

BRB No. 98-1112 BLA

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

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Robert Alsup, Pennington Gap, Virginia, *pro se*.

Edward Waldman (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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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 (97-BLA-17) 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718,¹ and found that the Director, Office of Workers' Compensation Programs (the

¹ Claimant filed his initial claim for benefits on May 29, 1974, which was denied by the district director on October 31, 1980. Director's Exhibits 27. Claimant filed the instant claimant on May 10, 1992, which was denied by the district director. Director's Exhibits 1, 17, 24. After the hearing, Administrative Law Judge

Director), had conceded the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. The administrative law judge therefore found a material change in conditions had been established at Section 725.309 pursuant to the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1985), and that the only issue left for resolution was whether claimant had established a totally disabling respiratory impairment at Section 718.204(c). In evaluating the evidence relevant to total disability, the administrative law judge found that it was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. The Director responds, urging affirmance of the denial of benefits.

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. *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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly set forth the standard enunciated in *Rutter, supra*, for deciding whether claimant demonstrated a material

DeGregorio denied benefits on May 20, 1994. Director's Exhibits 30, 31. On appeal, the Director filed a Motion for Remand and the Board remanded the case on August 30, 1995. Director's Exhibits 35, 39, 40, 43, 47.

change in conditions at Section 725.309. In *Rutter*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In the instant case, the Director conceded the existence of pneumoconiosis arising out of coal mine employment, and the administrative law judge determined that this concession was supported by Dr. Paranthaman's opinions and based on the rebuttable presumption set forth in section 718.203(b), thus establishing a material change in conditions pursuant to Section 725.309.

After consideration of the administrative law judge's Decision and Order, 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. The administrative law judge permissibly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as four out of the five of the pulmonary function studies² and all of the blood gas studies of record produced nonqualifying values³ and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. See 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 8, 23, 27; Claimant's Exhibit 1; Decision and Order at 7; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge properly considered the entirety of the medical opinion evidence of record and permissibly found that total disability was not established as none of the physicians of record found that claimant had a totally disabling respiratory or pulmonary impairment. *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Beatty v. Danri Corp.*, 16 BLR 1-111 (1991); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1984); *Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984). Director's Exhibits 9, 29; Claimant's Exhibit 1; Decision and Order at 10. The administrative law judge is empowered to weigh the medical evidence and to draw his own

² The administrative law judge noted that the January 22, 1996 post-bronchodilator results yielded qualifying values. Decision and Order at 7.

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

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 if the administrative law judge's findings are supported by substantial evidence. See *Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Consequently, we affirm the administrative law judge's finding that claimant has failed to carry his burden of establishing a totally disabling respiratory impairment pursuant to Section 718.204 (c) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order 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