BRB No. 00-0158 BLA

RALPH ERVIN SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITE RIDGE COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier	)	
	)	
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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Ralph Ervin Smith, Beckley, West Virginia, *pro se.*

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (99-BLA-0641) of Administrative Law Judge Daniel F. Sutton 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 administrative law judge credited claimant with 28.75 years of qualifying coal mine employment, and determined that the claim, filed on April 16, 1998, was subject to the duplicate claim provisions at 20 C.F.R. §725.309, as it was filed more than one year after the final denial of claimant's prior claim,

filed on February 27, 1986.[1] The administrative law judge found that the new evidence submitted in support of this duplicate claim was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), an element of entitlement which claimant failed to establish in the previous claim, thus claimant established a material change in conditions pursuant to Section 725.309. The administrative law judge then weighed all of the evidence of record and found it sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer and carrier have not responded to this appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

[1]The administrative law judge accurately determined that claimant's original claim for benefits was filed with the Social Security Administration on June 29, 1973, and was finally denied by the Department of Labor on March 4, 1980. Decision and Order at 2; Director's Exhibit 25. Claimant filed a second claim for benefits on February 27, 1986, which was denied by the district director on the grounds that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis. *Id.* Following claimant's request for a formal hearing, and his failure to appear at a hearing scheduled for May 7, 1992, Administrative Law Judge Martin J. Dolan, Jr. issued an Order on June 25, 1992, dismissing the claim as abandoned. *Id.*

[2]The administrative law judge's findings pursuant to Sections 718.202(a)(1), (4), 718.203(b), and 725.309, and his findings regarding the length of claimant's coal mine employment, which are not adverse to claimant, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, 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 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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding the evidence of record insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4), the administrative law judge initially determined that the record contained no evidence of complicated pneumoconiosis, thus the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 was not applicable. Decision and Order at 12. The administrative law judge accurately determined that only one out of four pulmonary function studies of record produced qualifying[3] values at Section 718.204(c)(1); that the four blood gas studies of record produced non-qualifying values at Section 718.204(c)(2); that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(c)(3); and that the five medical opinions of record pursuant to Section 718.204(c)(4) either affirmatively concluded that claimant had no more than a minimal respiratory or pulmonary impairment, or, in the case of Dr. Walker's evaluation,[4] failed to

[3]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(c)(1), (2).

[4]The administrative law judge accurately determined that Dr. Walker diagnosed a moderate obstructive pulmonary disease but did not address the severity of claimant's respiratory or pulmonary impairment or state whether it would prevent claimant from performing his usual coal mine employment. Decision and Order at 14; Director's Exhibit 13. The administrative law judge permissibly accorded greater weight to Dr. Rasmussen's

identify any exertional limitations which would prevent claimant from performing his usual coal mine employment or comparable work. Decision and Order at 13-14; *see generally Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986). The administrative law judge reasonably determined that a minimal respiratory or pulmonary impairment would not prevent claimant from performing the exertional requirements of his usual coal mine employment as a heavy equipment operator because the record showed that such work did not require heavy physical labor. Decision and Order at 14-15; Employer's Exhibit 5. The administrative law judge then acted within his discretion as trier-of-fact in finding that the single qualifying pulmonary function study of record[5] was of dubious probative value in view of the more recent non-qualifying study obtained by Dr. Zaldivar in January 1999, *see generally Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984), and that it was outweighed by the contrary probative evidence, particularly the opinion of Dr. Rasmussen, which the administrative law judge found was entitled to determinative weight because the physician had the benefit of reviewing the body of medical evidence developed over a twenty-year period, including the most recent objective test results. Decision and Order at 14-15; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). The administrative law judge's findings pursuant to Section 718.204(c)(1)-(4) are supported by substantial evidence and thus are affirmed. Inasmuch as claimant has failed to establish total respiratory disability, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Trent, supra*.

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conclusion that claimant had only a mild impairment in pulmonary function, Claimant's Exhibit 4, as Dr. Rasmussen reviewed the entire record spanning approximately 20 years, whereas Dr. Walker merely considered his own test results in reaching his conclusions. Decision and Order at 15; *see generally Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

[5]Inasmuch as Appendix B does not provide values for miners of claimant's age (75 at the time Dr. Walker conducted his study on August 7, 1998, Director's Exhibit 12), the administrative law judge apparently determined that Dr. Walker's pulmonary function study produced qualifying values based on the table values shown for a miner of claimant's height at the age of 71. 20 C.F.R. §718.204(c)(1), Appendix B; Decision and Order at 13-14.

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

REGINA C. McGRANERY
Administrative Appeals Judge