BRB No. 99-0908 BLA

WILLIAM P. RAMSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MEADOW RIVER COAL/SEWELL 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 on Remand of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

William P. Ramsey, Summersville, West Virginia, *pro se*.

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

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (96-BLA-1500) of Administrative Law Judge Mollie W. Neal 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). This case has been before the Board previously. In the original Decision and Order, the administrative law judge properly noted that the instant case was a duplicate claim[1] in accordance with the provisions of 20 C.F.R. §725.309 and that in order for

[1]Claimant filed his initial claim for benefits on March 13, 1973, which was finally denied by the Department of Labor on September 9, 1981. Director's

claimant to establish a material change in conditions, the newly submitted evidence must establish that claimant is totally disabled. Decision and Order dated October 30, 1997 at 2-4. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204(c). Decision and Order dated October 30, 1997 at 4-13. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1) and (3), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2) and (4) and remanded the case for the administrative law judge to reconsider the relevant evidence thereunder. *Ramsey v. Meadow River Coal/Sewell Coal* Co., BRB No. 98-0389 BLA (Dec. 2, 1998)(unpub.).

On remand, the administrative law judge found that the newly submitted blood gas study and medical opinion evidence was insufficient to establish total disability and thus that claimant failed to establish a material change in conditions. Decision and Order on Remand at 5-7. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the Decision and Order on Remand of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this appeal.

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. *See 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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v.*

Exhibits 22, 27. Claimant filed a second claim on April 30, 1987, which was finally denied on November 2, 1994, because although claimant established the existence of pneumoconiosis arising out of coal mine employment, the evidence was insufficient to establish total disability. Director's Exhibit 22. Claimant filed his most recent claim on November 8, 1995. Director's Exhibit 1.

Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein.[2] Considering the newly submitted evidence on remand, the administrative law judge properly found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Initially, the administrative law judge acted within her discretion in finding the exercise portion of the June 19, 1996 blood gas study performed by Dr. Rasmussen, which produced qualifying values[3], to be insufficient to establish total disability in light of the preponderance of the newly submitted studies which are non-qualifying. Decision and Order on Remand at 5. Therefore, the administrative law judge properly concluded that the weight of the

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]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).

newly submitted blood gas study evidence did not satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.204(c)(2). Decision and Order on Remand at 5; Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibit 1; *Sexton v. Southern Ohio Coal Co.,* 7 BLR 1-411 (1984); *Piccin, supra*.

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge properly determined the exertional requirements of claimant's usual coal mine employment as a coal car dropper and cleaner at the tipple and reviewed the newly submitted medical opinion evidence to determine if the physicians had an accurate knowledge of the exertional requirements of claimant's usual coal mine employment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); Decision and Order on Remand at 5-7. The administrative law judge rationally concluded that all of the opinions reflected an accurate knowledge of the exertional requirements of claimant's usual coal mine employment. *See Lane, supra*; Decision and Order on Remand at 6; Director's Exhibits 8, 9, 20; Employer's Exhibits 1, 2, 5, 7-10, 12; Claimant's Exhibits 1, 2. The administrative law judge then considered the newly submitted medical opinions of record and reasonably determined that the medical opinion evidence was insufficient to establish total disability based on her conclusion that the opinion of Dr. Rasmussen, that claimant was totally disabled from his previous coal mine employment, was outweighed by the opinions of Drs. Zaldivar, Fino and Jarboe, that claimant has the pulmonary and respiratory capacity to resume his former coal mine employment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Perry, supra*; Decision and Order on Remand at 6-7; Director's Exhibits 8, 9, 20; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2, 5, 7-10, 12. The administrative law judge acted within her discretion, as factfinder, when she accorded greater weight to the opinions by Drs. Zaldivar, Fino and Jarboe, that claimant has the pulmonary and respiratory capacity to resume his former coal mine employment, in light of their qualifications and as these opinions are supported by the opinion of claimant's treating physician, Dr. Fleer, who did not diagnose a pulmonary impairment. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985)*; Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Piccin, supra*; Decision and Order on Remand at 6-7; Director's Exhibits 8, 9, 20; Employer's Exhibits 1, 2, 5, 7-10, 12; Claimant's Exhibits 1, 2.

Claimant has the general burden of establishing entitlement and bears the risk

of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly found the only opinion diagnosing a totally disabling respiratory impairment outweighed by the remaining contrary medical opinions, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw her own inferences therefrom, *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*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.

Since claimant failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(c), the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309, and thus entitlement is precluded. *See 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).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge