

BRB No. 99-0915 BLA

ALBERT L. RUSHBROOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHANNON POCAHONTAS MINING	)	DATE ISSUED:
COMPANY	)	
	)	
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Albert L. Rushbrook, Welch, West Virginia, *pro se*.

William T. Brotherton, III (Spilman, Thomas and Battle), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (98-BLA-0509) of Administrative Law Judge Robert J. Hillyard 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 Act). The administrative law judge found that claimant established thirty-four years of coal mine employment, and applied the regulations found at 20 C.F.R. Part 718. Claimant filed his third claim for benefits on May 14, 1997. Director's Exhibit 1. Judge Robert L. Hillyard (the administrative law judge) reviewed all the newly submitted evidence at Section 718.204(c), and found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *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); *cert. denied*, 117 S.Ct. 763 (1997); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). Accordingly, benefits were denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

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). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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).

The administrative law judge determined that the evidence submitted after the prior denial failed to establish total disability pursuant to Section 718.204(c), the element of entitlement previously adjudicated against claimant. The administrative law judge determined that none of the pulmonary function studies yielded qualifying results, and that only one of the four blood gas studies yielded qualifying results.<sup>1</sup> The administrative law judge therefore properly found that total disability was not established at Section 718.204(c)(1) and (2). 20 C.F.R. §718.204(c)(1) and (c)(2); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> Total disability cannot be established at Section 718.204(c)(3) as there is no evidence in the record relevant to that Section. 20 C.F.R. §718.204(c)(3).

Next, the administrative law judge found that the evidence submitted since the prior denial also includes the opinions of three physicians.<sup>3</sup> The administrative law judge found that Dr. Iosif's opinion that claimant's respiratory impairment was of a mild degree and not severe enough to be considered disabling, was well reasoned as it was supported by the objective evidence, and was, therefore, entitled to substantial weight. Employer's Exhibit 4; Decision and Order at 13. Likewise, the administrative law judge found that Dr. Vasudevan's opinion of chronic obstructive pulmonary disease due to smoking but no pulmonary impairment, was also supported by objective medical evidence and entitled to substantial weight. Director's Exhibit 13. The administrative law judge found, however, that Dr. Rasmussen's diagnosis of minimal to moderate loss of respiratory function which would render claimant totally disabled from performing his very heavy manual labor, and "that '[a]s a consequence of his minimal pulmonary impairment and his age, he is totally disabled for [sic] resuming his former coal mine employment,'" was not supported by underlying documentation. Decision and Order at 14; Director's Exhibit 28; Claimant's Exhibit 1. Therefore, the administrative law judge permissibly found that the opinion of Dr. Rasmussen was outweighed by the opinions of Drs. Vasudevan and Iosif. Decision and Order at 14; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge then properly weighed all the relevant evidence together at 718.204(c) and found the evidence insufficient to establish total disability at 718.204(c). *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). We therefore affirm the administrative law judge's finding that claimant failed to establish total disability based on the newly submitted evidence pursuant to Section 718.204(c), and therefore failed to establish a material change in conditions. 20 C.F.R. §725.309.

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<sup>3</sup> Although the administrative law judge noted that there were hospital notes made subsequent to the prior denial of benefits covering claimant's treatment during hospital stays in February and March of 1997, as none addressed the severity of claimant's chronic obstructive pulmonary disease, they were not supportive of total disability pursuant to 20 C.F.R. §718.204(c)(4). Decision and Order at 14; Director's Exhibit 11.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge