

BRB No. 92-1846 BLA

BEN BROWN, JR.)
)
 Claimant-Petitioner)
)
v.)
)
DONALDSON MINING 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 of Theodore P. Von Brand, Administrative Law Judge, United States Department of Labor.

Ben Brown, Jr., Shrewsbury, West Virginia, *pro se*.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for
employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (92-BLA-0189) of Administrative Law Judge Theodore P. Von Brand 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). This case involves a duplicate claim issue. Claimant's first claim was filed on May 31, 1973 and denied on August 14, 1980, as the district director found the evidence

of record insufficient to establish that claimant was totally disabled. Claimant filed a second claim on June 4, 1982 which he withdrew in February of 1987. Claimant filed the present claim on January 13, 1987 and the administrative law judge considered it pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established forty-three years of coal mine employment and that the parties stipulated that claimant established the existence of pneumoconiosis which arose from his coal mine employment. The administrative law judge then considered the evidence submitted

subsequent to the prior denial and determined that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c) and thus failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. Claimant appeals this denial. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

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).

In making his finding of no material change in conditions, the administrative law judge considered the evidence that was submitted subsequent to the prior denial, which consists of four pulmonary function studies, two blood gas studies, and seven medical reports. None of the pulmonary function study and blood gas study evidence yielded qualifying results. See 20 C.F.R. §718.204(c)(1), (2); Director's Exhibits 5, 6, 17; Employer's Exhibit 1. Dr. Rasmussen, in a report dated March 19, 1987, diagnosed minimal pulmonary impairment. See Director's Exhibits 5, 7. Drs. Pfisten and Leef, in a report dated July 10, 1987, concluded that claimant had no pulmonary function impairment. See Director's Exhibit 17. Drs. Kress, Fritzhand, Crisalli, Fino, and Broudy, in separate reports, also concluded either that claimant had no pulmonary function impairment or that he was not totally disabled. See Director's Exhibits 18, 19; Employer's Exhibits 1-3. As none of the newly submitted evidence is indicative of total disability, the administrative law judge's finding that claimant failed to establish a material change in conditions is affirmed as it is supported by substantial evidence.¹ See *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988).

¹The administrative law judge also considered the entire medical record and determined that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge's finding is supported by the evidence of record as there is no evidence that claimant is totally disabled. As a result, the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(c) is affirmed as it is supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge