BRB No. 98-0449 BLA

JAMES E. SHELTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING	)	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 Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

James E. Shelton, West Frankfort, Illinois, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1506) of Administrative Law Judge Ellin M. O'Shea 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 thirty-five years of coal mine employment and adjudicated this duplicate claim[1] pursuant to the regulations

[1]Claimant filed his initial claim on January 5, 1982. Director's Exhibit 19. On March 2, 1987, Administrative Law Judge Ronald T. Osborn issued a Decision and Order denying benefits. *Id*. Although Judge Osborn found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, he nonetheless found the evidence insufficient to establish total disability. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final.

contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has participated in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be 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 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that "Claimant's previous claim was denied for failure to establish total disability." Decision and Order at 14.

Claimant filed another claim on June 25, 1990. Director's Exhibit 20. This claim was denied by the Department of Labor on October 12, 1990 because claimant failed to establish a material change in conditions. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on May 9, 1994. Director's Exhibit 1.

[2]Inasmuch as the administrative law judge's length of coal mine employment finding, which is not adverse to this *pro se* claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that a material change in conditions is established where the miner did not have pneumoconiosis at the time of the first application but has since contracted it and become totally disabled by it, or where the miner's pneumoconiosis has progressed to the point of total respiratory disability since the filing of the first application. *See Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991); *see also Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997).

In finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1), the administrative law judge considered the three newly submitted pulmonary function studies dated June 7, 1994, June 13, 1995 and July 12, 1995. Whereas the June 7, 1994 and June 13, 1995 pulmonary function studies yielded non-qualifying[3] values, Director's Exhibits 4, 24, the July 12, 1995 pulmonary function study yielded qualifying values, Director's Exhibit 22. The administrative law judge found the July 12, 1995 study unreliable "given the higher results achieved on testing the prior month, within essentially the same calendar period." Decision and Order at 15. Thus, since the administrative law judge properly discounted the July 12, 1995 qualifying study because it is inconsistent with the contemporaneous non-qualifying June 13, 1995 study, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1).[4] *See Baker v. North American Coal Corp.*, 7 BLR 1-79

[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, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[4]The administrative law judge also discounted the July 12, 1995 pulmonary function study because he found the study to be invalid. The administrative law judge stated that "[s]ince the [July 12, 1995] study report gives only one set of values obtained, this raises a question with the factfinder as to whether three tracings were obtained and the best values selected, although there is no medical opinion that the study is invalid." Decision and Order at 15. It is not entirely clear from the record whether the administrative law judge's finding is correct. Since the administrative law judge provided a valid alternate basis for discounting the July 12, 1995 study, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he discounted the qualifying July 12, 1995 study because it is inconsistent with the contemporaneous non-qualifying June 13, 1995 study, *see Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1994), we hold that any error by the administrative law judge in this

(1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1994). Furthermore, as noted by the administrative law judge, since two of the three newly submitted pulmonary function studies of record yielded non-qualifying values, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). *See O'Keeffe, supra*; Decision and Order at 16.

In addition, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(2) since none of the newly submitted arterial blood gas studies of record yielded qualifying values. Director's Exhibits 6, 22, 24. Furthermore, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record contains no evidence of cor pulmonale with right sided congestive heart failure.

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regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Finally, the administrative law judge found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). The administrative law judge considered the newly submitted medical opinions of Drs. Cohen, Khan, Sanjabi and Selby. Whereas Dr. Selby opined that claimant does not suffer from a disabling respiratory impairment,[5] Director's Exhibit 24, Drs. Cohen and Khan opined that claimant has a disabling respiratory impairment, Director's Exhibit 22; Claimant's Exhibit 4. Dr. Sanjabi opined that claimant had limitations due to chronic obstructive pulmonary disease and coronary artery disease. Director's Exhibit 5. The administrative law judge properly accorded greater weight to the opinion of Dr. Selby than to the contrary opinions of Drs. Cohen and Kann because she found the opinion of Dr. Selby to be better reasoned and documented.[6] *See*

[5]Dr. Selby opined that claimant has the respiratory and pulmonary capacity to perform any and all previous coal mine employment duties. Director's Exhibit 24.

[6]The administrative law judge found "Dr. Selby's opinion to be documented." Decision and Order at 16. The administrative law judge observed that Dr. Selby's "arterial blood gas test produced normal values." *Id*. The administrative law judge also observed that "Dr. Selby's pulmonary testing is...the most comprehensive, including measurements of the total lung capacity, DLCO, and D1/VA." *Id*. Further, the administrative law judge stated that "[t]o the extent there are differences between Dr. Cohen's analysis of the medical nuances of Dr. Selby's ventilatory and diffusion capacity test findings, which found their respective differences as to whether there are moderate or mild defects, and affect the extent of [the] respiratory impairment issue and the issue of total respiratory disability, probative weight on these tests' meanings is given to Dr. Selby's opinions." *Id*. at 17. Moreover, the administrative law judge observed that "Dr. Cohen's finding that the Claimant cannot do heavy exertion does not clearly exclude him from performing his last coal mine employment, which Dr. Cohen described as requiring [the] pumping of a 2 pound grease gun, and 'considerable walking, often as much as a mile at a time.'" *Id*. at 17-18. The administrative law judge stated that "it is still unclear that [claimant's] pulmonary condition alone is keeping the Claimant from pumping a 2 pound grease gun and walking around, as Dr. Cohen added a 'dusty atmosphere' into the equation, perhaps implying that he wanted to prevent further coal dust exposure." *Id*. at 18. In addition, the administrative law judge found Dr. Khan's "conclusion to be confusing." *Id*. at 17. The administrative law judge observed that "[i]nitially, it appears that [Dr. Khan] is finding the Claimant to be totally disabled based solely on his pulmonary condition, but the following sentence implies that his finding of total disability is based on the whole-man perspective." *Id*. The administrative law judge stated that "[w]ithout clarification, [he did] not accept Dr. Khan's opinion as one of total disability from a pulmonary or respiratory standpoint." *Id*.

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge permissibly discounted Dr. Sanjabi's opinion "[d]ue to its vagueness." Decision and Order at 16; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

Since the administrative law judge properly found that the newly submitted evidence did not establish total disability, the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See McNew*, *supra*. Therefore, we affirm the denial of benefits. *See McNew, 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