BRB No. 98-0296 BLA

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

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

William V. Kiser, Dayton, Ohio, *pro se*.

Sarah M. Hurley (Judith E. Kramer, 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, the United States Department of Labor.

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

PER CURIAM:

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

[1] Claimant is William V. Kiser, the miner. Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(96-BLA-1374) of Administrative Law Judge Richard E. Huddleston 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). Claimant's first application for benefits filed on May 20, 1980 was finally denied by the Department of Labor on October 10, 1980. Director's Exhibit 18. On November 6, 1995, claimant filed the present application, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d).

Prior to the scheduled hearing, claimant's representative informed the administrative law judge in writing that claimant wished to have his case decided on the record. Administrative Law Judge's Exhibit 2; *see* 20 C.F.R. §725.461(a). Accordingly, Administrative Law Judge Robert L. Hillyard cancelled the hearing and ordered a decision on the record provided that the Director, Office of Workers' Compensation Programs (the Director), did not object. Administrative Law Judge's Exhibit 3. Subsequently, the Director indicated that he had no objection to a decision on the record. Administrative Law Judge's Exhibit 4.

Considering the claim on the record only, Administrative Law Judge Richard E. Huddleston credited claimant with two years of coal mine employment, found that the new evidence established one of the elements of entitlement previously decided against claimant by proving that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), and therefore found that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d). *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). The administrative law judge then considered whether all of the evidence established entitlement to benefits. *Rutter, supra*.

The administrative law judge found that the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), but concluded that the record failed to demonstrate the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director responds, urging affirmance.[2]

[2] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(c), and 725.309(d) as they are unchallenged on appeal and are not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984);

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 Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

The administrative law judge found two years of coal mine employment established. Claimant alleged eight years of coal mine employment on his application for benefits, but, as the administrative law judge noted, also indicated that he could not recall the specific dates of his employment. Director's Exhibits 1, 2. Under these circumstances, the administrative law judge reasonably found that a report by the personnel records clerk at Clinchfield Coal Company documenting approximately two years of coal mine employment was "the most credible evidence contained in the record."[3] Decision and Order at 2. Substantial evidence supports the administrative law judge's finding. Director's Exhibits 3, 18. Therefore, we affirm the administrative law judge's finding of two years of coal mine employment.

Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

[3] This report indicated that claimant worked as a loader from June 21 until November 20, 1946, and from December 3, 1947 until June 1, 1949. Director's Exhibit 3. These dates match those filled in by claimant on a form dated July 23, 1980 and submitted with his first claim. Director's Exhibit 18 at 16. The record contains no Social Security earnings records or statements by co-workers.

Pursuant to Section 718.204(c)(1)-(3), the administrative law judge correctly noted that all of the pulmonary function studies and blood gas studies were non-qualifying[4] and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibits 3, 6, 8, 18. We therefore affirm the administrative law judge's finding that total respiratory disability was not established pursuant to Section 718.204(c)(1)-(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the opinions of Drs. Clark and Burton, both of whom examined and tested claimant. Director's Exhibits 7, 18. Dr. Clark diagnosed "[b]lack lung disease" but did not address total disability. Director's Exhibit 18 at 11. Dr. Burton diagnosed pneumoconiosis based upon an x-ray, interpreted claimant's pulmonary function and blood gas studies as "normal," and concluded that there was "minimal impairment, if any." Director's Exhibit 7 at 4. In this context, the administrative law judge acted within his discretion as fact-finder in concluding that these two opinions were "insufficient to support a finding of total disability pursuant to §718.204(c)(4)." Decision and Order at 7; *see Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984). We therefore affirm the administrative law judge's finding that the medical opinions failed to establish total respiratory disability pursuant to Section 718.204(c)(4). *See Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Because claimant has failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge