

BRB No. 01-0475 BLA

BILLY BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OLGA COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Billy Blankenship, Austinville, Virginia, *pro se*.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Michelle S. Gerdano (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel,<sup>2</sup> appeals the Decision and Order (99-

BLA-1004) of Administrative Law Judge Stuart A. Levin denying benefits on a miner's 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>3</sup> Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000).<sup>4</sup> Decision and Order at 2-3. Therefore, the administrative law judge found the new evidence insufficient to establish a material change in conditions. *Id.* Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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

Because this case involves a duplicate claim, the administrative law judge, in accordance with *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), considered the new evidence to determine whether it was sufficient to prove one of the elements of entitlement that formed the basis of the prior denial of the miner's claim. *See* 20 C.F.R. §725.309 (2000).<sup>5</sup> Claimant's most recent claim was finally denied because he failed to establish total respiratory disability. *See* n.1, *supra*. Therefore, the administrative law judge considered the evidence submitted since the most recent denial of claimant's prior claims to determine "whether the Claimant's pneumoconiosis has progressed to the point of total disability." Decision and Order at 2.

The administrative law judge found that claimant failed to prove that his pneumoconiosis has become totally disabling and, therefore, also found that claimant failed to establish a material change in conditions. Decision and Order at 3-4. We vacate the administrative law judge's finding that the new evidence is insufficient to establish total respiratory disability and a material change in conditions for the following reasons. First, the administrative law judge noted that the only new pulmonary function study, dated February 9, 1998, failed to produce qualifying<sup>6</sup> values.<sup>7</sup> *Id.* However, the record contains two additional pulmonary function studies performed on December 11, 1998 and December 31,

1996<sup>8</sup> which the administrative law judge did not address. Director's Exhibits 20, 21. Accordingly, because the administrative law judge did not consider all the relevant new evidence pursuant to 20 C.F.R. §718.204(b)(2)(i) as required by the Administrative Procedure Act, *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984), we instruct the administrative law judge on remand to consider the December 11, 1998 and December 31, 1996 pulmonary function studies and to reweigh all the newly submitted pulmonary function study evidence.

Second, the administrative law judge mischaracterized the December 10, 1996 blood gas study, Director's Exhibit 21, when he stated that it did not qualify under the regulations. *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). A blood gas study with a PCO<sub>2</sub> of 36 would need a PO<sub>2</sub> value of 64 or less to qualify.<sup>9</sup> *See* 20 C.F.R. Part 718, App. C. Therefore, the December 10, 1996 blood gas study, with a PCO<sub>2</sub> of 36 and a PO<sub>2</sub> of 61, does qualify to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), *see Tucker v. Director, OWCP*, 10 BLR 1-35 (1987), and we instruct the administrative law judge on remand to reconsider this blood gas study and to reweigh all the newly submitted blood gas study evidence.

Next, the administrative law judge stated that "there is no contemporary medical opinion" demonstrating that claimant is totally disabled due to pneumoconiosis because Dr. Forehand found that claimant "is not impaired from a respiratory or pulmonary standpoint." Decision and Order at 3. Since Dr. Forehand opined that claimant has no significant respiratory impairment,<sup>10</sup> Director's Exhibit 9, the administrative law judge permissibly found that Dr. Forehand's report is insufficient to support a finding of total respiratory disability. *See* 20 C.F.R. §718.204(b)(2)(iv); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Accordingly, we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability by the newly submitted medical opinion evidence. *See Lane, supra*; *Gee, supra*; *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

If, on remand, the administrative law judge finds the new evidence sufficient to establish total respiratory disability pursuant to any of the subsections at 20 C.F.R. §718.204(b)(2)(i) or (ii), he must then weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Finally, we instruct the administrative law judge that if he finds that claimant has established a material change in conditions on remand by establishing total respiratory disability, then he must consider the entire evidentiary record to determine if claimant has established entitlement to benefits. *See Rutter, supra.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge