BRB No. 00-0958 BLA

JOHN V. WARD, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SMC COAL & TERMINAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
PIER IX TERMINAL COMPANY	)	
	)	
and	)	
	)	
SHELL MINING COMPANY	)	
	)	
Employers/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph Kane, Administrative Law Judge, United States Department of Labor.

John V. Ward, Jr., Van Lear, Kentucky, *pro se*.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

Mary Forrest-Doyle (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-0124) of Administrative Law Judge Joseph E. Kane denying benefits on a request for modification of a duplicate claim[1] 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] After crediting claimant with eighteen years of coal mine employment, the administrative law judge found that claimant has established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R ''718.202(a) (2000) and 718.203(b) (2000). Thus, the administrative law judge found that claimant established a mistake in a determination of fact in the previous denial pursuant to 20 C.F.R. '725.310(a) (2000). However, the administrative law judge found the evidence insufficient to establish a totally disabling pulmonary impairment pursuant to 20 C.F.R. '718.204(c) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge=s denial of benefits.[3] In response,

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[1]Claimant=s initial claim, filed on April 26, 1991 was denied by the district director on September 25, 1991, because the evidence was insufficient to establish the existence of pneumoconiosis. Director=s Exhibit 31. Claimant filed this duplicate claim on April 24, 1994. Director=s Exhibit 1. The district director denied benefits on October 4, 1994 and May 8, 1995. Director=s Exhibits 9, 13. On July 30, 1995, claimant submitted new evidence and the district director denied the request for modification on September 20, 1995, October 31, 1996, December 30, 1997 and July 9, 1998. Director=s Exhibits 11, 12, 29. Claimant submitted a request for a formal hearing in August 4, 1998. Director=s Exhibit 30.

[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. 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]Claimant=s appeal was filed on June 28, 2000, without the assistance of counsel. On July 5, 2000, the Board acknowledged that since claimant had filed without representation from counsel, the case will be reviewed under the general standard of review, which is whether the administrative law judge=s Decision and Order is rational, is in accordance with the law and is supported by substantial evidence. 20 C.F.R. ''802.211, 802.220 (2000). Response briefs were filed by the Director on August 7, 2000 and employer on August 29, 2000. On November 20, 2000, Paul D. Deaton, an attorney, filed a brief on behalf of claimant. Inasmuch as it

employer argues that the administrative law judge=s denial of benefits is supported by substantial evidence. The Director, Office of Workers= Compensation Programs (the Director), declined to file a brief regarding the merits of claimant=s appeal in this case.[4]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Colombia granted limited injunctive relief and stayed for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which claimant, employer and the Director have responded.[5] Having considered the briefs submitted by the parties

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was submitted after the briefing schedule had closed, it will not be considered on appeal. 20 C.F.R. ''802.211, 802.213 (2000).

[4]We affirm as unchallenged and non-adverse to claimant, the administrative law judge=s finding of eighteen years of coal mine employment, his finding that claimant established a mistake in a determination of fact in the prior denial pursuant to 20 C.F.R. '725.310 (2000) and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ''718.202(a) and 718.203(b) (2000). *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

[5]Employer and the Director assert that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant contends that the expanded definition of pneumoconiosis in 65 Fed. Reg. 80048 (2000) (to be codified at 20 C.F.R. '718.201 (a)(2), (c)), and 65 Fed. Reg. 80049 (to be codified at 20 C.F.R. 718.204(a)) will have an impact on the outcome.

and reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See 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 supported by substantial evidence, are rational, and are consistent 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 (1985).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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 (2000); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge correctly found that none of the pulmonary function and blood gas studies of record yielded qualifying values and that the record is devoid of any evidence regarding the existence of cor pulmonale with right sided congestive heart failure under Section 718.204(c)(1)-(3) (2000).[6] Decision and Order at 13; Director=s Exhibits 7, 26, 31. Under Section 718.204(c)(4) (2000), the administrative law judge found that Dr. Fritzhand was the only physician of record who opined that claimant suffered from a totally disabling pulmonary impairment and credited the contrary opinions of Drs. Rasmussen, Fino and Castle. Decision and Order at 14. The administrative law judge found that Dr. Haseeb=s opinion, merely recommending claimant to refrain from going back to his regular job, was not equivalent to a finding of total disability. However, Dr. Haseeb indicated that he had been treating claimant for eight months and that after his coronary artery bypass surgery, claimant has not Atolerated [his return to work] well.@ Director=s Exhibits 1-19. Dr. Haseeb explained:

[6]A Aqualifying@ 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 Anon-qualifying@ study yields values that exceed those values.

> [Claimant] gets short of breath and tired very easily. He also has frequent swelling of his right leg. His exertion capacity is significantly limited. Considering this patient=s history of myocardial infarction in the past, coronary artery bypass surgery, and early occupational lung disease (enclosed please see letter from Dr. Mendieta, pulmonologist), it is strongly recommended that the patient discontinue any further efforts to go back to his regular work. He has achieved his maximum recovery and is not expected to improve any more.[7]

Director=s Exhibit 31-49. Dr. Haseeb=s assessment of claimant=s physical capability may be tantamount to a finding of total disability. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Zimmerman v. Director,* OWCP, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Company, Inc.*, 12 BLR 1-83 (1988). Therefore, we vacate the administrative law judge=s finding under Section 718.204(c)(4) (2000), and instruct the administrative law judge to reconsider Dr. Haseeb=s opinion and to consider his status as claimant=s treating physician in weighing all the evidence under Section 718.204(c) (2000). *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 7 BLR 2-16 (6th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[7]Although, as the administrative law judge observed, Dr. Rasmussen recommended that claimant=s workplace be changed, he also stated that the pulmonary function studies Ashow that [claimant] has deceased functional residual capacity to only 65 percent of predicted and residual volume to only 80 percent of predicted.@ Decision and Order at 14; Director=s Exhibits 31-50.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge