

BRB No. 97-1158 BLA

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| BILLY MILLS                   | ) |                    |
|                               | ) |                    |
| Claimant-Petitioner           | ) |                    |
|                               | ) |                    |
| v.                            | ) |                    |
|                               | ) |                    |
| STRAIGHT CREEK MINING 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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp (Kenneth S. Stepp, P.A., P.S.C.), Manchester, Kentucky, for claimant.

Bonnie Hoskins (Stoll, Keenon & Park), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0765) of Administrative Law Judge Robert L. Hillyard 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 credited claimant with fifteen years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> The administrative law judge found that the

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<sup>1</sup> Claimant filed his initial claim for benefits on October 6, 1986 and it was finally denied on June 9, 1993. Director's Exhibits 61-33, 61-592. The instant claim was

recent evidence submitted with the instant claim was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

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 the 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).

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 of claimant 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).

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filed on July 27, 1994. Director's Exhibit 1.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error therein. In weighing the newly submitted medical opinions of record, the administrative law judge rationally concluded that this evidence failed to establish total disability by a preponderance of the evidence.<sup>2</sup> In considering the medical opinions pursuant to Section 718.204(c)(4), the administrative law judge permissibly found that the opinions of Drs. Fino and Vaezy, that claimant did not have a significant pulmonary impairment, were entitled to the greatest weight and failed to establish total disability.<sup>3</sup> *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); Decision and Order at 12; Director's Exhibits 10-11, 54. Moreover, the administrative law judge rationally accorded less weight to the opinions of Drs. Gardezi and Woolum since these physicians concluded that claimant was disabled due to multiple problems and did not diagnose a disabling pulmonary impairment. *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 12-13; Director's Exhibits 35, 55. Consequently, the administrative law judge acted within his discretion as fact-finder in concluding that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. See 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c). Inasmuch as the administrative law judge

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<sup>2</sup> The administrative law judge's findings that the newly submitted evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Coal Creek Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> The administrative law judge properly noted that the opinions of Drs. Reddy and Chatterjee were insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) as the physicians did not address whether claimant was disabled. Decision and Order at 8, 12; Director's Exhibit 54.

properly considered the newly submitted medical evidence and rationally concluded that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309, we affirm the administrative law judge's denial of benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge