

BRB No. 98-0883 BLA

JAMES L. SHEPPARD)
)
 Claimant-Petitioner)
)
 v.)
)
 BEATRICE POCAHONTAS) DATE ISSUED:
 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 Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

James L. Sheppard, Oakwood, Virginia, *pro se*.¹

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

¹Tim 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. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, representing himself, appeals the Decision and Order (97-BLA-1425) of Administrative Law Judge Fletcher E. Campbell, Jr. 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 instant case involves a duplicate claim filed on August 9, 1996.² The administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. 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

²The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on May 23, 1972. Director's Exhibit 35. The SSA denied this claim on June 3, 1974 and January 31, 1975. *Id.* In a Decision dated February 27, 1976, Administrative Law Judge Joseph P. Rushbrooke denied the claim. *Id.* Claimant also filed a claim with the Department of Labor (DOL) on June 13, 1974 which the DOL informally denied on November 8, 1976. *Id.* After claimant elected SSA review of his claim, the SSA again denied claimant's claim on July 5, 1979. *Id.* The DOL also subsequently reviewed the miner's claim, and the district director denied the claim on June 24, 1980. *Id.* There is no indication that claimant took any further action in regard to these claims.

Claimant filed a second claim on November 19, 1991. Director's Exhibit 36. By Decision and Order dated August 23, 1993, Administrative Law Judge Robert J. Shea found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Id.* Even assuming that claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309, Judge Shea found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Id.* Accordingly, Judge Shea denied benefits. *Id.* By Decision and Order dated September 19, 1994, the Board reversed Judge Shea's finding that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Sheppard v. Beatrice Pocahontas Co.*, BRB No. 93-2424 BLA (Sept. 19, 1994) (unpublished). The Board, however, affirmed Judge Shea's finding that claimant failed to establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Id.* The Board, therefore, affirmed Judge Shea's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a third claim on August 9, 1996. Director's Exhibit 1.

denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1991 claim was denied because he failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 36. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).³

³The Fourth Circuit has held that a claimant must prove that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. See *Robinson v. Pickands Mather & Company*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

The administrative law judge correctly noted that the record does not contain any newly submitted evidence supportive of a finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).⁴ Decision and Order at 7. We, therefore, affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *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

REGINA C. McGRANERY
Administrative Appeals Judge

⁴The newly submitted medical evidence includes medical reports submitted by Drs. Forehand, Castle, Sargent and Fino. Dr. Forehand opined that claimant did not suffer from any respiratory impairment arising from lung disease. Director's Exhibit 14. Dr. Castle opined that claimant had no significant respiratory impairment whatsoever. Director's Exhibit 34; Employer's Exhibits 11, 12. Dr. Castle further opined that even if claimant suffered from pneumoconiosis, he would not be disabled by that process. *Id.* Dr. Sargent opined that claimant did not suffer from any demonstrable ventilatory impairment that could be attributed to coal dust exposure. Employer's Exhibit 5. Dr. Fino opined that claimant was not disabled due to coal mine dust inhalation or any intrinsic respiratory condition. Employer's Exhibits 7, 9.