

BRB No. 01-0924 BLA

GEORGE S. McKENZIE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS=)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

George S. McKenzie, Stambaugh, Kentucky, *pro se*.

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

PER CURIAM:

Claimant ¹ appeals the Decision and Order - Denial of Benefits (01-BLA-0307) of Administrative Law Judge Daniel J. Roketenetz rendered 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 Act).² The administrative law judge found, and the parties stipulated to, fourteen years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.³ Decision and Order at 3.

¹ Susie Davis, a benefits counselor with the Kentucky Black Lung Association, requested on behalf of claimant that the Board review the administrative law judge=s decision, but Ms Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985)(Order).

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. Theses regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The previous history of this case is set forth in the administrative law judge=s

Considering the evidence submitted in support of claimant=s request for modification along with the evidence submitted in support of the duplicate claim, the administrative law judge concluded that the evidence failed to establish total disability due to pneumoconiosis, the element of entitlement previously adjudicated against claimant. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see Hess v. Director, OWCP*, 21 BLR 1-141 (1998). Benefits were, accordingly, denied.

On appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers= Compensation Programs, responds, urging affirmance of the denial of benefits as the administrative law judge properly found that total disability, and, therefore, a material change in conditions, were not established. The Director further noted that the revisions to Section 725.309 did not apply to claims pending on January 19, 2001, such as this one.

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. *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 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).

In order to establish entitlement to benefits in a living miner=s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. ' ' 718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge=s Decision and Order and the evidence of record, we conclude that the Decision and Order of administrative law is supported by substantial evidence and contains no reversible error. The administrative law judge correctly found the evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(iii) as the pulmonary function studies and blood gas studies of record produced non-qualifying values,⁴ and there was no evidence of cor pulmonale with

Decision and Order at pages 2-3.

⁴ A Aqualifying@ pulmonary function study or blood gas study yields values that are

right-sided congestive heart failure in the record. 20 C.F.R. '718.204(b)(2)(i)-(iii); Director=s Exhibits 10, 14; Decision and Order at 7; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev=d on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991). Turning to the medical opinion evidence, the administrative law judge properly found that the medical opinion evidence failed to establish total disability because Dr. Fritzhand found that claimant was able to perform his usual coal mine employment and Dr. Westerfield found no impairment. The administrative law judge also found that their opinions were supported by the objective laboratory data of record. Director=s Exhibits 10, 14; Decision and Order at 8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Steel Corp.*, 9 BLR 1-43 and 13 BLR 1-46 (1986), *aff=d on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *see Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). Thus, the administrative law judge properly found that total disability and, therefore, a material change in conditions were not established. 20 C.F.R. '718.204(b)(2)(iv); 20 C.F.R. '725.309(d); *Ross, supra*; *Hess, supra*.

equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A Anon-qualifying@ exceeds those values. *See* 20 C.F.R. '718.204(b)(2)(i), (ii).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge