

BRB No. 96-1362 BLA

HAZEL A. KINDER)
(Widow of HILLARD KINDER))
)
Claimant-Petitioner)
)
v.)
)
EASTERN ASSOCIATED 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 Supplemental Decision and Order on Remand of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Hazel A. Kinder, Ridgeview, West Virginia, *pro se*.

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

PER CURIAM:

Claimant¹, without the assistance of counsel, appeals the Supplemental Decision and Order on Remand (92-BLA-1832) of Administrative Law Judge Edith Barnett denying benefits on a claim filed pursuant to the provisions of Title IV of the

¹Claimant is the surviving widow of Hillard Kinder, Jr., the miner, who filed claims for benefits on September 24, 1980 and October 19, 1981, which were finally denied on March 11, 1982. Director's Exhibit 24. The miner filed the present claim on January 28, 1990, which is being pursued by claimant. Director's Exhibit 1.

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. Initially, Administrative Law Judge George A. Fath considered the claim pursuant to 20 C.F.R. §725.309 and found that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), and, thus, a material change in condition. Accordingly, benefits were denied. On

appeal, the Board, applying *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992), reversed the administrative law judge's finding pursuant to Section 725.309 and remanded the case for consideration of all the evidence of record pursuant to 20 C.F.R. Part 718. *Kinder v. Eastern Assoc. Coal Corp.*, BRB No. 93-2474 BLA (Jan. 30, 1995)(unpub.).

On remand, the administrative law judge applied *Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), considered the newly submitted evidence and found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), and thus, a material change in conditions pursuant to Section 725.309. Accordingly, benefits were denied.

In the instant appeal, Claimant generally challenges the denial of benefits. Employer has not responded. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.

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 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, held, in *Rutter*, that in order to establish a material change in conditions, claimant must prove, by means of evidence submitted subsequent to the prior denial, at least one of the elements previously adjudicated against him. *See Rutter, supra*. In this case, the claim was previously denied because claimant failed to establish the existence of total respiratory disability. Director's Exhibit 24.

Pursuant to Section 718.204(c)(1), the administrative law judge considered the newly submitted pulmonary function study evidence which consists of two non-qualifying studies dated April 10, 1992 and May 12, 1993, and one qualifying study dated April 1, 1993. Director's Exhibit 11; Employer's Exhibit 1; Claimant's Exhibit 4. The administrative law judge permissibly found that the preponderance of the pulmonary function study evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1). Decision and Order on Remand at 2; *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lafferty v. Cannelton*

Industries, Inc., 12 BLR 1-190 (1989). Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1).

The record also contains three newly submitted non-qualifying arterial blood gas studies and no evidence of cor pulmonale with right sided congestive heart failure. Director's Exhibit 14; Employer's Exhibit 1; Claimant's Exhibit 4. Thus, the administrative law judge properly found that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(2)-(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the three newly submitted medical opinions. Dr. Cardona, in an opinion dated July 10, 1991, opined that claimant had moderate to severe impairment due to pneumoconiosis. Director's Exhibit 3. Drs. Walker and Zaldivar, in opinions dated April 13, 1992 and May 12, 1993 respectively, opined that claimant is capable of performing his last coal mine employment. Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge permissibly assigned greater weight to the opinions of Drs. Walker and Zaldivar because their opinions are better documented. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). 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 findings that the newly submitted evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c) and a material in condition pursuant to Section 725.309. We therefore affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and is in accordance with law.

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand 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