

BRB No. 99-0662 BLA

HERSHEL NEW)
Claimant-Petitioner)
v.)
WISE MINING CORPORATION)
Employer-Respondent) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Hershel New, Panther, West Virginia, *pro se.*

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (1998-BLA-86) of Administrative Law Judge Daniel L. Leland 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). This case involves a duplicate claim. The administrative law judge found that employer stipulated that claimant has twenty-eight and seven-tenths years of qualifying coal

¹Claimant is Hershel New, the miner, whose initial claim for benefits was filed on August 12, 1983 and ultimately denied when the Board affirmed Administrative Law Judge Robert J. Shea's Decision and Order denying benefits. Director's Exhibit 29; *New v. Wise Mining Corp.*, BRB No. 89-1903 BLA (Sep. 26, 1991)(unpub.). Claimant filed the instant claim on October 7, 1996. Director's Exhibit 1.

mine employment and that the newly submitted evidence does not establish either total respiratory disability pursuant to 20 C.F.R. §718.204(c) or a material change in conditions pursuant to 20 C.F.R. §725.309(c). Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to find that claimant established entitlement to benefits. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on 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. *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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'd*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Claimant's prior claim was denied because claimant failed to establish total respiratory disability pursuant to Section 718.204(c). Director's Exhibit 29.

Pursuant to Section 718.204(c), the administrative law judge considered the newly submitted evidence of record, which consists of one pulmonary function study, one arterial blood gas study and the medical report of Dr. Younes. Director's Exhibits 9-11. The pulmonary function study yielded non-qualifying results pursuant to Section 718.204(c)(1) and the arterial blood gas study produced non-qualifying results pursuant to Section 718.204(c)(2). Director's Exhibits 9, 11. Additionally, pursuant to Section 718.204(c)(3), there is no evidence of cor pulmonale with right-sided congestive heart failure and, pursuant to Section 718.204(c)(4), Dr. Younes opined that claimant has a "moderate obstructive impairment that should not interfere with his last coal mining job." Director's Exhibit 10. Because the administrative law judge properly found that the newly submitted evidence does not support a finding of total respiratory disability pursuant to Section 718.204(c), we affirm the administrative law judge's findings pursuant to Section 718.204(c), that claimant failed to establish a material change in conditions pursuant to Section 725.309, and the denial of benefits. Decision and Order at 4; *Rutter, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge