BRB No. 98-0571 BLA

JOHN A. SELAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INC.	)	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 George P. Morin, Administrative Law Judge, United States Department of Labor.

John A. Selan, Century, West Virginia, *pro se*.

Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1229) of Administrative Law Judge George P. Morin 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 found that the instant case is a duplicate claim and determined that pursuant to the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), the newly submitted evidence was insufficient to establish a material change in conditions, as the evidence failed to establish at least one of the elements of entitlement previously adjudicated against claimant.[1]

[1] Claimant originally filed for benefits in 1973, and the claim was

The administrative law judge credited claimant with forty-three years of coal mine employment and found the new evidence submitted by claimant insufficient to establish that claimant was totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Thus, the administrative law judge declined to adjudicate the claim on the merits and denied benefits on the basis of the previous denial. Accordingly, benefits were denied. On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to 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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

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administratively denied by the Social Security Administration on October 6, 1978. Director's Exhibit 34. Subsequently, the case was transferred to the Department of Labor. On October 7, 1980, the claim was also administratively denied by the Department of Labor on the basis that claimant failed to establish the presence of pneumoconiosis and that he was thereby totally disabled. Director's Exhibit 34. The claim was not pursued further. Claimant filed a second claim in 1989, and on July 13, 1989, it too was administratively denied since although claimant established the existence of pneumoconiosis, claimant failed to establish the existence of a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 35. Claimant took no further action on this claim. Subsequently, claimant filed the instant claim for benefits on August 3, 1995. Director's Exhibit 1.

(1965).

To be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 therein. The administrative law judge, in the instant case, permissibly found that the newly submitted evidence failed to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204. The administrative law judge properly determined that all of the newly submitted pulmonary function and blood gas studies were non-qualifying.[2] 20 C.F.R. §718.204(c)(1), (2); Director's Exhibits 14, 17, 26. Further, the administrative law judge rationally concluded that none of the newly submitted medical opinion evidence diagnosed claimant as suffering from a totally disabling respiratory or pulmonary impairment.[3] Director's Exhibits 15, 16, 26; Employer's Exhibits 1, 11, 12, 13; Decision and Order at 12. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish that claimant is totally disabled, and thus, insufficient to establish a material change in conditions. *See Rutter, supra*; Director's Exhibit 35; Decision and Order at 12.

[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 yields values that exceed those values.

[3] The administrative law judge correctly noted that the record in the instant case is devoid of any evidence that claimant suffers from cor pulmonale with right-sided congestion heart failure. Thus, total disability can not be established pursuant to 20 C.F.R. §718.204(c)(3). *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

Inasmuch as the evidence fails to establish at least one of the elements of entitlement previously adjudicated against claimant, *see Rutter, supra*, we affirm the administrative law judge's denial of benefits as 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge