

BRB No. 97-0782 BLA

HASSEL KENDRICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CIMARON MINERALS, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Hassel Kendrick, Elkhorn City, Kentucky, *pro se*.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; 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, the United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of legal counsel,<sup>1</sup> appeals the Decision and Order (95-BLA-958) of Administrative Law Judge Daniel A. Sarno, Jr., denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

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<sup>1</sup> Susie Davis, a benefits counselor with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge noted that a prior claim was denied and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge found that the recent evidence submitted with the instant claim was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(4).<sup>3</sup> 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 generally contends that the administrative law judge erred in finding that the recent evidence was insufficient to establish entitlement. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a motion to clarify the contents of the formal record.<sup>4</sup>

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, are supported by substantial evidence and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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

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<sup>2</sup> Claimant filed his first claim for black lung benefits on October 11, 1984, which was denied on March 27, 1985. Decision and Order at 3, 8; Director's Exhibit 49. Claimant filed the instant claim on May 26, 1993. Decision and Order at 3; Director's Exhibit 1.

<sup>3</sup> The administrative law judge did not make specific findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(3).

<sup>4</sup> The Board accepts the Director's motion as his response brief and herein decides the case on its merits.

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).

With respect to the Director's request, he seeks a determination as to whether the record contains a September 27, 1994 medical report by Dr. Wright and an April 12, 1995 medical report by Dr. Sutherland. Attached to the Director's brief is a copy of a letter by claimant's former counsel dated May 17, 1995 addressed to the Office of Administrative Law Judges with the reports of Drs. Wright and Sutherland attached. The letter requests that the reports be made a part of the record in this claim, but the administrative law judge does not mention them in his Decision and Order. Although the administrative law judge has broad discretion in procedural matters, he has provided no basis for excluding the reports, if that is the case. 20 C.F.R. §725.456; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). In any event, we agree with the Director's request that the case should be remanded to the administrative law judge for clarification of the contents of the official record with respect to these reports and, if necessary, to address the merits in light of this evidence. Consequently, we vacate the administrative law judge's finding of no material change in conditions and the denial of benefits and remand the case for additional findings with regard to the evidence of record.

Accordingly, the Decision and Order of the administrative law judge denying benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge