

BRB No. 97-0892 BLA

CHESTER BROWN, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA	)	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 - Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Chester Brown, Sr., Gilbert, West Virginia, *pro se*.

Mary Rich Malloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the benefit of counsel, appeals the Decision and Order - Denying Benefits (96-BLA-1219) of Administrative Law Judge Mollie W. Neal on a duplicate 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 administrative law judge concluded that the evidence was insufficient to

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<sup>1</sup> Claimant is Chester Brown, the miner, who filed two claims with the Department of Labor (DOL). The first claim, filed on March 12, 1980, was denied by Administrative Law Judge Russell L. Stevens in a Decision and Order dated November 17, 1986. Director's Exhibit 33. Following claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Brown v. Amherst Coal Co.*, BRB No. 86-3040 BLA (Jul. 21, 1988)(unpub.). The Board also reaffirmed this position following claimant's Motion for Reconsideration. *Brown v. Amherst Coal Co.*, BRB No. 86-3040 BLA (Oct. 21, 1988)(Order on Motion for Reconsideration)(unpub.). The second, the instant claim, was filed on November 30, 1994. Director's Exhibit 1.

establish a material change in condition pursuant to 20 C.F.R. §725.309(c) because it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied the claim.

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 Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). 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). Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish entitlement is supported by substantial evidence, and accordingly, he urges affirmance of the denial of benefits. The Director, OWCP, has filed a letter indicating that he will not file a brief in the instant case.<sup>2</sup>

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that pursuant to Section 725.309, a 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.” *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

The administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge correctly summarized the six newly submitted x-ray interpretations of record, and then permissibly

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<sup>2</sup> We note that claimant appeared at the hearing before the administrative law judge without counsel. The administrative law judge however made the requisite inquiry to determine if claimant was aware that any attorney he selects to represent him at the hearing may not obtain a fee unless there is an award and if after being informed of this, whether claimant desired to proceed without such representation. *Shappell v. Director, OWCP*, 7 BLR 1-304 (1984). H.Tr. at 3-4.

gave greater weight to the negative interpretations of Drs. Wiot, Shipley and Spitz, Director's Exhibit 26, as the only dually-qualified readers of record, on the basis of their superior qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 5. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Next, the administrative law judge correctly concluded that the record did not contain any autopsy or biopsy evidence, such that Section 718.202(a)(2) could not be established. Moreover, the administrative law judge correctly concluded that none of the presumptions contained in Section 718.202(a)(3) were applicable. *See* 20 C.F.R. §§718.304; 718.305; 718.306. Accordingly, we affirm the administrative law judge's findings thereunder.

The administrative law judge also found that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge correctly noted that Drs. Carrillo and Rasmussen opined the existence of pneumoconiosis, that Dr. Ferman stated that claimant suffered from pneumoconiosis without explaining his diagnosis, and that Dr. Zalvidar expressly stated that claimant did not have pneumoconiosis on the basis of claimant's normal pulmonary function studies and negative x-ray reports. Director's Exhibit 12, Claimant's Exhibits 1, 2, 3; Employer's Exhibit 1; Decision and Order at 7-8. The administrative law judge permissibly discounted Dr. Ferman's opinion because he found that the doctor failed to adequately explain his conclusions, and thus, his opinion was unreasoned. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). She then found that the opinions of Drs. Carrillo and Rasmussen were outweighed by the well-reasoned and well-supported opinion of Dr. Zalvidar, a highly qualified pulmonary specialist. *Church v. Eastern Associated Coal Co.*, 21 BLR 1-52 (1997) *aff'g on recon.* 20 BLR 1-8 (1996); *see Woodward, supra; Worhach, supra; Trent, supra. See also Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Decision and Order at 8. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish a material change in conditions pursuant to Section 725.309 as it fails to establish the existence of pneumoconiosis at Section 718.202(a)(4).

The administrative law judge also found that the newly submitted evidence fails to establish total respiratory disability pursuant to Section 718.204(c). With respect to the administrative law judge's finding at Section 718.204(c)(1), (2) the administrative law judge correctly found that neither of the two pulmonary function studies nor blood gas studies of record produced qualifying values. Director's Exhibits 11, 13; Claimant's Exhibit 3. As these studies are insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1), (2) we affirm this finding. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987); *Winchester v. Director v. OWCP*, 9 BLR 1-177 (1986). *Tucker v Director v. OWCP*, 10 BLR 1-35 (1987).

With respect to the administrative law judge's finding at Section 718.204(c)(3), the administrative law judge correctly found that the evidence contains no evidence of cor pulmonale with right-sided congestive heart disease. We affirm, therefore, the administrative law judge's

finding at Section 718.204(c)(3). *See Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987).

The administrative law judge also found that the medical opinions of record were insufficient to establish total disability at Section 718.204(c)(4). The administrative law judge correctly found that Drs. Rasmussen and Zalvidar, Claimant's Exhibits 2, 3; Employer's Exhibit 1, both concluded that claimant was not totally disabled. Decision and Order at 11. The administrative law judge found that Drs. Carrillo and Ferman, Director's Exhibits 12; Claimant's Exhibit 1, opined that claimant suffered from a pulmonary impairment, without assessing the extent of the impairment. Decision and Order at 11. The administrative law judge permissibly credited the opinions of Drs. Rasmussen and Zalvidar over those of Drs. Carrillo and Ferman on the basis that the former opinions were better supported by objective data, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and on the basis of Dr. Zalvidar's superior credentials. We affirm, therefore, the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4). Therefore, the administrative law judge's finding that the newly submitted evidence fails to establish a material change in conditions pursuant to Section 725.309, as it fails to establish a total respiratory disability pursuant to Section 718.204(c) is affirmed. As all of the administrative law judge's findings preclude entitlement pursuant to the Part 718 regulations, *see Trent, supra; Perry, supra*, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order - Denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge