BRB No. 99-1324 BLA

ZANE A. CHILDRESS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
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 on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Zane A. Childress, Mavisdale, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order on Modification Denying Benefits (99-BLA-0398) of Administrative Law Judge Jeffrey Tureck denying benefits on a request for modification with respect to 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 has been before the Board previously. Claimant

[1] Ron Carson, 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, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

originally filed a claim for black lung benefits on April 13, 1992. In his Decision and Order dated January 10, 1994, Administrative Law Judge Reno E. Bonfanti credited claimant with thirty-five years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied.

Claimant filed a motion for modification on December 14, 1994. In a Decision and Order issued January 29, 1996, Administrative Law Judge Charles P. Rippey reviewed the evidence submitted by claimant in support of his request for modification of Judge Bonfanti's Decision and Order and determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, modification and benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Childress v. Island Creek Kentucky Mining [sic]*, BRB No. 96-0726 BLA (May 30, 1997)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 103.

Claimant subsequently requested modification pursuant to 20 C.F.R. §725.310 on April 20, 1998. Decision and Order at 2. In reviewing this case on claimant's request for modification, Administrative Law Judge Tureck initially noted that claimant was seeking modification solely on the basis of a change in conditions and that claimant knowingly withdrew modification due to a mistake in a determination of fact as an issue. Decision and Order at 2, n. 2. As Judges Bonfanti and Rippey had reached inconsistent findings regarding the existence of pneumoconiosis, but had both found that total disability was not established, the administrative law judge assumed a change in conditions was shown by evidence that claimant suffers from pneumoconiosis. The administrative law judge then considered all of the evidence of record, old and new, on the merits and found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this 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 administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are 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 of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that substantial evidence supports the denial of benefits under 20 C.F.R. Part 718. With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant probative evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence, as well as the other evidence of record, failed to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established pursuant to Section 718.204(c)(1)-(3), the administrative law judge permissibly found that the evidence of record contains no credible qualifying pulmonary function or blood gas studies,[2] inasmuch as that Dr. Forehand's qualifying blood gas studies were outweighed by the non-qualifying studies of Drs. Sutherland, Dahhan, Robinette and Hippensteel, and that the record contains no evidence of cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(1)-(3); *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.* (*en banc*) 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); Decision and Order at 4; Director's Exhibits 10-13, 25-26, 68, 71, 83, 88, 113; Claimant's Exhibit 1.

[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

With respect to Section 718.204(c)(4), the administrative law judge also rationally determined that the medical opinion evidence of record was insufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment. The administrative law judge considered the medical opinions of Drs. Reddy, Patel, Sutherland, Dahhan, Robinette, Michos, Fino, Zaldivar, Jarboe and Morgan, which were previously discussed by Judges Bonfanti and Rippey, and reasonably found that these physicians' opinions, when properly weighed, failed to establish total disability. Decision and Order at 4; Director's Exhibits 15-17, 19, 55, 64-65, 68, 70, 92-96. The administrative law judge also permissibly concluded that the newly submitted medical opinion evidence was insufficient to establish total disability since Dr. Forehand's diagnosis of total disability was not credible as it was not supported by his medical documentation. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-324 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In addition, the administrative law judge rationally credited the contrary opinions of Drs. Hippensteel, Dahhan, Jarboe, Zaldivar, Fino, Morgan and Repshur, stating that claimant was not suffering from a disabling respiratory or pulmonary impairment, based on the physicians' expertise and the consistency of their explanations.[3] *Hicks*, *supra*; *Akers*, *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *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*, *supra*; ; *Perry*, *supra*; Decision and Order at 5; Director's Exhibits 113, 115-116; Employer's Exhibits 1-2, 8-11. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Inasmuch as claimant has failed to establish total respiratory disability pursuant to Section 718.204(c), a requisite element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law. *Trent*, *supra*; *Perry*, *supra*.

[3] As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

Accordingly, the Decision and Order on Modification Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge