmonary impairments are not relevant to the inquiry. See *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); see *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). Claimant, in the instant case, is unable to point to any evidence supporting his burden at Section 718.204(c)(4). See *Ondecko, supra*. Accordingly, we affirm the administrative law judge's determination that claimant has failed to demonstrate a material change in conditions pursuant to Section 725.309 and we therefore affirm

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<sup>5</sup> The Board affirmed Administrative Law Judge Lesniak's conclusion that these opinions failed to support a finding of total disability at Section 718.204(c)(4). *Napier*, BRB No. 97-0569 BLA, slip op. at 2.

the denial of benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge