BRB No. 97-1302 BLA

JACK R. PATRICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Jack R. Patrick, Raven, Virginia, *pro se.*

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the representation of counsel,[1] appeals the Decision and

[1]Claimant's appeal was filed on claimant's behalf by Tim White, a lay representative with Stone Mountain Health Services in Vansant, Virginia. By Order dated June 24, 1997, the Board advised claimant that his appeal would be reviewed under the provisions provided at 20 C.F.R. §§802.211(e), 802.220. *See generally Shelton v. Claude V. Keene Trucking Co.,* 19 BLR 1-88 (1995).

Order Denying Benefits (97-BLA-0143) of Administrative Law Judge Pamela Lakes Wood 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). The procedural history of this case is as follows: Claimant filed his original claim for benefits on April 14, 1981 and the claim was denied by the district director on July 16, 1981. Claimant did not pursue this denial of benefits. He filed a second claim for benefits on June 30, 1987. This claim was ultimately denied by the district director on January 29, 1990. Claimant filed his third claim for benefits on April 29, 1991. Following a denial of the third claim by the district director, Administrative Law Judge Stuart A. Levin denied the claim on the grounds that claimant did not establish total respiratory disability under 20 C.F.R. §718.204(c) or a material change in conditions under 20 C.F.R. §725.309. Claimant appealed and the Board affirmed the administrative law judge's denial of benefits holding that the evidence was insufficient to establish total respiratory disability at Section 718.204(c). *Patrick v. Island Creek Coal Co.,* BRB No. 93-1531 BLA (Dec. 29, 1994)(unpub.). Claimant did not appeal the Board's Decision and Order. On March 29, 1996, claimant filed the instant claim for benefits which the district director denied on May 9, 1996 and on August 22, 1996, following an informal conference. Director's Exhibits 1, 15, 26. The case was transferred to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 32.

The administrative law judge credited claimant with "at least" twenty-three years of coal mine employment based on prior stipulation. Weighing the evidence submitted since the prior denial, she found that claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(c) and thus failed to establish a material change in conditions at 20 C.F.R. §725.309(d) pursuant to the governing standard in *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). The administrative law judge alternatively found on the merits, based on the entirety of the evidentiary record, that claimant failed to establish total respiratory disability at Section 718.204(c). Accordingly, she denied benefits

On appeal, claimant generally contends that he is entitled to benefits. Employer, in response, urges affirmance of the administrative law judge's denial of entitlement. The Director, Office of Workers' Compensation Programs, has not submitted a brief.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of

law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

The administrative law judge properly found that this case involved a duplicate claim pursuant to Section 725.309(d), and that the newly submitted evidence must be sufficient to establish total respiratory disability pursuant to Section 718.204(c) for claimant to establish a material change in conditions. *See Rutter, supra.*

In making her findings at Section 718.204(c), the administrative law judge properly determined that total respiratory disability was not demonstrated at Section 718.204(c)(1) inasmuch as neither of the two newly submitted pulmonary function studies is qualifying. Director's Exhibit 9, 25; Decision and Order at 6.

In weighing the newly submitted blood gas evidence at Section 718.204(c)(2), the administrative law judge found that studies had been conducted on April 15, 1996 by Dr. Forehand, and on July 23, 1996 by Dr. Castle, with study values reported for the miner at rest and following exercise. Decision and Order at 6, 10; Director's Exhibits 9, 25. She properly found that of the four studies, only the values at rest for the April 15, 1996 study by Dr. Forehand, were qualifying. The remaining three studies were non-qualifying. The administrative law judge, "[e]xamining the arterial blood gas tests as [a] whole, in light of the pre-and post-exercise results, notations by physicians, and without reference to dates....," reasonably found the blood gas study evidence was insufficient to demonstrate total respiratory disability at Section 718.204(c)(2). Decision and Order at 10; *see generally Greer v. Director, OWCP,* 940 F.2d 88, 15 2-167 (4th Cir. 1991). We therefore affirm her findings at Section 718.204(c)(2).

The administrative law judge correctly found that there is no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(c)(3).

Turning to Section 718.204(c)(4), the administrative law judge examined the newly submitted medical opinions of Drs. Abernathy, Fino, Forehand and Castle and the deposition testimony of Dr. Castle. She found that each of these "qualified" physicians concluded that from a respiratory standpoint, claimant was not totally disabled and could return to his usual coal mine employment.[2] Decision and Order at

[2]The administrative law judge acknowledged that claimant testified at the hearing that his last usual coal mine employment was cleaning and tagging coal

10; Director's Exhibits 9, 25; Employer's Exhibits EX 2, 4, 6. The administrative law judge properly found the evidence insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4). We affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total respiratory disability at Section 718.204(c) and thus is insufficient to establish a material change in conditions pursuant to the governing standard in *Rutter, supra*. We, therefore, affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

cars. Decision and Order at 4. Drs. Castle, Forehand, and Abernathy also recorded claimant's last usual coal mine employment. Dr. Fino in a consultative report summarized claimant's duties as a coal car tagger. He noted that claimant would bring the cars down from the tipple, clean and load them, then tag them for shipment. Dr. Fino opined that there was heavy labor involved with cleaning the cars. *See Eagle v. Armco Inc.,* 943 F.2d 509, 15 BLR 2-2017 (4th Cir. 1991); *Walker v. Director, OWCP,* 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).