

BRB No. 99-0200 BLA

MARY CRESS (on behalf of and)
as widow of WILLIAM H. CRESS))
Claimant-Petitioner)
v.)
WESTMORELAND COAL COMPANY)
Employer-Respondent)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Mary Cress, Pennington Gap, Virginia, *pro se*.¹

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

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

PER CURIAM:

Claimant², without assistance of counsel, appeals the Decision and Order (98-BLA-0152) of Administrative Law Judge Lawrence P. Donnelly denying benefits on a miner's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

¹The Board acknowledged this appeal on November 10, 1998 and determined that Mr. Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but that Mr. Carson is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

²Mary Cress, claimant and widow of William H. Cress, is pursuing the miner's claim.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In considering claimant's petition for modification³ under 20 C.F.R. §725.310, the administrative law judge found that claimant did not establish a change in conditions or a mistake in a determination of fact in the prior denial pursuant to Section 725.310. Consequently, the administrative law judge denied benefits. Claimant appeals, generally challenging the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. See *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, are rational, and are consistent with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must prove that the miner suffered from pneumoconiosis, that his

³This miner's claim, filed on June 1, 1982, was denied by Administrative Law Judge Charles Rippey on September February 4, 1988. Director's Exhibits 1, 49. The Board affirmed Judge Rippey's decision. *Cress v. Westmoreland Coal Co.*, BRB No. 88-0654 BLA (May 20, 1994)(unpub.). The miner made a timely request for modification that was denied by Judge Rippey on September 1, 1995. Director's Exhibit 75. The miner died on October 30, 1995 and his widow sought modification of the miner's claim and also filed a survivor's claim on May 24, 1996. Director's Exhibit 76. The miner's claim was assigned to the Administrative Law Judge Lawrence P. Donnely as Judge Rippey had retired. The survivor's claim was denied on October 9, 1997 by Administrative Law Judge Jeffrey Tureck. The Board affirmed the denial of survivor's benefits, see *Cress v. Westmoreland Coal Co.*, BRB No. 98-0240 BLA (Aug. 31, 1999) and the case is currently pending before the United States Court of Appeals for the Fourth Circuit.

pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. See *Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc*).

After considering the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that claimant has not established total disability pursuant to Section 718.204(c), based on consideration of all the relevant evidence of record. The administrative law judge correctly found that none of the pulmonary function studies and arterial blood gas studies of record yielded qualifying values under Section 718.204(c)(1) and (c)(2)⁴ and that the record is devoid of any evidence regarding the existence of cor pulmonale with right sided congestive heart failure under Section 718.204(c)(3). Finally, under Section 718.204(c)(4), the administrative law judge properly found the opinions of Drs. Robinette and Smiddy, the only physicians' opinions of record which concluded that the miner had a total respiratory disability, unreasoned and not consistent with the objective evidence of record. Decision and Order at 16. The administrative law judge properly noted that the ventilatory study on which Dr. Robinette based his conclusions was flawed, inasmuch as the results were found to be not valid by Dr. Vest, who is a Board-certified internist and pulmonary specialist. Decision and Order at 15, 16; Director's Exhibit 39, 43, 46. The administrative law judge properly found that in 1984, Dr. Smiddy determined that the miner was disabled due to the oxygen level on a blood gas study which, in fact, was non-qualifying. Director's Exhibits 25, 62. Moreover, the administrative law judge properly noted that in 1994, Dr. Smiddy examined the miner and administered a pulmonary function study which showed no significant respiratory impairment. Decision and Order at 16; Director's Exhibit 62. Finally, the administrative law judge properly relied on the contrary medical opinions of record, namely those of Drs. Dahhan, Mettu, Kleinerman, Caffrey, Castle, Naeye, Zaldivar and Fino, to find that total disability was not established because the respective opinions of these physicians were supported by the objective medical data of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 17. Consequently, we affirm the administrative law judge's determination on the merits, based on all the relevant evidence of record, that claimant has failed to establish total respiratory disability at Section 718.204(c)(1)-(4).

⁴A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values. *i.e.* Appendices B and C of Part 718. See 20 C.F.R. §§718.204(c)(1) and (c)(2). A "non-qualifying" study yields values which exceed the requisite table values.

Inasmuch as we affirm the administrative law judge ' s finding that claimant failed to establish total disability, an essential element of entitlement, an award of benefits under 20 C.F.R. Part 718 is precluded. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge