BRB Nos. 99-0414 BLA and
99-0414 BLA-A

ELMER F. CHILDRESS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ELMER CHILDRESS TRUCKING COMPANY	)	
	)	
	)	
and	)	DATE ISSUED:
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Elmer F. Childress, Cedar Bluff, Virginia, *pro se*.

John C. Johnson (Frith, Anderson & Peake PC), Roanoke, Virginia, for employer/carrier.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the administrative law judge's Decision and Order on Remand - Denying Benefits (95-BLA-2078) of Administrative Law Judge Clement J. Kichuk on a duplicate claim[1] 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). Employer cross-appeals the administrative law judge's Decision and Order on Remand. This case is before the Board for the second time. In the initial Decision and Order, Administrative Law Judge Charles P. Rippey properly adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 and determined that, because claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(c), he failed to establish a material change in conditions since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. Claimant appealed and the Board affirmed Administrative Law Judge Rippey's finding that claimant failed to demonstrate total disability under 20 C.F.R. §718.204(c)(1)-(2) as supported by substantial evidence, affirmed only his weighing of Dr. Forehand's opinion under 20 C.F.R. §718.204(c)(4), and deemed his failure to consider total disability under 20 C.F.R. §718.204(c)(3) as harmless error because there was no evidence in the record relevant to that subsection. However, the Board vacated Administrative Law Judge Rippey's determinations under 20 C.F.R. §§718.202(a)(1), (a)(4), 718.204(c)(4), and 725.309 because he mischaracterized the evidence and failed to consider relevant evidence of record. Hence, the Board remanded the case for further consideration. *Childress v. Elmer Childress Trucking Co.,* BRB No. 96-0498 BLA (Aug. 29, 1996) (unpub.); Director's Exhibit 26. On September 5, 1996, claimant requested reconsideration of the Board's decision which the Board denied. *Childress v. Elmer Childress Trucking Co.,* BRB No. 96-0498 BLA (Oct. 2, 1996) (unpub. Order). Subsequently, claimant appealed the Board's decision and the United States Court of Appeals for the Sixth Circuit dismissed the appeal for lack of jurisdiction on the basis that an order remanding a case to an administrative law judge for reconsideration is not appealable. *Childress v. Elmer Childress Trucking Co.,* No. 96-3966 (6th Cir. Feb. 11, 1997) (unpub.).

[1] Claimant is Elmer Childress, the miner, who filed his first application with the Social Security Administration on March 9, 1973, which was finally denied on December 30, 1980. Director's Exhibit 25. Claimant filed a second application for benefits with the Department of Labor on March 9, 1993, which was finally denied on July 20, 1993. Director's Exhibit 26. Claimant took no further action regarding this denial and filed a third claim for benefits on September 7, 1994, which is the subject of the instant case. Director's Exhibit 1; *see Childress v. Elmer Childress Trucking Co.,* BRB No. 96-0498 BLA, *slip op.* at 2 n.2 (Aug. 29, 1996) (unpub.).

Due to the unavailability of Administrative Law Judge Rippey on remand, the case was assigned to Administrative Law Judge Clement J. Kichuk (administrative law judge), who found that because claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he affirmatively demonstrated a material change in conditions under Section 725.309(d). Addressing the merits of entitlement, the administrative law judge revisited the issue of the existence of pneumoconiosis and found that claimant established that he suffers from simple coal workers' pneumoconiosis. Next, the administrative law judge considered all of the medical opinion evidence and found that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's Decision and Order on Remand denying benefits. Employer cross-appeals, arguing that the administrative law judge erroneously found that claimant demonstrated a material change in conditions pursuant to Section 725.309 because the medical opinion evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In the alternative, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating his intention not to participate 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 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).

Relevant to Section 718.204(c)(4), a review of the record reveals the medical opinions of six physicians who were evenly divided on the issue of total disability. Drs. Forehand, Mitchell, and Baxter supported claimant's contention. During his initial pulmonary evaluation of claimant on April 5, 1993, Dr. Forehand diagnosed a mild impairment and opined that claimant should be able to return to his last coal mining job. Director's Exhibit 26. Based on subsequent examinations and additional diagnostic tests conducted one year later, Dr. Forehand opined that claimant's "respiratory impairment is now to the point that he would be unable to return to his last coal mine job. He is totally and permanently disabled." Director's Exhibits 11,13; Claimant's Exhibit 1. In a letter dated October 24, 1995, Dr. Mitchell stated that he evaluated claimant on October 14, 1995 and agreed with Dr. Forehand's

opinion that claimant is totally and permanently disabled. Claimant's Exhibit 2. On April 7, 1980, Dr. Baxter diagnosed the existence of coal workers' pneumoconiosis and listed the following physical limitations: walking 100 yards, climbing 20 steps, and lifting and carrying 25 pounds for 20 yards. Director's Exhibit 25. Holding contrary views, Drs. Fino and Castle opined that claimant does not suffer from coal workers' pneumoconiosis and has the respiratory capacity to return to his usual coal mine work, in reports dated July 19, 1995 and July 28, 1995 respectively. Employer's Exhibits 1, 14. Although Dr. Iosif reported on June 21, 1995 that claimant "may... have" simple pneumoconiosis, he similarly opined that claimant "should be able to continue driving a truck, although more strenuous activities could result in the occurrence of dyspnea, with hemoglobin desaturation." Employer's Exhibits 2, 7.

Acknowledging the Board's affirmance of Administrative Law Judge Rippey's discounting of Dr. Forehand's opinion, *see Childress, slip. op.* at 5, the administrative law judge, within a proper exercise of his discretion, found Dr. Mitchell's opinion insufficient to demonstrate total disability because Dr. Mitchell's opinion was terse, unreasoned, *see Lucostic v. U.S. Steel Corp.,* 8 BLR 1-46 (1985); *Carpeta v. Mathies Coal Co.,* 7 BLR 1-145, 1-147 n.2 (1984), and lacked objective tests to support his conclusions, *see Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85, 1-88 (1993); *King v. Consolidation Coal Co.,* 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP,* 8 BLR 1-139, 1-141 (1985); Decision and Order on Remand at 13. The administrative law judge permissibly found Dr. Baxter's list of physical limitations insufficient to demonstrate that claimant was unable to perform his usual coal mining duties inasmuch as claimant continued working in the coal mining industry until 1991, eleven years after Dr. Baxter assessed these physical limitations. Decision and Order on Remand at 13. In addition, the administrative law judge properly compared claimant's duties of driving a truck and working an end loader and high lift during the time period of 1981 to 1991 to the physical limitations listed by Dr. Baxter in 1980, and rationally determined that Dr. Baxter's opinion failed to demonstrate that claimant is totally and permanently disabled from performing his last coal mine employment. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991) (*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989). Inasmuch as the administrative law judge permissibly discounted the opinion of Dr. Mitchell and rationally accorded diminished weight to that of Dr. Baxter, we affirm the administrative law judge's Section 718.204(c)(4) determination that claimant failed to demonstrate total disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986); Decision and Order on Remand at 13. Inasmuch as the administrative law judge's determination, that claimant failed to satisfy his burden of

establishing the presence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c), a requisite element of entitlement in this Part 718 case, is rational and supported by substantial evidence, we affirm the Decision and Order on Remand of the administrative law judge denying benefits.[2] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2] Claimant's failure to affirmatively establish total respiratory disability under Section 718.204(c), a requisite element of entitlement pursuant to Part 718, obviates the need to address employer's arguments contained in its cross-appeal. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).