BRB No. 97-1604 BLA

GEORGE D. HAGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION 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 Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

George D. Hager, Beckley, West Virginia, *pro se.*

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (96-BLA-1825) of Administrative Law Judge James W. Kerr, Jr. 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). The instant case involves a duplicate claim filed on November 28, 1995.[1] The administrative law

[1]The relevant procedural history of this case is as follows: Claimant filed his initial claim for benefits on March 22, 1984. Director's Exhibit 33. There is no indication in the record that claimant took any further action regarding his 1984 claim, and the claim was officially closed. *Id.* Claimant filed his second application for benefits, a duplicate claim, on September 4, 1991. Director's Exhibit 32. That claim was denied on February 28, 1992. *Id.*

judge, properly adjudicating this case pursuant to 20 C.F.R. Part 718, found the existence of pneumoconiosis established under 20 C.F.R. §718.202(a)(1). However, the administrative law judge also found the evidence of record insufficient to establish total disability under 20 C.F.R. § 718.204(c), and accordingly, denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds to this *pro se* appeal, urging affirmance of the administrative law judge's denial. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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. *Stark v. Director, OWCP,* 9 BLR 1-36 (1986). We must

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There is no indication in the record that claimant took any further action regarding his 1991 claim. Claimant filed the instant duplicate claim on November 28, 1995. Director's Exhibit 1.

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings under 20 C.F.R. §718.202(a)(1). *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983); Decision and Order at 15-16. We note that the administrative law judge's findings under this subsection would suffice to demonstrate a material change in conditions under 20 C.F.R. §725.309, even though the administrative law judge did not specifically so find, *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), we will therefore address the administrative law judge's findings on the merits as they are dispositive of the case.

affirm the administrative law judge law judge's Decision and Order of 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence or record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Therefore, it is affirmed. Relevant to 20 C.F.R. §718.204(c)(1), the administrative law judge properly found the weight of the pulmonary function study evidence negative for total disability. The administrative law judge properly discredited two qualifying[3] studies because the January 31, 1996 study had been invalidated by a reviewing physician, *see Siegel v. Director, OWCP,* 8 BLR 1-156 (1985); Decision and Order at 18; Director's Exhibits 12, 13, and because Dr. Forehand, who administered the November 11, 1996 test, admitted to concerns regarding its reliability at his deposition. *See Mabe v. Bishop Coal Co.,* 9 BLR 1-67 (1988); Decision and Order at 18-19; Claimant's Exhibits 1, 2. Consequently, the administrative law judge properly found that claimant failed to carry his burden by a preponderance of the evidence under this subsection. *See Director, OWCP v. Greenwich Collieries [Ondecko],* 117 S.Ct. 2251, 18 BLR 2A-1 (1994); Decision and Order at 19; Director's Exhibits 10, 12, 26, 27, 29, 32; Claimant's Exhibit 1; Employer Exhibit 3. Furthermore, the administrative law judge properly found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(2) inasmuch as the four blood gas studies of record yielded non-qualifying values. Decision and Order at 19; Director's Exhibits 15, 29, 32. The administrative law judge likewise found that the record contained no evidence of cor pulmonale with right-sided congestive heart failure, and therefore, that total

[3]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "nonqualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

respiratory was not established pursuant to 20 C.F.R. §718.204(c)(3). Decision and Order 17, n.10. Relevant to 20 C.F.R. §718.204(c)(4), the administrative law judge properly accorded determinative weight to the opinions of Drs. Castle, Dahhan and Zaldivar, each of whom opined that claimant was not totally disabled from his previous coal mine employment, based on the strength of their professional credentials.[4] *See Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); Decision and Order at 21; Director's Exhibit 29, Employer's Exhibits 2, 5, 7, 9, 10. Moreover, the administrative law judge properly discredited Dr. Forehand's opinion in light of the fact that the doctor partially relied on a pulmonary function study of questionable reliability. *See Street v. Consolidation Coal Co.,* 7 BLR 1-165 (1984); *Baker v. North American Coal Co.*, 7 BLR 1-79 (1984); Decision and Order at 21; Claimant's Exhibit 2. Inasmuch as the administrative law judge properly found that claimant failed to carry his burden by a preponderance of the evidence, we affirm the administrative law judge's finding that claimant failed to establish total disability under Section 718.204(c)(4). *See Ondecko, supra;* Decision and Order at 21.

Because claimant failed to establish total respiratory disability under 20 C.F.R. §718.204(c), a requisite element of entitlement under Part 718, *see Trent, supra; Perry, supra*, the administrative law judge properly denied benefits in this case, and his decision is therefore affirmed.

[4]The administrative law judge also found that Dr. Daniel's opinion supported the opinions of Drs. Castle, Dahhan and Zaldivar, inasmuch as Dr. Daniel found no evidence of a significant pulmonary impairment. *See* Decision and Order 21; Director's Exhibit 14.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge