

BRB No. 07-0904 BLA

V.P., On Behalf of E.P.)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 06/27/2008
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

V.P., Hazard, Kentucky, *pro se*.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; 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, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the July 2, 2007 Decision and Order Denying Benefits (2005-BLA-5113) of Administrative Law Judge Alice M. Craft (the administrative law judge) rendered on a subsequent 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).¹ The prior claim was denied for failure to

¹ Claimant, the widow of the miner, was substituted as a party after the miner's death on October 18, 2003. The miner's first claim for benefits was filed on November 26, 1974 and later declared abandoned for failure to submit any evidence. A second claim was filed on March 25, 1992, and denied on July 25, 1997 for failure to establish total respiratory disability. Director's Exhibit 1. The current claim was filed on

establish total respiratory disability at 20 C.F.R. §718.204(b)(2). Addressing the subsequent claim, the administrative law judge found that the evidence submitted in support of the subsequent claim failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), the element of entitlement previously adjudicated against claimant. Therefore, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance 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 raised on appeal 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 conclusions of law are rational, supported by substantial evidence, and in accordance with law.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a miner files 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 "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon

November 7, 2001. On December 19, 2002 the district director issued a proposed Decision and Order denying benefits. The miner then requested a hearing before an administrative law judge, however the miner died on October 18, 2003 before a hearing could be held. Director's Exhibits 19, 21. Claimant's request that the miner's claim be remanded and consolidated with her survivor's claim was granted by Administrative Law Judge Rudolf L. Jansen by Order on May 7, 2004. Director's Exhibit 21. The district director awarded benefits in the survivor's claim on May 14, 2004, but denied the miner's claim by letter dated June 28, 2004. Director's Exhibit 22. The claimant requested a hearing on the miner's claim, which was adjudicated by the administrative law judge and is now the subject of this appeal.

² The law of the United States Court of Appeals for the Sixth Circuit is applicable, because the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3, 5, 6.

which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Claimant’s prior claim was denied because the evidence failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2). Director’s Exhibit 1. Consequently, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2), (3); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

After consideration of the administrative law judge’s Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed.

A review of the record reveals that the administrative law judge properly found that the only newly submitted pulmonary function study of record produced non-qualifying values,³ and therefore, failed to demonstrate total respiratory disability at Section 718.204(b)(2)(i). *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 6; Director’s Exhibit 10. Likewise, the administrative law judge properly determined that the only newly submitted arterial blood gas study of record produced non-qualifying values. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 6; Director’s Exhibit 10. Hence, we affirm the administrative law judge’s determination that total respiratory disability was not demonstrated under Section 718.204(b)(2)(i), (ii). Similarly, we affirm the administrative law judge’s determination that the record does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(iii). *See Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev’d on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 6. In addition, relevant to Section 718.204(b)(2)(iv), the administrative law judge properly found that, in the only newly submitted medical report of record, Dr. Dahhan opined that the miner was not impaired from a respiratory standpoint and that the miner retained the ability to perform his previous coal mine employment or comparable work. Decision and Order at 6; Director’s Exhibit 10. We, therefore, affirm the administrative law judge’s finding that total respiratory disability was not established pursuant to Section 718.204(b)(2)(iv), as supported by substantial evidence.

Further, in addition to considering the medical evidence at Section 718.204(b)(2)(i)-(iv), the administrative law judge acknowledged claimant’s hearing testimony to the effect that the miner’s coal mine employment required heavy exertion and that his breathing problems limited his physical activity. Decision and Order at 3;

³ A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

see Hearing Transcript at 8-13. However, the administrative law judge properly found that this lay testimony was insufficient to overcome the objective testing, which she found revealed no pulmonary or respiratory impairment. *See* 20 C.F.R. §718.204(d)(5); *Daugherty v. Director, OWCP*, 843 F.2d 1390 (6th Cir. 1988); *Coleman v. Director, OWCP*, 829 F.2d 3, 4-5, 10 BLR 2-287, 2-288-89 (6th Cir. 1987).

Thus, finding that total disability was not established at Section 718.204(b)(2), the administrative law judge properly found that no change in an applicable condition of entitlement was demonstrated pursuant to Section 725.309. Consequently, we affirm the administrative law judge's finding that claimant is precluded from entitlement to benefits.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge