BRB No. 99-0309 BLA

LAWRENCE T. GOAD, SR.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Respondent

Appeal of the Decision and Order - Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Lawrence T. Goad, Sr., Belspring, Virginia, *pro se*.

Helen H. Cox (Henry L. Solano, 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the

Order - Rejection of Claim (97-BLA-1117) of Administrative Law Judge Edward Terhune Miller 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 administrative law judge determined that this claim involved a request for modification, pursuant to 20 C.F.R. §725.310, of the denial of claimant's duplicate claim in a Decision and Order issued by Administrative Law Judge George Fath on February 6, 1995.[2] Initially, the administrative law judge credited claimant with no more than eight years and nine months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering claimant's request for modification, the administrative law judge found the newly submitted medical

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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] Claimant filed his initial application for benefits on June 2, 1980, which was denied by the district director on June 12, 1981, finding that claimant failed to establish any of the elements of entitlement. Director's Exhibit 21. Claimant filed a second application for benefits on July 22, 1988, which was denied by the district director on December 2, 1988 due to abandonment of the claim. *Id*.

Claimant filed his third and current application for benefits on August 25, 1993, which was denied by the district director on December 9, 1993. Director's Exhibits 1, 18. The case was thereafter transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge George Fath. Following a formal hearing, Judge Fath issued his Decision and Order –Denying Benefits on February 6, 1995. Judge Fath determined that the instant case was a duplicate claim, but that the Director, Office of Workers' Compensation Programs, conceded the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, Judge Fath found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. Considering the merits of entitlement, Judge Fath credited claimant with eight years and nine months of coal mine employment and found that the evidence of record, old and new, was insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). In addition, he found the evidence insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, Judge Fath denied benefits. Director's Exhibit 29.

Claimant thereafter filed his request for modification on February 2, 1996. Director's Exhibit 31.

evidence of record, that evidence submitted since the denial of claimant's previous claim, in conjunction with the old evidence insufficient to establish a totally disabling respiratory impairment or that pneumoconiosis was a contributing cause of that impairment pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge, therefore, found the new evidence insufficient to establish a change in conditions or a material change in conditions. The administrative law judge further found that the record does not support a finding of a mistake in a determination of fact. Accordingly, the administrative law judge denied benefits. In response to claimant's *pro se* appeal, the Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 under 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

The administrative law judge credited claimant with eight years and nine months of coal mine employment, based on claimant's Social Security Administration earning records and his United States Army records, which the administrative law judge found to be uncontradicted. Decision and Order at 4; Director's Exhibits 4, 5, 24. Inasmuch as the administrative law judge acted reasonably in relying upon this documentary evidence in crediting claimant with eight years and nine months of coal mine employment, we affirm this finding. *See Dawson v. Old Ben Coal Co.,* 11 BLR 1-58 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

We also affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment inasmuch as it is supported by substantial evidence and

contains no reversible error.[3] The administrative law judge properly found the

[3] We note that the administrative law judge considered the evidence submitted with claimant's 1993 duplicate claim as well as the new evidence submitted in conjunction with his 1996 request for modification in determining whether the evidence supports a finding of modification pursuant to 20 C.F.R. §725.310. However, inasmuch as Judge Fath found that claimant established a material change in conditions in the duplicate claim pursuant to 20 C.F.R. §725.309, he, thus, denied benefits on the merits under 20 C.F.R. Part 718. Director's Exhibit 29. Therefore, the proper course of action would have been for the administrative law judge to consider only that new evidence submitted in conjunction with the modification request under Section 725.310. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998). However, we need not address this procedural inconsistency inasmuch as the administrative law judge, in finding that the evidence of record was insufficient to establish a totally disabling respiratory impairment under 20 C.F.R. §718.204(c), considered all of the evidence of record, the new evidence from the duplicate claim and modification as well as that evidence submitted with claimant's original claim, see Director's Exhibit 21,

pulmonary function study evidence insufficient to demonstrate total disability pursuant to Section 718.204(c)(1) as the weight of the pulmonary function studies produced non-qualifying values.[4] Decision and Order at 4, 8; Director's Exhibits 11, 21, 31; Claimant's Exhibit 1; 20 C.F.R. §718.204(c)(1). Similarly, the administrative law judge correctly found that all of the blood gas studies were non-qualifying and, thus, insufficient to demonstrate total disability. Decision and Order at 4, 8; Director's Exhibits 13, 21; Claimant's Exhibit 1; 20 C.F.R. §718.204(c)(2). In addition, the administrative law judge correctly found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure and, therefore, total disability was not demonstrated pursuant to Section 718.204(c)(3). 20 C.F.R. §718.204(c)(3); *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

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and, therefore, has provided reviewable findings on the merits of entitlement. Consequently, we will address these findings.

[4] A "qualifying" 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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Furthermore, the administrative law judge properly found that total disability was not demonstrated at Section 718.204(c)(4), as the medical opinions of record were insufficient to demonstrate a totally disabling respiratory or pulmonary impairment.[5] The administrative law judge properly set forth the medical opinions of record, finding that Drs. Vasudevan and Spagnolo opined that there was no pulmonary or respiratory impairment. Decision and Order at 5-6, 9-10; Director's Exhibits 12, 23; *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991). The administrative law judge also properly found that the opinion of Dr. Jabour, that claimant's moderate impairment precludes claimant from resuming his coal mine exposure, was not sufficient to demonstrate total disability pursuant to Section 718.204(c)(4). Decision and Order at 5, 9-10; Claimant's Exhibit 1; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988). In addition, the administrative law judge properly found that neither Dr. Troxel nor Dr. Skewes rendered an opinion regarding a respiratory or pulmonary impairment. Decision and Order at 6, 9-10; Director's Exhibits 21, 35, 39. Consequently, the administrative law judge properly exercised his discretion in determining that the

[5] The record contains the medical opinions of Drs. Troxel and Jabour, submitted in conjunction with claimant's request for modification, the opinions of Drs. Vasudevan and Spagnolo, submitted with claimant's 1993 duplicate claim and the opinion of Dr. Skewes, submitted in 1981 with claimant's initial claim. Dr. Jabour, examined claimant and in his 1997 report, diagnosed asbestosis and coal workers' pneumoconiosis and opined that claimant's impairment is moderate and precludes claimant from resuming his previous coal mine exposure. Claimant's Exhibit 1. Dr. Vasudevan, examined claimant in 1993 and diagnosed pleural based nodules and mild chronic obstructive pulmonary disease, which he attributed to claimant's smoking. In addition, Dr. Vasudevan opined that there was no degree of pulmonary impairment, but did note that he could not exclude a cardiac limitation to exercise. Director's Exhibit 12. Dr. Spagnolo, in 1994, reviewed the evidence of record and opined that claimant was not suffering from a totally disabling breathing impairment, but that considering claimant's age and the results of the 1993 exercise test it was unlikely that claimant could perform his usual coal mine employment at this time. Dr. Spagnolo also stated that claimant's exercise limitation is due to poor conditioning or an underlying cardiac condition and is not related to his coal mine employment. Director's Exhibit 23. The record also contains the 1996 letter of Dr. Troxel, Director's Exhibits 35, 39, and the 1981 report by Dr. Skewes, Director's Exhibit 21, neither of which expresses an opinion concerning respiratory disability.

medical opinions of record were insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4). Decision and Order at 10; *see Carson, supra; Taylor, supra*; *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *see also Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Since claimant has failed to establish the existence of a totally disabling respiratory or pulmonary impairment, a necessary element of entitlement under Part 718, an award of benefits is precluded. *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order - Rejection of Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge