

BRB No. 01-0422 BLA

ROBERT C.D. PHILLIPS)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
EASTERN ASSOCIATED COAL)	DATE	ISSUED:
)		
CORPORATION)		
)		
and)		
)		
OLD REPUBLIC INSURANCE COMPANY)		
)		
Employer-Carrier)		
Respondents)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

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

Robert C.D. Phillips, Merritt Island, Florida, pro se.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for
employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order
On Remand (96-BLA-1129) of Administrative Law Judge Stuart A. Levin 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).¹

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). By order dated April 10, 2001, the Board granted the request made by the Director, Office of Workers' Compensation Programs (the Director), for an extension of time to file a response brief and also granted the parties of record the opportunity to submit briefs addressing whether the challenged regulations would affect the outcome of this

Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Pursuant to claimant's prior appeal, the Board affirmed the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)(2000) and insufficient to establish total disability pursuant to Section 718.204(c)(2)-(c)(4)(2000). The Board, however, vacated the administrative law judge's finding that the pulmonary function study of evidence was in equipoise, and therefore insufficient to establish total disability pursuant to 718.204(c)(1)(2000) and a material change in conditions, because the administrative law judge failed to address a qualifying pulmonary function study in the record. The Board, therefore, remanded the case for reconsideration of all the pulmonary function studies of record along with the contrary probative evidence. *Phillips v. Eastern Associated Coal Co.*, BRB No. 99-0625 BLA (Mar. 17, 2000)(unpub.). On remand, having considered all the pulmonary function studies of record, the administrative law judge concluded that they were insufficient to establish total disability pursuant to Section 718.204(c)(1)(2000), and therefore, insufficient to establish a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

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 supported by substantial evidence, rational, 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).

case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Association v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision, therefore, renders moot those arguments made by the parties regarding the impact of the challenged regulations.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. As instructed by the Board, the administrative law judge explicitly addressed the qualifying pulmonary function study of June 2, 1989, and reconsidered it along with the other pulmonary function study evidence of record. Although noting that the June 2, 1989 study was qualifying, the administrative law judge accorded it little weight as it was accompanied by only one tracing and no comment was made regarding claimant's cooperation and comprehension during the test. Thus, the administrative law judge found that the test results were entitled to diminished weight. This was rational. 20 C.F.R. §§718.104, 718.204(b)(2)(i);² *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Orek v. Director, OWCP*, 10 BLR 1-51, 54 n.3 (1988); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). In addition, the administrative law judge found the June 2, 1989 study outweighed by the two more recent studies of October 2, 1992 and January 26, 1998, as the October 1992 study produced non-qualifying values even with poor effort on claimant's part, and the January 26, 1988 study produced non-qualifying postbronchodilator values. This was rational. See *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Revnack v. Director, OWCP*, 7 BLR 1-771, 773 (1985); *Clayton v. Pyro Mining Co.*, 7 BLR 1-551, 556 (1984); compare *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991). Thus, the administrative law judge rationally found the pulmonary function study evidence insufficient to establish total disability pursuant to Section 718.204(c)(1)(2000), now 718.204(b)(2)(i), and, therefore, a material change in conditions.

² A "qualifying" pulmonary function 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. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1)(2000), now 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability and, therefore, a material change in conditions, as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge