BRB No. 98-1126 BLA

CLARENCE J. RAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG OAK COAL CORPORATION	)	DATE ISSUED: 7/9/99
	)	
and	)	
	)	
VIRGINIA COAL PRODUCERS GROUP	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Clarence Ray, Raven, Virginia, *pro se*.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (97-BLA-1507) of Administrative Law Judge Alexander Karst 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). The instant case involves a duplicate claim filed on January 3, 1995.[1] The administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C.

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on October 9, 1979. Director's Exhibit 34. The district director denied the claim on December 23, 1980 and May 5, 1981. *Id.* There is no indication that claimant took any further action in regard to his 1979 claim.

Claimant filed a second claim on October 31, 1986. Director's Exhibit 34. By Decision and Order dated November 21, 1990, Administrative Law Judge Charles W. Campbell found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Id.* Judge Campbell, therefore, considered claimant's 1986 claim on the merits. *Id.* Judge Campbell found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id.* Judge Campbell further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Id.* Judge Campbell, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, Judge Campbell denied benefits. *Id.* By Decision and Order dated March 11, 1993, the Board affirmed Judge Campbell's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). *Ray v. Big Oak Coal Corp.*, BRB No. 91-0540 BLA (Mar. 11, 1993) (unpublished). The Board, therefore, affirmed Judge Campbell's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to his 1986 claim.

Claimant filed a third claim on January 3, 1995. Director's Exhibit 1.

§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 United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's prior 1986 claim was denied because claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 34. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of total disability pursuant to 20 C.F.R. §718.204(c).

In his consideration of the newly submitted pulmonary function studies, the administrative law judge questioned the validity of claimant's January 23, 1995 pulmonary function study[2] inasmuch as it was invalidated by Drs. Michos, Branscomb and Fino.[3] *See generally Revnack v. Director, OWCP*, 7 BLR 1-771

---

[2]The pre-bronchodilator portion of claimant's January 23, 1995 pulmonary function study produced qualifying values while the post-bronchodilator portion of the study produced non-qualifying values. Director's Exhibit 9.

A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" study yields values which exceed the requisite table values.

[3]Dr. Michos invalidated claimant's January 23, 1995 pulmonary function study because of less than optimal effort, cooperation and comprehension. Director's Exhibit 10. Dr. Michos noted that there was erratic performance of the flow volume loops suggestive of suboptimal effort/comprehension. *Id.* Dr. Branscomb opined that claimant's January 23, 1995 pulmonary function study was clearly invalid based upon the tracing itself. Employer's Exhibit 8. Dr. Fino opined that claimant's January 23, 1995 pulmonary function study was invalid because of a premature termination to exhalation and a lack of reproducibility in the expiratory tracings. *Id.* Dr. Fino also noted that there was a lack of an abrupt onset to exhalation. *Id.*

We further note that Dr. Castle opined that there appeared to be less than maximal effort on claimant's January 23, 1995 pulmonary function study. Director's

(1985); Decision and Order at 6; Director's Exhibits 9, 10; Employer's Exhibit 8. The administrative law judge properly noted that the only other newly submitted pulmonary function studies, studies conducted on February 25, 1995 and March 21, 1995, are non-qualifying. Director's Exhibits 8, 28. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1).

The administrative law judge properly noted that both of the newly submitted arterial blood gas studies are non-qualifying. Decision and Order at 5; Director's Exhibits 12, 28. The administrative law judge also found that there was no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 5. Consequently, the administrative law judge's findings that the newly submitted medical evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3) are affirmed.

Exhibit 28. However, Dr. Castle stated that it was not possible to accurately determine the extent of claimant's effort because of the electronic nature of the graph. *Id.*

In his consideration of the newly submitted medical opinion evidence, the administrative law judge noted that although Dr. Forehand initially opined that claimant was totally disabled, he subsequently changed his opinion.[4] Decision and Order at 8; Director's Exhibits 11, 17. The administrative law judge further noted that Drs. Castle,[5] Branscomb[6] and Fino[7] opined that claimant did not suffer from a totally

[4]Dr. Forehand examined claimant on January 23, 1995. In a report dated January 23, 1995, Dr. Forehand opined that claimant was totally and permanently disabled and would be unable to return to his last coal mining job. Director's Exhibit 11. However, after reviewing claimant's examination and a repeat pulmonary function study, Dr. Forehand amended his earlier report, opining that there was no evidence of active pulmonary disease and that claimant should be able to return to his last coal mining job. Director's Exhibit 17.

[5]Dr. Castle examined claimant on March 21, 1995. Dr. Castle also reviewed the medical evidence of record. In a report dated January 3, 1996, Dr. Castle opined that claimant had no respiratory impairment whatsoever. Director's Exhibit 28. Dr. Castle opined that claimant retained the respiratory capacity to perform his usual coal mine employment. *Id.*

disabling pulmonary impairment. Decision and Order at 8; Director's Exhibit 28; Employer's Exhibit 8. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). *See generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Inasmuch as the administrative law judge properly found the newly submitted medical evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Rutter*, *supra*.

---

[6]Dr. Branscomb reviewed the evidence of record. In a report dated October 27, 1997, Dr. Branscomb opined that from a pulmonary standpoint, claimant was capable of continuing his previous coal mining work. Employer's Exhibit 8.

[7]Dr. Fino reviewed the evidence of record. In a report dated October 31, 1997, Dr. Fino opined that there was no respiratory impairment present. Employer's Exhibit 8. Dr. Fino opined that from a respiratory standpoint, claimant was neither partially nor totally disabled from returning to his last coal mining job. *Id.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge