

BRB No. 97-1112 BLA

KAY BOWLING)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Kay Bowling, Avawam, Kentucky, *pro se*.

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ proceeding without the benefit of counsel, appeals the Decision

¹Susie Davis, a benefits counselor with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the

and Order - Denying Benefits (96-BLA-1365) of Administrative Law Judge Richard E. Huddleston, 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). Claimant filed a request for modification of his denied claim for benefits on August 16, 1993. See Director's Exhibit 73.² In his decision, the administrative law judge, after finding a change in conditions established, weighed the entire record on the

administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

²The relevant procedural history of this case is as follows: Claimant filed his initial claim for Black Lung benefits with the Department of Labor on June 25, 1987. Director's Exhibit 1. That claim was finally denied by a Decision and Order of the Benefits Review Board on October 15, 1992. *Bowling v. Blue Diamond Coal Co.*, BRB No. 91-1564 BLA (Oct.15, 1992)(unpub.); Director's Exhibit 72. Claimant filed the instant request for modification on August 16, 1993. Director's Exhibit 73. Claimant's request was denied by the district director on April 13, 1994. Director's Exhibit 86. On April 19, 1994, claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 87. Administrative Law Judge Richard E. Huddleston conducted a hearing on the claim in Pikeville, Kentucky, on January 30, 1996. Decision and Order at 3; Hearing Transcript at 1. Judge Huddleston issued his decision on April 9, 1997.

merits. The administrative law judge found the existence of coal mine-related pneumoconiosis established under 20 C.F.R. §§718.202, 718.203. However, the administrative law judge also found that the evidence of record failed to establish the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c), and accordingly denied benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's *pro se* appeal, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed.³

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, 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. Failure to prove 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*).

Upon consideration of the administrative law judge's Decision and Order and the record before us, we conclude that substantial evidence supports the administrative law judge's denial of benefits. Initially, as the Director notes, the administrative law judge's finding that claimant established a change in conditions under 20 C.F.R. §725.310 in this case, is in error, as he only weighed the evidence supportive of claimant's position, rather than all of the newly submitted evidence. See *Kovac v. BCNR Mining Corporation*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR1-71 (1992); Decision and Order at 11. The administrative law judge's error, however, is harmless, as his weighing of the entire record on the merits, and his

³The administrative law judge's findings under 20 C.F.R. §§718.202, 718.203 are unchallenged on appeal, and not adverse to claimant, and are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

affirmable finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c), discussed *infra*, precludes entitlement under Part 718. See *Trent, supra*; *Perry, supra*; see also *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Turning to the merits of the case, we hold that the administrative law judge properly found the evidence of record insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(1) and (c)(2), as all of the objective studies of record produced non-qualifying values.⁴ See Decision and Order at 5-7, 15. Additionally, we hold that the administrative law judge properly found that total disability could not be established under Section 718.204(c)(3), as the record was devoid of evidence of cor pulmonale. *Id.* at 15.

Finally, we hold that the administrative law judge properly found the medical opinion evidence insufficient to establish total disability under Section 718.204(c)(4). Initially, the administrative law judge appropriately placed determinative weight on the opinions of Drs. Broudy, Myers, Williams, Jackson, Wright and Wicker, each of whom found no respiratory impairment, because their opinions were consistent with the objective evidence, *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and well-reasoned. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 16; Director's Exhibits 16, 22, 23, 46, 89. Moreover, the administrative law judge properly discredited the opinions of Drs. Hieronymous and Sundaram, both of whom found claimant totally disabled. The administrative law judge noted that Dr. Hieronymous's opinion was "so faint as to be unreadable." Decision and Order at 15. Additionally, the administrative law judge found this 1987 opinion to be dated, *Witt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990), noted that it contained no corresponding objective medical evidence, see *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985), and found that it was "inconsistent with the vast weight of the objective evidence." *Wetzel, supra*; Decision and Order at 15. Furthermore, the administrative law judge discredited Dr. Sundaram's opinion because it, too, was "inconsistent with the vast weight of the objective medical

⁴A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "nonqualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

evidence.” See *Wetzel, supra*. In considering the other medical opinions in the record, the administrative law judge properly found that the opinions of Drs. Adams, Arnett, and Chaney, which advised claimant against further coal dust exposure, were insufficient to establish total disability under Section 718.204(c). See *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Lastly, as the Director contends, the administrative law judge failed to properly characterize Dr. Baker’s opinion. Although Dr. Baker advised claimant against further dust exposure, the basis for which the administrative law judge found the opinion unresponsive of claimant’s burden of proof under Section 718.204(c)(4), we note that Dr. Baker also found that claimant would have difficulty performing sustained manual labor on an eight (8) hour basis. See Director’s Exhibit 80. As the Director argues, however, the administrative law judge’s improper characterization of Dr. Baker’s opinion in this case is harmless error, inasmuch as the administrative law judge has properly accorded determinative weight to the reports of physicians who issued contrary opinions because they were supported by the objective evidence of record. See *Discussion, supra*. As Dr. Baker’s opinion is not supported by the weight of the objective evidence of record, proper classification of the doctor’s opinion would, therefore, not alter the outcome of the case. See *Larioni, supra*. Consequently, the administrative law judge’s finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c) is affirmed. Inasmuch as the establishment of total respiratory disability is a requisite element of entitlement under Part 718, we hold that the administrative law judge properly denied benefits in this case. See *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge