BRB No. 97-1086 BLA

JUNIOR V. PRICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
S & D COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Junior V. Price, Honaker, Virginia, *pro se*.

Michael J. Pollack (Arter & Hadden), Washington, DC, for employer.

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

PER CURIAM:

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

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant but is not representing him in this appeal. *See Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995)(Order).

(96-BLA-957) of Administrative Law Judge Jeffrey Tureck 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.[2] The administrative law judge considered the evidence submitted by claimant subsequent to the previous denial of benefits, and found that it failed to establish totally disabling pneumoconiosis arising out of coal mine employment. Accordingly, benefits were denied as claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Claimant now appeals these findings. Employer responds, urging affirmance. The Director has not responded to claimant's 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. *See 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).

[2] Claimant previously filed two claims on August 16, 1989 and August 23, 1989, which were consolidated and denied on November 3, 1989 for failure to establish total disability or pneumoconiosis arising out of coal mine employment. Director's Exhibit 40. No further action was taken by claimant until the filing of the the instant claim on January 18, 1995. Director's Exhibit 1.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge initially considered the medical opinion evidence to determine whether it established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge found that of the new evidence submitted subsequent to the previous denial, only one opinion, by Dr. Sutherland, even diagnosed the existence of pneumoconiosis. Director's Exhibit 30. The administrative law judge found that the remaining opinions diagnosed asthma and cardiovascular related breathing problems. Decision and Order at 3. The administrative law judge permissibly accorded no weight to Dr. Sutherland's one sentence opinion because it was conclusory and the physician failed to state what medical evidence he relied upon in reaching his diagnosis.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Thus, as claimant failed to establish that his respiratory condition arose out of coal mine employment the administrative law judge rationally concluded that the new evidence failed to establish causality pursuant to Section 718.203.

The administrative law judge next considered whether the new evidence established total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge properly found that the new pulmonary function studies and blood gas studies submitted by claimant were not qualifying, and that thus, claimant did not establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (2).[4] Decision and Order at 3; Director's Exhibits 12, 14, 36. The administrative law judge also properly found that the medical opinion evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) because none of the new medical opinions indicated a disabling respiratory impairment or that claimant could not perform his previous coal mine employment. Decision and Order at 3; Director's Exhibits

[3] The administrative law judge properly declined to consider the issue of the existence of pneumoconiosis as the threshold determination is whether claimant has established a material change in conditions in this duplicate claim to warrant a *de novo* review of the record. 20 C.F.R. §725.309; Decision and Order at 2- 3, fn. 4; Director's Exhibit 41; *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

[4] 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. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

13, 30, 36; Employer's Exhibits 1, 2, 5; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). We note that the administrative law judge neglected to consider whether claimant established total disability pursuant to 20 C.F.R. §718.204(c)(3). This error does not require remand, however, as the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c).

Inasmuch as claimant's new evidence fails to establish any element of entitlement previously adjudicated against him, we affirm the administrative law judge's denial of benefits as claimant failed to establish a material change in conditions pursuant to Section 725.309, and thus, a basis for consideration of the merits of his claim. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Accordingly, the Decision and Order of the administrative law judge 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