

BRB No. 97-0842 BLA

LAWRENCE O'QUINN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG TRACK COAL COMPANY	)	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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Lawrence O'Quinn, Birchleaf, Virginia, *pro se*.<sup>1</sup>

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

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<sup>1</sup>Tim White, 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. White 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 (96-BLA-0689) of Administrative Law Judge Pamela Lakes Wood 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, based on the parties' stipulation, credited claimant with thirty-two years of coal mine employment and adjudicated this duplicate claim<sup>2</sup> pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge also found, based on the parties' stipulations, that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203. However, 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 concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the

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<sup>2</sup>Claimant filed his initial claim with the Social Security Administration (SSA) on February 26, 1973. Director's Exhibit 28. After several denials, SSA Administrative Law Judge Oliver E. Payne issued a decision denying benefits on August 7, 1975. *Id.* Subsequently, claimant filed a claim with the Department of Labor (DOL) on February 2, 1977. *Id.* While the 1977 DOL claim was pending, claimant elected to have his 1973 SSA claim reviewed by the DOL on April 14, 1978. *Id.* Hence, claimant's 1973 SSA claim merged with his 1977 DOL claim. The DOL denied benefits on the claim on November 21, 1978 and February 21, 1980. *Id.* Since claimant did not pursue this claim any further, the denial became final. On January 28, 1983, claimant filed another claim. *Id.* Administrative Law Judge Robert L. Hillyard issued a Decision and Order denying benefits on June 27, 1991. *Id.* Although Judge Hillyard credited claimant with thirty-two years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), he nonetheless found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). *Id.* Claimant filed his most recent claim on December 12, 1994. Director's Exhibit 1.

administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. 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 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'Keefe 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. Claimant's previous claim was denied on the ground that he failed to show that he suffered from a totally disabling respiratory impairment. See Director's Exhibit 28. The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction this case arises,<sup>3</sup> adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). See *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).

Initially, 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) and (c)(2) since none of the newly submitted pulmonary function studies or arterial blood gas studies of record yielded qualifying<sup>4</sup> values. Director's Exhibits 8, 10, 22. Additionally, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3). The administrative law judge correctly concluded that "[t]here is no evidence which establishes the presence of cor pulmonale with right-sided congestive heart failure." Decision and Order at 6.

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<sup>3</sup>Inasmuch as claimant performed his most recent coal mine employment in Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup>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, C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

Finally, we address the administrative law judge's evaluation of the newly submitted medical reports of record. The administrative law judge stated that "none of the medical evidence submitted in conjunction with the current (duplicate) claim establishes that the Claimant is totally disabled by a respiratory or pulmonary impairment." Decision and Order at 8. Dr. Castle opined that claimant does not suffer from a respiratory impairment. Director's Exhibit 22. Further, Dr. Iosif opined that "[a]lthough [claimant's p]neumoconiosis has not resulted in any pulmonary functional compromise, [claimant] should not undergo further exposure to coal dust." Director's Exhibit 9. The administrative law judge correctly stated "that the inadvisability of a return to coal mine employment because of pneumoconiosis is not the equivalent of an opinion of total disability." Decision and Order at 7 n.4; see *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). 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). See *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Moreover, since claimant failed to establish a total respiratory disability, the administrative law judge properly concluded that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. See *Rutter, supra*.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

