BRB No. 00-0276 BLA

FRANKIE B. MCCUTCHEON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEWELL 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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Frankie B. McCutcheon, Leivasy, West Virginia, *pro se*.

William S. Mattingly (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order (1999-BLA-73) of Administrative Law Judge Gerald M. Tierney 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 administrative law judge credited claimant with at least twenty years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the recent evidence submitted

[1] Claimant has filed four previous claims for black lung benefits. Decision and Order at 2; Director's Exhibits 28-31. Claimant filed his fourth claim for benefits on June 30, 1996, which was denied on November 25, 1996. *Id*. Claimant took no further action on that claim. Claimant filed the instant claim on December 9, 1997.

with the instant claim was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) under *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), *cert. denied*, 519 U.S. 1090 (1997). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this 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. *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, are supported by substantial evidence, and are 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal 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 record contains no qualifying pulmonary function study evidence and thus establishing total disability pursuant to Section 718.204(c)(1) is precluded. In considering whether total disability was established under Section 718.204(c)(2), the

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Decision and Order at 2; Director's Exhibit 1.

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

administrative law judge noted that only the exercise portion of the January 13, 1998, blood gas study was qualifying while the resting portion of the January 13, 1998, blood gas study as well as the April 10, 1998, and July 30, 1998, blood gas studies were all nonqualifying. Decision and Order at 4, 8; Director's Exhibits 7, 18, 20. The administrative law judge then rationally gave greater weight to the most recent blood gas studies which were non-qualifying and found that, as a whole, total disability was not established pursuant to Section 718.204(c)(2). *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); Decision and Order at 8. In addition, the administrative law judge correctly found that as the record contains no evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3), establishing total disability by this method is precluded. Decision and Order at 8.

In considering whether total disability was established by the recently submitted medical opinions of record under Section 718.204(c)(4), the administrative law judge permissibly gave greater weight to the opinions of Drs. Bellotte, Dahhan and Durham, that claimant has no significant pulmonary impairment and is capable of doing his usual coal mine employment from a respiratory standpoint, based on their superior qualifications and since he found their opinions were more consistent with the credible objective medical evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 4-6, 8; Director's Exhibits 6, 20; Employer's Exhibits 4, 6. Moreover, the administrative law judge permissibly gave diminished weight to the opinion of Dr. Johnson since his credentials were unknown and there was no credible documentation to support the physician's conclusions. *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985); Decision and Order at 5-6, 8; Claimant's Exhibit 1. Consequently, as the administrative law judge properly found that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4), this finding is affirmed. Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c). Inasmuch as the administrative law judge properly considered the newly submitted medical evidence and rationally concluded that the evidence did not establish claimant was totally disabled pursuant to Section 718.204(c), and thus did not establish a

material change in conditions pursuant to 20 C.F.R. §725.309, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and in accordance with law. *Rutter*, *supra*.

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

REGINA C. McGRANERY
Administrative Appeals Judge