BRB No. 02-0720 BLA

RACHEL RIFE (On Behalf of FRANKLIN D. RIFE, deceased miner)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK 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 Denying Benefits on Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Rachel Rife, Hurley, Virginia, *pro se*.

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order

[1] Claimant Rachel Rife, is the widow of the deceased miner and is pursuing the miner's application for benefits, which was filed on June 9, 1997. Director's Exhibit 1.

[2] Ron Carson, a benefits counselor and Black Lung Program Director of Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the 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).

Denying Benefits on Modification (02-BLA-0033) of Administrative Law Judge Linda S. Chapman 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).[3] Adjudicating the claim pursuant to 20 C.F.R. Part 718, Administrative Law Judge Daniel J. Roketenetz found that the miner worked in qualifying coal mine employment for thirty-two years, but found that the miner failed to establish the existence of pneumoconiosis arising out of coal mine employment or total respiratory disability due to pneumoconiosis. Accordingly, benefits were denied. Director's Exhibits 16, 45. The miner appealed the administrative law judge's denial of benefits. Prior to the Board's issuance of its decision, however, the miner died on May 8, 2000. The Board affirmed Judge Roketenetz's determinations that the miner failed to establish the existence of pneumoconiosis arising out of coal mine employment or total respiratory disability due to pneumoconiosis, and, accordingly, affirmed the denial of benefits. *Rife v. Island Creek Coal Co.,* BRB No. 99-1288 BLA (Sep. 18, 2000) (unpub.); Director's Exhibit 53.

The miner's widow, claimant herein, filed a petition for modification on November 20, 2000, with supporting evidence. Considering claimant's request for modification, Administrative Law Judge Linda S. Chapman (administrative law judge) credited the miner with thirty-two years of qualifying coal mine employment and determined that a change in conditions was established because the newly submitted evidence established the existence of pneumoconiosis. Considering the evidence as a whole, however, the administrative law judge found that claimant still failed to demonstrate that the miner suffered from a totally disabling respiratory or pulmonary impairment. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this *pro se* appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating he will not participate in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board

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[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4] The administrative law judge's findings regarding length of coal mine employment, the existence of pneumoconiosis arising out of coal mine employment, and modification are affirmed since they are not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983); Decision and Order on Modification at 4, 11, 12 n.4.

considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 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 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).

After consideration of the administrative law judge's Decision and Order 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 because the administrative law judge properly found that the evidence of record failed to establish entitlement to benefits. The record contains two pulmonary function studies of record which produced non-qualifying values.[5] Director's Exhibits 11, 34. Thus, the administrative law judge properly found that the pulmonary function study evidence yielded non-qualifying values, and, therefore, failed to demonstrate total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 12. Likewise, the administrative law judge properly found that the two arterial blood gas studies of record did not establish total disability because they produced non-qualifying values. 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibits 13, 34. Hence, we affirm the administrative law judge's finding that the pulmonary function and blood gas studies of record were insufficient to demonstrate total respiratory disability. 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order on Modification at 12. The administrative law judge further found that a review of the record did not show evidence of cor pulmonale with right-sided congestive heart failure, and that total disability could not, therefore, be demonstrated by this method. 20 C.F.R. §718.204(b)(2)(iii).

Turning to the medical opinion evidence, the record contains the opinions of eleven physicians. After conducting pulmonary examinations and objective testing of the miner, Drs. Forehand and Hippensteel each opined that the miner was physically able, from a pulmonary standpoint, to do his usual coal mine work. Director's Exhibits 12, 34, 41; Employer's Exhibit 6. Similarly, Dr. Hippensteel testified during his deposition that the miner did not have a "respiratory or pulmonary impairment prior to the debilitating effects of [his] Lou Gehrig's disease" and that he maintained the respiratory capacity to return to his last coal mine job. Employer's Exhibit 6 at 18. In a report dated October 17, 1998, Dr. Morgan's review of the medical records revealed that the miner was totally and permanently disabled due to his Lou Gehrig's disease and prior myocardial infarction, but he did not have any significant respiratory impairment and would be capable of working in coal mine employment. Director's

[5] 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 and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Exhibit 42. After the miner's death, Dr. Segen performed the autopsy on May 9, 2000 and diagnosed mild coal workers' pneumoconiosis, but did not render an opinion regarding the presence of a respiratory or pulmonary disability. Director's Exhibit 56. In a letter dated September 10, 2000, Dr. Patel opined that the miner had coal workers' pneumoconiosis and "received treatment for the same." Director's Exhibit 54. After reviewing medical records including the autopsy report, Drs. Morgan, Caffrey, Tomashefski, Bush, Naeye, and Perper opined that coal workers' pneumoconiosis lesions found in the miner's lungs were too small and few in number to cause any measurable abnormalities in lung function or to result in any respiratory disability. Director's Exhibits 58, 59, 62; Employer's Exhibits 1-5.

The administrative law judge, within a proper exercise of her discretion, found that the pathologists and consulting physicians unanimously agreed that, while the miner suffered from pneumoconiosis, based on autopsy findings, it was too mild to have caused any respiratory impairment or disability while the miner was alive and that the miner's amyotrophic lateral sclerosis, otherwise known as Lou Gehrig's disease, was responsible for the respiratory symptoms the miner exhibited. 20 C.F.R. §718.204(b)(2)(iv); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5-6 (4th Cir. 1994); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); Decision and Order on Modification at 12. The administrative law judge further found that the non-qualifying pulmonary function and blood gas studies of record supported the medical opinion evidence. This was rational. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee*, *supra*; Decision and Order on Modification at 12. Hence, we affirm the administrative law judge's finding that claimant has not established the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv). Because claimant has failed to satisfy her burden of establishing that the miner had a total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), a requisite element of entitlement pursuant to Part 718, we affirm the Decision and Order of the administrative law judge denying benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the Decision and Order Denying Benefits on Modification of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge