

BRB No. 93-1270 BLA

JOHN BOSTIC)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: _____)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

John Bostic, Verdunville, West Virginia, *pro se*.

Sarah M. Hurley (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (92-BLA-1446) of Administrative Law Judge Lawrence E. Gray 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). This

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

case involves a duplicate claim. Claimant's first claim was filed on August 16, 1977 and was denied on February 10, 1981. The present claim was filed on September 27, 1991. The administrative law judge considered the present claim pursuant to 20 C.F.R. Part 718 and found that the existence of pneumoconiosis was uncontested. The administrative law judge then considered the old and new evidence together and determined that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals this denial. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order.

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).

As the administrative law judge determined that the existence of pneumoconiosis was uncontested, he first discussed whether claimant was totally disabled pursuant to 20 C.F.R. §718.204(c).¹ The record contains one non-qualifying pulmonary function study which was invalidated on January 30, 1987. See Director's Exhibit 27. As a result, the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) is affirmed as it is supported by substantial evidence.

The record contains two blood gas studies, both of which are non-qualifying, and no evidence of cor pulmonale with right sided congestive heart failure. Director's Exhibit 27. As a result, the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (3) are affirmed as they are supported by substantial evidence.

The medical opinion evidence of record consists of six reports, only one of

¹It is noted that the administrative law judge erred in failing to make a determination as to whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. See *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). However, any error is harmless as the administrative law judge's finding that claimant failed to establish total disability is supported by substantial evidence. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

which diagnoses any impairment. Director's Exhibits 14, 15, 24, 27; Claimant's Exhibit 1. Dr. King, in a 1977 report, stated that the degree of claimant's impairment is that he is limited to moderate to light work. See Director's Exhibit 27. Dr. Ranavaya, in a report dated October 19, 1991, stated that no impairment was determined at the time of the report. See Director's Exhibit 15. The remaining four reports do not discuss the issue of impairment. See Director's Exhibits 14, 24, 27; Claimant's Exhibit 1. The administrative law judge permissibly found that the weight of the more recent medical opinion evidence did not establish total disability. See Decision and Order at 2; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). As a result, the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) is affirmed as it is supported by substantial evidence. Further, as claimant has not established total disability, a requisite element of entitlement under 20 C.F.R. Part 718, the administrative law judge's denial of benefits is affirmed. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge