BRB No. 01-0435 BLA

CHARLIE M. LOONEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BOUNTY MINING CORPORATION	)	
	)	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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Charlie M. Looney, Vansant, Virginia, *pro se*.[1]

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, representing himself, appeals the Decision and Order (00-BLA-0925) of Administrative Law Judge Alice M. Craft 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).[2] The instant case involves a duplicate claim filed on October 17, 1995.[3] In the initial decision, Administrative Law Judge Thomas M. Burke found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or total disability pursuant to 20 C.F.R. §718.204(c) (2000). Judge Burke, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, Judge Burke denied benefits.

Claimant subsequently filed a timely request for modification. In a Decision and Order dated January 12, 2001, Administrative Law Judge Alice M. Craft (the administrative law judge) found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis or total disability. The administrative law judge, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying

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[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on April 10, 1984. Director's Exhibit 80-1. In a Decision and Order dated January 22, 1990, Administrative Law Judge John J. Forbes, Jr. found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 80-69. Judge Forbes also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, Judge Forbes denied benefits. *Id.* By Decision and Order dated March 25, 1992, the Board affirmed Judge Forbes's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Looney v. Bounty Mining Corp.*, BRB No. 90-0644 BLA (Mar. 25, 1992) (unpublished). By Decision and Order dated December 11, 1992, the United States Court of Appeals affirmed the Board's March 25, 1992 Decision and Order. *Looney v. Bounty Mining Corp.*, No. 92-1391 (4th Cir. Dec. 11, 1992) (unpublished).

Claimant filed a second claim on October 17, 1995. Director's Exhibit 1.

benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a 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 establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The record contains the results of seven newly submitted pulmonary function studies taken between November 6, 1995 and September 6, 2000. Director's Exhibits 10, 23, 73; Employer's Exhibits 1, 4-6. Only one of the seven studies, the study conducted on October 12, 1999, is qualifying. Director's Exhibit 73. However, because three physicians invalidated claimant's qualifying October 12, 1999 pulmonary function study,[4] the administrative law judge properly found that this study

[4]Dr. Craven administered the October 12, 1999 pulmonary function study. Director's Exhibit 73. Drs. Castle, Long and Michos invalidated the study. Director's Exhibits 75, 77, 79. The record reflects that while Dr. Michos is not Board-certified in any medical specialty, Director's Exhibit 75, Dr. Castle is Board-certified in Internal Medicine and Pulmonary Disease, Director's Exhibit 79, and Dr. Long is Board-eligible in Internal Medicine. Director's Exhibit 77. The record reflects that Dr. Craven is only Board-certified in Family Practice. Employer's Exhibit 4.

was invalid. Decision and Order at 19; Director's Exhibits 75, 77, 79. Since it is based on substantial evidence, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability.

All of the newly submitted arterial blood gas studies are non-qualifying. Director's Exhibits 14, 23; Employer's Exhibit 1. There is no newly submitted medical opinion evidence that supports a finding that claimant suffers from a totally disabling respiratory or pulmonary

impairment[5] and no evidence of cor pulmonale with right sided congestive heart

[5]In reports dated November 6, 1995 and December 20, 1995, Dr. Forehand opined that there was no respiratory impairment. Director's Exhibits 12, 13.

In a report dated April 10, 1996, Dr. Sargent opined that claimant retained the respiratory capacity to perform his last coal mine employment. Director's Exhibit 23.

In a report dated March 17, 1997, Dr. Ahmad noted that claimant had symptoms of shortness of breath and wheezing and dyspnea on exertion. Director's Exhibit 57.

In a report dated August 16, 2000, Dr. Narayanan opined that claimant's coal mine employment could be a major contributing factor to his respiratory tract pathology and "also possible [sic] is interfering with the patient's activities of daily living." Claimant's Exhibit 1.

In reports dated April 10, 1989, September 26, 2000 and November 1, 2000, Dr. Fino

failure.[6] Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *See* 20 C.F.R. §718.204(b).[7]

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opined that there was no evidence of a disabling respiratory impairment. Director's Exhibit 66; Employer's Exhibits 1, 6.

[6]Inasmuch as there is no evidence of complicated pneumoconiosis, the administrative law judge properly found that claimant was not entitled to the presumption set out at 20 C.F.R. §718.304 (2000). 20 C.F.R. §718.304; Decision and Order at 16.

[7]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

In light of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability and the Board's previous affirmance of Judge Forbes's finding that the previously submitted evidence was insufficient to establish total disability,[8] *see* n.3, *supra*, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[9] *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[8]As previously noted, by Decision and Order dated March 25, 1992, the Board affirmed Judge Forbes's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Looney v. Bounty Mining Corp.*, BRB No. 90-0644 BLA (Mar. 25, 1992) (unpublished). By Decision and Order dated December 11, 1992, the United States Court of Appeals affirmed the Board's March 25, 1992 Decision and Order. *Looney v. Bounty Mining Corp.*, No. 92-1391 (4th Cir. Dec. 11, 1992) (unpublished).

[9]In his adjudication of claimant's 1995 claim, the administrative law judge considered whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Before making such a finding, the administrative law judge should have addressed whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). However, in light of our affirmance of the respective findings of Judge Forbes and the administrative law judge that the evidence of record is insufficient to establish total disability, the administrative law judge's failure to make an initial finding pursuant to 20 C.F.R. §725.310 constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

BETTY JEAN HALL
Administrative Appeals Judge