BRB No. 00-0546 BLA

DAVID M. TELFER	)	
	)	
	)	
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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

David M. Telfer, St. Clairsville, Ohio, *pro se*.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-1142) of Administrative Law Judge Daniel L. Leland denying benefits 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 twenty-six years and two months of coal mine employment and based on the date of filing, adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. After considering the newly

[1] Claimant filed his first claim for benefits on September 8, 1983. It was denied by the district director on January 30, 1984 because the evidence did not establish the existence of pneumoconiosis. Claimant did not request a hearing on this claim or further pursue it. Director's Exhibit 30.

submitted evidence of record, the administrative law judge concluded that it was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 as it failed to establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. The administrative law judge further concluded that, even assuming the existence of pneumoconiosis was established, claimant failed to establish a totally disabling pulmonary impairment based on the evidence of record. *See* 20 C.F.R. §718.204(c)(1)-(4). 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 filed a letter indicating that he will not 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 Corp.*, 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).

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 to establish any 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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge properly determined that claimant failed to establish a totally disabling respiratory impairment at Section 718.204(c)(1)-(4). Based on claimant's testimony and the other evidence of record, the administrative law judge found

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The instant duplicate claim was filed on August 5, 1997, and denied by the district director on December 18, 1997 and July 9, 1998. Director's Exhibits 1, 15, 26. Administrative Law Judge Daniel L. Leland issued the denial on appeal before us subsequent to a hearing held December 1, 1999.

[2] Although claimant was not represented by counsel below, the administrative law judge's inquiry into claimant's *pro se* status, his continuance of the first hearing in order to give claimant the opportunity to find counsel, and his conduct of the hearing meet the requirements listed in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), for the protection of claimants appearing without counsel.

that claimant's last usual coal mine employment was as a communications operator responsible for safety conditions in five mines. Decision and Order at 2; Director's Exhibit 30; Hearing Transcript at 16-19, 26-27, 31; *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant testified that at most he went into the mines two to three times a week and that the rest of the time he answered phones in the communications center. Decision and Order at 2; Hearing Transcript at 19; Director's Exhibit 30 at 39-42. In the Description of Coal Mine Work and Other Employment, claimant described his coal mine employment as sitting for eight hours a day, Director's Exhibit 30 at 40. Based on this evidence, therefore, we conclude that the administrative law judge rationally found that claimant's usual coal mine employment as a communications operator required little exertion. Decision and Order at 6. *See Defore*, *supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons*, *supra*.

In weighing the medical opinion evidence against the requirements of claimant's usual coal mine employment, the administrative law judge rationally found that: Dr. Delvecchio's statement that claimant would be considered 75 percent disabled if he had to go and do some real miner's work, Dr. Altmeyer's statement that claimant's mild pulmonary impairment does not prevent him from doing his last coal mine job which required no exertion other than walking; Dr. Kleinerman's statement that claimant's mild respiratory dysfunction does not disable claimant from doing his regular coal mine work; and Dr. Lenkey's opinion that claimant would be able to do light to moderate labor from a pulmonary standpoint were, when coupled with the nonqualifying pulmonary function and blood gas study evidence and absence of evidence of cor pulmonale with right-sided congestive heart failure, insufficient to establish a totally disabling respiratory impairment at Section 718.204(c)(1)-(4). *Defore*, *supra*; *McMath*, *supra*; *Aleshire v. Central Coal Co.*, 8 BLR 1-70 (1985); *Hvizdzak*, *supra*; *Parsons*, *supra*. We must, therefore, affirm the administrative law judge's finding thereunder. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Thus, inasmuch as claimant has failed to establish a totally disabling respiratory impairment, an essential element of entitlement under Part 718, benefits must be denied, and we will not consider the administrative law judge's findings at Sections 718.202(a) and 725.309(d). *See Trent*, *supra*; *Perry*, *supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge