

BRB No. 99-0965 BLA

BOBBY G. SIMPSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TERCO, INCORPORATED)	
)	
and)	
)	
KENTUCKY COAL PRODUCERS)	
SELF-INSURANCE FUND)	
)	
Employer/Carrier-)	DATE ISSUED:
Party-in-Interest)	
)	
and)	
)	
GATLIFF COAL COMPANY)	
)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Bobby G. Simpson, Artemus, Kentucky, *pro se*.

W. M. Cox, Jr., Williamsburg, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, and BROWN, Administrative Appeals Judges.
PER CURIAM:

Claimant¹, without the assistance of counsel, appeals the Decision and Order (1998-BLA-0178) of Administrative Law Judge Robert L. Hillyard 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 claim involves a duplicate claim. The administrative law judge found that claimant established sixteen years of qualifying coal mine employment and that the newly submitted evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, thus, a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs, responds declining to submit a brief on 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. *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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove “under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him.” See *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1995). In this case, because claimant’s prior claim was denied due to his failure to establish the existence of a total respiratory disability, the evidence developed subsequent to the prior denial must establish that he has a totally disabling respiratory impairment. See Director’s Exhibit 30; 20 C.F.R. §§718.3, 718.202, 718.204; *Ross, supra*; *Director, OWCP v. Mangifest*, 826

¹Claimant is Bobby Gene Simpson, the miner, whose first claim for benefits was filed on September 27, 1990 and denied on March 11, 1991 because claimant failed to establish total respiratory disability. Director’s Exhibit 30. Claimant filed the instant claim for benefits on November 4, 1994. Director’s Exhibit 1.

F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. The record contains four newly submitted pulmonary function studies, only one of which yielded qualifying results pursuant to Section 718.204(c)(1).² Director's Exhibits 9, 10, 34. The administrative law judge rationally found the qualifying pulmonary function study, dated December 22, 1994, to be entitled to little weight as it was invalidated by Dr. Vaezy, the administering physician, and by Dr. Kraman, a reviewing physician. Decision and Order at 11; Director's Exhibit 10; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The administrative law judge also properly found that the newly submitted arterial blood gas studies yielded non-qualifying results pursuant to Section 718.204(c)(2). Decision and Order at 11; Director's Exhibit 12. Further, the record does not contain evidence of cor pulmonale with right sided congestive heart failure pursuant to Section 718.204(c)(3). Thus, we affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(3).

The record contains the newly submitted medical opinions of Drs. Bushey, Vaezy, Baker, and Anderson. Director's Exhibits 11, 34; Claimant's Exhibit 1. Drs. Bushey and Baker opined that claimant is unable, from a pulmonary standpoint, to perform his usual coal mine employment. Director's Exhibit 34; Claimant's Exhibit 1. The administrative law judge noted that Dr. Bushey, whose opinion consists of one sentence answers to questions regarding claimant's condition, did not provide "any of the dates of any x-rays or pulmonary function and arterial blood gas studies or any

²A "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.

subjective examination findings on which he relied.” Decision and Order at 12; Claimant’s Exhibit 1. The administrative law judge then rationally found Dr. Bushey’s opinion to be cursory and unsupported and entitled to little weight. *Id*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge next rationally found that Dr. Baker’s opinion is entitled to little weight because his explanation for why claimant could no longer perform his usual coal mine employment was that claimant should have no further exposure to coal dust due to his pneumoconiosis and chronic bronchitis and because Dr. Baker did not explain why his 1991 opinion, which is based on a non-qualifying pulmonary function study, differs from his 1990 opinion that claimant’s impairment was minimal or none. Decision and Order at 12; Director’s Exhibits 30, 34; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff’d*, 865 F.2d 916 (7th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

The administrative law judge next properly found that Dr. Vaezy stated that he was unable to determine the severity of claimant’s respiratory impairment because he obtained invalid pulmonary function study results. Director’s Exhibit 11. The administrative law judge then acted within his discretion in finding Dr. Anderson’s opinion that claimant retained the capacity, from a pulmonary standpoint, to do his usual coal mine employment to be entitled to substantial weight because it is well-reasoned and supported by the objective medical evidence. Decision and Order at 12; Director’s Exhibit 34; *Lafferty, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). As a result, we affirm the administrative law judge’s findings that the newly submitted medical opinion evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4), and therefore, claimant failed to establish a material change in conditions pursuant to Section 725.309.

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

JAMES F. BROWN
Administrative Appeals Judge