BRB No. 98-0969 BLA

CHARLES D. RIFE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHARLES D. RIFE TRUCKING COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED: 4/22/99
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Charles D. Rife, Wolford, Virginia, *pro se*[1].

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

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[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, 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 (1995) (Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1426) of Administrative Law Judge Fletcher E. Campbell, Jr. 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). At the hearing the administrative law judge accepted the parties' stipulation to 15.59 years of coal mine employment. Hearing Transcript at 9. After determining that this case involves a request for modification,[2] the administrative law judge found that claimant failed to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Thus, the administrative law judge concluded that claimant failed to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits.[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See 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

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[2]The administrative law judge determined that claimant's application for benefits is a request for modification. He found that claimant originally filed for benefits on July 21, 1994, Director's Exhibit 1, and that the Department of Labor issued a proposed decision and order denying the claim on July 14, 1995, finding neither the existence of pneumoconiosis nor total disability. Director's Exhibit 33. The administrative law judge also found that following a timely request for reconsideration, the claim was reviewed and again denied on August 15, 1995. The administrative law judge concluded that claimant made a timely request for modification on August 14, 1996. The district director found that claimant's request for modification was untimely. Director's Exhibit 42. Although there is evidence which supports the finding that claimant's request for modification is untimely, Director's Exhibit 33, 40, the administrative law judge did not discuss this issue. Because we affirm the denial of this claim on the merits at 20 C.F.R. §718.204, based on all the evidence of record *see, infra* at 3-5, we do not need to decide whether claimant's recent application for benefits is a request for modification.

[3]We affirm the administrative law judge's finding of 15.59 years of coal mine employment as unchallenged on appeal and not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable 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 (1985).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After considering the administrative law judge's Decision and Order and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(1)-(4) and total disability due to pneumoconiosis pursuant to Section 718.204(b). The administrative law judge properly found that of the four pulmonary function studies of record, only the study performed on August 9, 1996 was qualifying. The administrative law judge also found that this pulmonary function study was invalidated by Dr. Ranavaya, who is NIOSH-certified in spirometry[4], and permissibly found that this questionable study was insufficient to establish total disability in light of the other three non-qualifying studies which were properly performed. Decision and Order at 8; Director's Exhibit 12, 29, 40 ,41; Employer's Exhibit 8. Further, the administrative law judge properly found that none of the arterial blood gas studies of record yielded qualifying values under Section 718.204(c)(2) and that the record is devoid of any evidence regarding the existence of cor pulmonale with right sided congestive heart failure under Section 718.204(c)(3). Finally, under Section 718.204(c)(4) and (b), the administrative law judge noted that all the medical opinions, namely those of Drs. Forehand, Shoukry and Sargent, agreed that claimant has no respiratory or pulmonary impairment due to pneumoconiosis. Decision and Order at 8. The administrative law judge noted claimant's progress notes by Dr. Sutherland diagnosing "diffuse rhonchi with both inspiratory stridor and expiratory wheeze. No crepitant rale". Decision and Order at 5; Director's Exhibits 13, 29; Employer's Exhibit 8. Dr. Sutherland also assessed that claimant had chronic bronchitis, that claimant was "Unable to do gainful work! No work since 6/91" and that claimant had "COPD." Although the administrative law judge did not specifically determine the weight to be given to Dr. Sutherland's progress notes, the physician did not explain the basis for his conclusory statements and did not relate his medical condition to claimant's coal dust exposure. We,

[4]Dr. Ranavaya determined that the pulmonary function study was improperly performed and that claimant gave less than optimal effort. Director's Exhibit 41.

therefore, affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability or total disability due to pneumoconiosis, as it is supported by substantial evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge properly weighed all the relevant evidence and properly found that claimant failed to establish total disability under Section 718.204.

Inasmuch as claimant failed to establish total disability under Section 718.204, a requisite element of entitlement, an award of benefits under Part 718 is precluded. See *Perry, supra.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge