BRB No. 99-0672 BLA

CHARLIE D. MORRISON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TENNESSEE CONSOLIDATED COAL COMPANY	)	DATE ISSUED:
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Charlie D. Morrison, Whitwell, Tennessee, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen Chartered), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (98-BLA-0390) of Administrative Law Judge Edward Terhune Miller 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). The instant case involves a duplicate claim filed on February 3, 1997.[1] The administrative law judge

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on September 30, 1987. Director's Exhibit 24. By

Decision and Order dated December 5, 1989, Administrative Law Judge John H. Bedford found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Judge Bedford also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, Judge Bedford denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1987 claim.

Claimant filed a second claim on January 14, 1991. Director's Exhibit 24. By Decision and Order dated November 6, 1992, Administrative Law Judge E. Earl Thomas found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* Judge Thomas, therefore, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Id.* However, in his consideration of the merits of claimant's 1991 claim, Judge Thomas found that the

found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

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evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, Judge Thomas denied benefits. *Id.* By Decision and Order dated March 29, 1994, the Board affirmed Judge Thomas's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). *Morrison v. Tennessee Consolidated Coal Co.*, BRB No. 93-0618 BLA (Mar. 29, 1994) (unpublished). The Board, therefore, affirmed Judge Thomas's denial of benefits. *Id.* The Board denied claimant's motion for reconsideration on July 27, 1995. *Morrison v. Tennessee Consolidated Coal Co.*, BRB No. 93-0618 BLA (July 27, 1995) (Order) (unpublished). There is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a third claim on February 3, 1997. Director's Exhibit 1.

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

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's prior 1991 claim was denied because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 24. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of total disability pursuant to 20 C.F.R. §718.204(c).

The administrative law judge properly found that all of the valid newly submitted pulmonary function and arterial blood gas studies are non-qualifying.[2] Decision and Order at 5; Director's Exhibits 5, 7, 9, 21. The administrative law judge also found that there was no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 5. We, therefore, affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3).

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge noted that Dr. Soteres was the only physician who

[2]The administrative law judge noted that Dr. Burki invalidated claimant's March 17, 1997 pulmonary function study due to poor effort. Decision and Order at 3 n.4; Director's Exhibits 5, 6. The remaining newly submitted pulmonary function studies conducted on April 23, 1997 and November 4, 1997 are non-qualifying. Director's Exhibits 7, 21. The only newly submitted arterial blood gas study, a study conducted on March 17, 1997, is also non-qualifying. Director's Exhibit 9.

addressed the extent of claimant's pulmonary impairment. In a report dated March 17, 1997, Dr. Soteres indicated that claimant suffered from a Class III impairment under the AMA Guidelines. Director's Exhibit 8. The administrative law judge, however, permissibly rejected Dr. Soteres's assessment of claimant's impairment because Dr. Soteres failed to provide an explanation for his conclusion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 5; Director's Exhibit 8. Inasmuch as there are no other newly submitted medical opinions addressing the extent of claimant's pulmonary impairment, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

In light of our affirmance of the administrative law judge's findings that the newly submitted medical evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Ross*, *supra*.

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

REGINA C. McGRANERY
Administrative Appeals Judge