BRB No. 99-0602 BLA

ZANE R. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ELKAY MINING COMPANY	)	
	)	
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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Zane R. Moore, Logan, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0210) 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). The administrative law judge properly considered the instant claim, a duplicate claim which was filed on June 16, 1994, on the merits pursuant to the permanent regulations at 20 C.F.R. Part 718.[1] After noting that the parties stipulated that claimant established twenty-eight years of coal mine employment,

[1]Claimant filed an initial claim on June 28, 1973. Director's Exhibit 30. The district director issued a final denial of the claim on August 13, 1980 because claimant did not establish total disability and because claimant was currently engaged in coal mine employment. *Id*. Claimant did not thereafter take any further action in pursuit of benefits until filing the instant duplicate claim on June 16, 1994. Director's Exhibit 1.

the administrative law judge determined that the evidence of record was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not presently intend to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of 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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Inasmuch as the administrative law judge correctly found that none of the pulmonary function studies or arterial blood gas studies of record are qualifying,[2] Decision and Order at 1; Director's Exhibits 10, 12, 16, 24, 27, 30, 34, 50, 51, we affirm the administrative law judge's finding that claimant failed to establish total disability under 20 C.F.R. §718.204(c)(1) and (c)(2). The administrative law judge also properly found that the record does not contain any evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 1. We, therefore, affirm the administrative law judge's finding that claimant is precluded from establishing total disability pursuant to Section 718.204(c)(3).

[2]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" test yields values which exceed the requisite table values. The record contains the results of eight pulmonary function studies and six arterial blood gas studies, all of which are non-qualifying. Director's Exhibits 10, 12, 16, 24, 27, 30, 34, 50, 51.

In finding that the medical opinion evidence of record was insufficient to establish total disability under Section 718.204(c)(4), the administrative law judge correctly stated that no physician of record specifically indicated that claimant was suffering from a totally disabling respiratory or pulmonary impairment. Decision and Order at 1. The administrative law judge correctly found that Drs. Zaldivar, Castle, Piracha, Ranavaya, Crisalli and Fino all opined that claimant has little or no pulmonary impairment and retains the respiratory and pulmonary capacity to perform his last usual coal mine employment as a roof bolter and buggy operator. *Id*.; Director's Exhibits 11, 24, 27, 30, 34, 38, 39, 51. The administrative law also correctly stated that while Dr. Rasmussen did not specifically indicate that claimant was totally disabled, Dr. Rasmussen indicated that claimant would not be able to perform heavy manual labor.[3] Decision and Order at 1-2; Director's Exhibit 34. The administrative law judge found, however, that the evidence did not establish that claimant's job required heavy manual labor.[4] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The administrative law judge thus properly determined that Dr. Rasmussen's opinion did not support a finding of total disability. *See McMath, supra; DeFore, supra; Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); Decision and Order at 1-2; Director's Exhibit 34. The administrative law judge also properly found that, assuming claimant's work did require heavy manual labor, Dr. Rasmussen's opinion would still be outweighed by the remaining opinions of record -- *i.e.*, the opinions of Drs. Zaldivar, Castle, Piracha, Ranavaya, Crisalli and Fino, which as noted

[3]Dr. Rasmussen examined claimant on April 3, 1996. Director's Exhibit 34. Dr. Rasmussen indicated that the arterial blood gas study he administered on that date was normal, and that the pulmonary function study exhibited a minimal irreversible restrictive and obstructive defect. *Id*. Dr. Rasmussen did not specifically indicate that claimant was totally disabled from a respiratory standpoint, but stated that claimant's anaerobic threshold of 49% as determined on pulmonary function testing indicated that claimant would "not be able to perform heavy or very heavy labor." *Id.*

[4]Substantial evidence supports this finding inasmuch as claimant's counsel elicited only general testimony from claimant at the hearing, testimony which did not detail the duties and exertional requirements in his jobs as a roof bolter and buggy operator. Claimant merely indicated that his job as a roof bolter entailed drilling holes in a roof and inserting pins to secure the roof, and that the buggy operator job consisted of running machinery which hauled coal from the face to the belt. Hearing Transcript at 15 *et seq.* Additionally, the administrative law judge correctly found that, while Dr. Rasmussen noted that claimant's job description indicated claimant had to lift heavy mine cable and move it five-hundred feet at least twice a shift and lift fifty pound rock dust bags, Dr. Rasmussen did not note the weight of the cables claimant had to move or the number of men required to move them, and did not note how frequently claimant had to lift the fifty pound bags of dust. Decision and Order at 2; Director's Exhibit 34.

supra, indicate that claimant retains the respiratory capacity for his usual coal mine employment as a roof bolter and buggy operator -- since these opinions were better supported by the objective evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 2; Director's Exhibits 11, 24, 27, 30, 34, 38, 39, 51. We, therefore, affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

Inasmuch as claimant failed to total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits.[5] *Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[5]While the administrative law judge did not address the issue of whether a material change in conditions was established under 20 C.F.R. §725.309, his omission constitutes harmless error. The administrative law judge considered the claim on the merits, and claimant, therefore, was not prejudiced by the administrative law judge's failure to specifically address the issue. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Additionally, the administrative law judge did not address whether claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). This error is harmless because, as discussed *supra,* the administrative law judge properly found that claimant failed to establish total disability under 20 C.F.R. §718.204(c), a requisite element of entitlement under 20 C.F.R. Part 718. *Id*. Claimant would thus not be entitled to benefits even had the administrative law judge found that the existence of pneumoconiosis was established.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge