BRB No. 00-0990 BLA

KARA ALLEN	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
CLINCHFIELD 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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Kara Allen, Keen Mountain, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Dorothy L. Page (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 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,[1] without the assistance of counsel, appeals the Decision and Order (99-BLA-0771) of Administrative Law Judge Daniel F. Sutton 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] This case is before the Board for a third time.[3] The administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718, and noted that the parties stipulated to at least forty-five years of coal mine employment. Hearing Transcript at 10. The administrative law judge found the newly submitted evidence insufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000), or a material change in conditions pursuant to 20 C.F.R. §725.309 (1999).[4] Accordingly, benefits were denied.

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[1]Claimant is the miner, Kara Allen. 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, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[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, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

[3]Claimant initially filed a claim for benefits on October 20, 1976. Director's Exhibit 24-1. This application was denied by Administrative Law Judge Edward J. Murty, Jr. in a Decision and Order issued on June 15, 1983. Director's Exhibit 24-38. This determination was affirmed by the Board on appeal. Director's Exhibit 24-26; *Allen v. Clinchfield Coal Co.*, BRB No. 83-1487 BLA (May 15, 1986)(unpub.). Claimant filed a second application for benefits on February 26, 1993, which was denied by Administrative Law Judge Charles P. Rippey on June 29, 1995, due to claimant's failure to establish the existence of a totally disabling respiratory impairment or a material change in conditions pursuant to 20 C.F.R. §725.309 (1999). Director's Exhibits 25-1, 25-59. The Board affirmed the denial of benefits on May 22, 1996. Director's Exhibit 25-64; *Allen v. Clinchfield Coal Co.*, BRB No. 95-1921 BLA (May 22, 1996)(unpub.). Claimant filed the present duplicate claim on April 7, 1998. Director's Exhibit 1.

[4]The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c),

In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in the merits of this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia 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 claims, 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 April 20, 2001, to which the Director and employer responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order.[5] Based on the briefs submitted by the Director and employer, and our review, 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 considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 rational, supported by substantial evidence, and in accordance with 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 in a living miner's claim pursuant to 20

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65 Fed. Reg. 80,057 (2000).

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on April 20, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). 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*).

Where a claimant filed a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d) (1999). The United States Court of Appeals for the Fourth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against the claimant. *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied,* 519 U.S. 1090 (1997).[6]

[6]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of a totally disabling respiratory impairment was not established pursuant to Section 718.204(c) (2000). The administrative law judge properly found that claimant failed to demonstrate a totally disabling respiratory impairment under Section 718.204(c)(1) (2000), as all of the pulmonary function tests submitted in support of the duplicate claim produced non-qualifying results.[7] Decision and Order at 5, 8; Employer's Exhibits 1, 12; Director's Exhibits 5, 18; *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994). Pursuant to Section 718.204(c)(2) (2000), the administrative law judge considered the arterial blood gas study dated June 17, 1998, which produced qualifying values at rest, and non-qualifying values after exercise, and the non-qualifying studies performed on March 7, 1997, and January 13, 1999, and rationally determined that they were inconclusive since the most recent study produced non-qualifying values. Decision and Order at 6, 8; Employer's Exhibit 1; Director's Exhibits 7, 12; *Schetroma v. Director, OWCP,* 18 BLR 1-19 (1993); *Sheckler v. Clinchfield Coal Co.,* 7 BLR 1-128 (1984). We also affirm the administrative law judge's findings at Section 718.204(c)(3) (2000), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 5; *see generally Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991).

The administrative law judge then considered the relevant medical reports of record pursuant to Section 718.204(c)(4) (2000), and rationally credited the reports of Drs. Castle and Fino, both of whom found no evidence of a totally disabling respiratory impairment, as well documented and reasoned based on their review of claimant's medical records developed over a 20-year period and Dr. Castle's examination. Decision and Order at 6-8; Employer's Exhibits 1, 5, 13*; Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*). In addition, the administrative law judge reasonably accorded more weight to Drs. Castle and Fino based upon their qualifications as Board-certified pulmonologists. *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988). Moreover, it was within the administrative law judge's discretion to accord less weight to Dr. Forehand's diagnosis of totally disabling pneumoconiosis, since this physician is not a Board-certified pulmonologist, his report was based on a qualifying test result he obtained, which was not confirmed by Dr. Castle's more recent test, and Dr. Forehand did not review claimant's other medical evidence. Decision and Order at 8; Director's Exhibit 6; *see Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood*

[7]A "qualifying" pulmonary function or blood gas study yields values equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(2) (2000).

v. Elkay Mining Inc., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Trumbo, supra*.

As the administrative law judge's finding that claimant failed to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c) (2000) is supported by substantial evidence, it is affirmed. Inasmuch as claimant has failed to establish an element of entitlement previously decided against him, we also affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309 (1999), and thus, is ineligible for benefits. *Ondecko, supra; Rutter, supra.*

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

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

REGINA C. McGRANERY
Administrative Appeals Judge