BRB No. 00-0711 BLA

CHARLES H. MALONE	)	
	)	
Claimant - Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Charles H. Malone, Centerville, Ohio, *pro se*.

Rita A. Ropolo (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits (99-BLA-0492) 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 administrative law judge found that the newly submitted evidence was insufficient to establish total respiratory disability, and thereby, was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000).[2] Accordingly, the administrative law judge denied the claim. The Director, Office of Workers' Compensation Programs, in response to claimant's

[1]Claimant is Charles M. Malone, the miner, who has filed three applications for benefits with the Department of Labor (DOL). The first was filed on February 9, 1978, and the second was filed on March 27, 1981. Director's Exhibit 24.The claims were merged and denied by Administrative Law Judge Frederick D. Nuesner in a Decision and Order dated April 27, 1984 pursuant to the regulations at 20 C.F.R. Part 727. The third claim, the instant duplicate claim, was filed on April 3, 1998. Director's Exhibit 1.

[2]Administrative Law Judge Frederick D. Neusner found that although the evidence established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), that presumption was rebutted because the evidence established that claimant was capable of performing his usual coal mine work or comparable and gainful employment pursuant to 20 C.F.R. §727.203(b)(2). Director's Exhibit 24.

appeal, asserts that the administrative law judge's finding that the evidence fails to establish the existence of a totally disabling respiratory impairment is supported by substantial evidence, and accordingly, the Director urges affirmance of the administrative law judge's denial of benefits.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 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).[3]

[3]We affirm, as unchallenged on appeal and not adverse to claimant, the administrative law judge's finding the miner established seventeen years of qualifying coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those which the Board, after briefing by the parties to the claim, determines that the regulations at issue will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2 ,2001, to which the Director and claimant responded.[4] Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989), has held that in

[4]The Director asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. In response to the Board's Order, claimant's lay representative requested "literature" on Black Lung Benefits and expressed concerns about losing claimant's case because he is unfamiliar with the laws, rules and regulations. Claimant's lay representative is advised that his failure to file a substantive response to the Board's Order for briefing on the impact of the challenged regulations will not prejudice claimant's case. *See* Board's Order of March 2, 2001. By Order dated May 23, 2000, the Board previously indicated that it would review claimant's appeals under the general standard of review. *See* 20 C.F.R.§§802.211, 802.220.

assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 763 (1997). The miner's last claim, filed in1978, was denied because the evidence established that claimant could perform his usual coal mine employment or comparable and gainful work pursuant to 20 C.F.R. §727.203(b)(2). Director's Exhibit 24. Consequently, in order to establish a material change in conditions pursuant to Section 725.309, the newly submitted evidence in the miner's claim must support a finding of total respiratory disability.

With respect to the administrative law judge's finding at Section 718.204(c)(1)(2000),[5] the administrative law judge correctly found that the only newly submitted pulmonary function study of record produced non-qualifying values. Director's Exhibit 4. As this is insufficient to establish total respiratory disability, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence fails to establish total respiratory disability. See 20 C.F.R. §718.204(b)(2)(i); *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc)*; Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987)*; Winchester v. Director v. OWCP, 9 BLR 1-177 (1986).*

The administrative law judge also correctly found that the newly submitted blood gas study produced non-qualifying values at Section 718.204(c)(2)(2000). Director's Exhibit 9. This study is insufficient to establish total disability, and we affirm the administrative law judge's finding that the newly submitted blood gas study evidence fails to establish a total respiratory disability. *See* 20 C.F.R. §718.204(b)(2)(ii); *See Clark, supra; Fields, supra; Tucker v Director v. OWCP*, 10 BLR 1-35 (1987).

At Section 718.204(c)(3)(2000), the administrative law judge correctly found that the record contains no evidence of cor pulmonale with right-sided congestive heart disease. We affirm, therefore, the administrative law judge's finding that total disability is not established

[5]We note that the provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

by evidence of cor pulmonale. *See* 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987).

At Section 718.204(c)(4)(2000), the administrative law judge found that the only newly submitted medical opinion was by Dr. Parrish, Director's Exhibit 8, who concluded that claimant did not suffer from a totally disabling respiratory or pulmonary impairment, but that his problems were due to cardiovascular disease. *Id*. As such, this opinion is legally insufficient to meet claimant's burden of establishing total disability pursuant to Section 718.204(b)(2)(iv). We affirm, therefore, the administrative law judge's finding that the newly submitted medical opinion evidence did not establish total respiratory disability. *See* C.F.R. §718.204(b)(2)(iv); *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). We affirm, therefore the administrative law judge's finding that the newly submitted evidence fails to establish total respiratory disability, as it is supported by substantial evidence and is in accordance with applicable law. *See* 20 C.F.R. §718.204(b)(2).

Thus, the administrative law judge properly found that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). Moreover, the administrative law judge correctly found, based upon all of the evidence of record, that claimant failed to establish total respiratory disability. *See Worhach v. Director, OWCP*, 17 BLR 1-105(1993); *Trent, supra.* As this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc)*, we affirm the denial of benefits in the instant duplicate claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge