

BRB No. 04-0320 BLA

BERNARD G. YATES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY)	DATE ISSUED: 11/23/2004
)	
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 of Administrative Law Judge Pamela Lakes Wood, United States Department of Labor.

Bernard G. Yates, North Tazwell, Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia for employer.

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

PER CURIAM:

Claimant appeals, without representation, the Decision and Order Denying Benefits (02-BLA-5199) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) 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 three prior claims, which were denied because he failed to establish total respiratory or pulmonary disability.¹ The instant subsequent claim was

¹ Claimant filed his first claim for benefits on May 21, 1980, which was denied by Administrative Law Judge Frederick D. Neusner on May 4, 1987. Director's Exhibit 1. Judge Neusner determined that while claimant established the existence of

filed on January 22, 2001. Director's Exhibit 5. The administrative law judge considered the claim on the record without a formal hearing, noting the parties' prior stipulation that claimant has pneumoconiosis arising from thirty-two years of coal mine employment. The administrative law judge determined that the new evidence failed to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative thus determined that claimant failed to meet his burden to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d) since the prior denial. Accordingly, the administrative law judge denied benefits. Employer responds to claimant's appeal, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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 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. §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 this case, claimant's prior claim was denied because he failed to establish that he was totally disabled due to a pulmonary or respiratory impairment. *See* 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987);

pneumoconiosis, he failed to establish that he had a totally disabling respiratory or pulmonary impairment. *Id.* The Board subsequently affirmed the denial of benefits, *Yates v. U.S. Steel Corporation*, BRB No. 87-1452 BLA (May 31, 1989) (unpub.) *Id.* Claimant next filed a claim on June 4, 1990. In a Decision and Order dated May 12, 1992, Administrative Law Judge George A. Fath denied benefits, finding that claimant failed to establish total disability and, therefore, that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 2. Judge Fath's decision was also affirmed by the Board, *Yates v. U.S. Steel Corporation*, BRB No. 92-1882 BLA (Sept 2, 1992) (unpub.). *Id.* Claimant filed his third claim for benefits on February 22, 1994, which was denied by Administrative Law Judge Jeffrey Tureck on July 16, 1996 based on claimant's failure to establish total disability and a material change in conditions pursuant to 20 C.F.R. §725.309(d) 2000). Director's Exhibit 3. Judge Tureck's decision was affirmed by the Board, *see Yates v. U.S. Steel Corporation*, BRB No. 97-0246 BLA (Oct. 16, 1997) (unpub.), and claimant's subsequent request for reconsideration was denied by the Board. *Id.* Claimant took no further action with respect to this claim. He filed the instant claim on January 22, 2001. Director's Exhibit 5.

Perry v. Director, OWCP, 9 BLR 1-1 (1986); Director’s Exhibit 1. The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial.² 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit has held that, in a case involving the prior regulations, in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. 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). If claimant proves one of the elements, he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must consider whether all of the evidence of record, including the evidence submitted with claimant’s prior claim, supports a finding of entitlement to benefits. *Id.* In this case, the administrative law judge properly considered, in accordance with 20 C.F.R. §725.309(d) and the Fourth Circuit’s holding in *Rutter*, whether the new evidence established that claimant is totally disabled. Decision and Order at 3-4.

After consideration of the administrative law judge’s Decision and Order, the issues on appeal, and the record evidence, we affirm the administrative law judge’s determination that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b). In this case, the administrative law judge correctly determined that the one, new pulmonary function study was non-qualifying³ and, therefore, that this study failed to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i). Director’s Exhibit 13; Decision and Order at 5. Likewise, he correctly determined that the one, new arterial blood gas study was non-qualifying and, therefore, that claimant cannot establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii). Director’s Exhibit 13; Decision and Order at 6. Further, the administrative law judge correctly found that since there was no evidence of record that claimant suffered from cor pulmonale, claimant cannot establish a totally disabling pulmonary or respiratory impairment at 20 C.F.R.

² Because claimant’s last coal mine employment occurred in the Commonwealth of Virginia, this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 9.

³ A “qualifying” pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of C.F.R. Part 718. See 20 C.F.R. §718.204(b)(2)(i) and (ii). A “non-qualifying test” produces results that exceed the table values.

§718.204(b)(2)(iii). Decision and Order at 6. Lastly, with respect to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge properly determined that claimant failed to establish total disability based on the medical opinion evidence since Dr. Forehand, who rendered the only new medical report, opined that claimant had “no respiratory impairment.” Director’s Exhibit 13; Decision and Order at 6. Thus, because substantial evidence supports the administrative law judge’s finding that the new evidence failed to establish that claimant is totally disabled from a pulmonary or respiratory impairment, we affirm the administrative law judge’s findings pursuant to 20 C.F.R. §718.204(b).

In light of our affirmance of the administrative law judge’s finding that the new evidence was insufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge’s determination, pursuant to 20 C.F.R. §725.309 and *Rutter*, that claimant failed to meet his burden to establish a change in conditions in the element of entitlement which was the basis of the prior denial. We therefore affirm the administrative law judge’s denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge