

BRB No. 98-0971 BLA

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

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roy Collins, Bristol, Virginia, *pro se*.

Roger Pitcairn (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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order (97 -BLA-1654) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health

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 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found seven and three-quarter years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 5. After noting that the case was a duplicate claim, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) and thus insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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 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 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 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

² Claimant filed his initial claim for benefits on July 26, 1974, which was denied on November 29, 1976 and June 27, 1980. Director's Exhibit 15. The claim was finally denied on November 24, 1982. The instant claim was filed on February 26, 1997, and denied May 5, 1997. Director's Exhibits 1, 14.

no reversible error therein. The administrative law judge properly determined that the existence of pneumoconiosis was not established as the two newly submitted x-rays of record were read negative for the existence of pneumoconiosis. Director's Exhibits 11, 12; Decision and Order at 5; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there is no biopsy of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 5; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Further, the administrative law judge considered the new medical opinion and properly found the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4) as Dr. Forehand, found no evidence of coal workers' pneumoconiosis or respiratory impairment. Director's Exhibit 9; Decision and Order at 6; 20 C.F.R. §718.202; *Perry, supra*.

Turning to the issue of total disability, the administrative law judge properly found that total disability was not established pursuant to Section 718.204(c)(1) and (c)(2) as the newly submitted pulmonary function studies and blood gas studies of record produced non-qualifying values.³ See 20 C.F.R. §718.204(c)(1), (2); Director's Exhibits 8, 10; Decision and Order at 6; *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 found that total disability was not established as the opinion of Dr. Forehand, the only medical opinion submitted since the prior denial, found no functional respiratory impairment and did not otherwise address total disability. Director's Exhibit 9; Decision and Order at 6; see *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 findings that the newly

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).

submitted evidence of record is insufficient to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(c) as it is supported by substantial evidence and is in accordance with law.⁴

Inasmuch as the administrative law judge properly considered claimant's newly submitted evidence and determined that it failed to establish the existence of pneumoconiosis and total disability, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d), *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 denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁴ There is no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(c)(3).