

BRB No. 99-0378 BLA

KENNETH R. DEAN)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
FLAT GAP MINING COMPANY)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in -Interest)	

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr., (Wolfe & Farmer), Norton, Virginia, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (98-BLA-0513) of Administrative Law Judge Jeffrey Tureck on a duplicate 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 case is before the Board for the second time. The administrative law judge found that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) and therefore claimant had not met his burden of establishing a material change in conditions pursuant to 20 C.F.R. §725.309(c). *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). Decision and Order at 5. Accordingly, the administrative law judge denied claimant's request for modification and denied the claim.

¹Claimant is Kenneth R. Dean, the miner, who filed two claims with the Department of Labor (DOL). The first claim, filed on February 28, 1983, was denied by Administrative Law Judge Eric Feirtag in a Decision and Order dated March 18, 1993. Director's Exhibit 42. Following claimant's appeal, the Board remanded the case back to the administrative law judge. *Dean v. Flat Gap Mining Co.*, BRB No. 93-1319 BLA (Sept. 23, 1994)(unpub.). Claimant was again denied benefits by the administrative law judge on January 10, 1995. Claimant's subsequent request for modification, was denied on December 18, 1995. *Id.* Claimant took no further action on this claim, and the denial became final. Claimant's second claim, the instant duplicate claim, was filed on March 4, 1997. Director's Exhibit 1.

On appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.204(c)(2) and (4). Claimant asserts that the administrative law judge erred by improperly discounting Dr. Forehand's qualifying blood gas study and medical opinion. Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not responded to the instant appeal.²

The Board's scope of review is defined by statute. 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 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence fails to establish the existence of a total respiratory disability pursuant to Section 718.204(c)(1); See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in according less weight to the opinion of Dr. Forehand primarily because the physician relied upon a qualifying blood gas study that was lower than other studies performed at different times over the last fifteen years. In considering the newly submitted blood gas studies, the administrative law judge correctly found that Dr. Forehand's blood gas study dated July 7, 1997 yielded very low qualifying values both at rest and after exercise. Director's Exhibit 12; Decision and Order at 3. The administrative law judge also determined that the blood gas study administered by Dr. Dahhan on March 16, 1998, and St. Mary's Hospital on May 5, 1995 were non-qualifying. Employer's Exhibits 1,8. The administrative law judge found that "there clearly is no basis to find that the single qualifying blood study...outweighs the two non-qualifying tests" submitted in conjunction with this duplicate claim. Director Exhibit 12; Employer's Exhibits 1, 8. The administrative law judge rationally determined that based on the evidence of record, claimant has not met his burden of establishing he is totally disabled pursuant to Section 718.204(c)(2). See *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). Moreover, we specifically reject claimant's contention that the administrative law judge substituted his own medical conclusions as his finding was within his discretion and supported by the record. We affirm, therefore, the administrative law judge's determination that the newly submitted evidence is insufficient to establish total respiratory disability via the blood gas studies of record at Section 718.204(c)(2).³

With respect to Section 718.204(c)(4), claimant contends that the administrative law judge improperly discounted Dr. Forehand's opinion on the basis that the blood gas study he relied upon was qualifying. We disagree. The administrative law judge found that Dr. Forehand's opinion, that claimant was totally disabled, relied heavily upon the results of his own blood gas study. Decision and Order at 4. The administrative law judge considered all the blood gas studies in the record and

³Since the administrative law judge properly determined that the one qualifying blood gas test did not outweigh the two non-qualifying tests, any error in the administrative law judge's statement that "[i]f claimant's qualifying blood gas tests were due to pneumoconiosis, they would not fluctuate as they have over the years; they would be consistently low....," is harmless. Decision and Order at 3.

found that Dr. Forehand's July 7, 1997 test results contained the lowest values and were the only qualifying studies since 1986. Director's Exhibits 12, 42; Employer's Exhibits 1, 8. The administrative law judge then rationally credited Dr. Dahhan's March 18, 1998 opinion that claimant was not totally disabled, but able to do his usual coal mine employment, on the basis that it was well reasoned and better supported by the objective data of record. Decision and Order at 5; See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). In addition, the administrative law judge also permissibly found that Dr. Dahhan's opinion was better explained than the opinion of Dr. Forehand. Decision and Order at 5; *Clark v. Karst- Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Tackett v. Cargo Mining, Inc.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Company*, 10 BLR 1-19 (1987)(*en banc*). We affirm, therefore, the administrative law judge's finding that the medical opinion evidence is insufficient to establish total respiratory disability at Section 718.204(c)(4) as it is supported by substantial evidence. We further affirm the administrative law judge's finding that the evidence fails to establish a material change in conditions pursuant to Section 725.309(c), as claimant has not established that he suffers from a totally disabling respiratory impairment pursuant to Section 718.204(c). As this finding precludes entitlement pursuant to the Part 718 regulations, we affirm the administrative law judge's denial of benefits. See *Trent supra*; *Perry, supra*.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

