BRB No. 00-0180 BLA

RONALD J. BREGAR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SUPERIOR COAL COMPANY	)	DATE ISSUED: _____)
and	)	
	)	
ITT HARTFORD	)	
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Ronald J. Bregar, Bussey, Iowa, *pro se*.

David L. Murphy (Clark, Ward & Cave), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (98-BLA-614) of Administrative Law Judge Edward Terhune Miller denying benefits in a duplicate 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). In this duplicate claim, the administrative law judge found that claimant's prior claim had been finally denied on March 16, 1989.[1] After crediting claimant with twenty-three years of coal mine employment, the

[1] Claimant filed his first application for benefits on April 18, 1981 which the district

administrative law judge found the newly submitted evidence insufficient to establish a material change in conditions at 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge pursuant to Section 725.309. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers

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director denied on July 15, 1981 on the grounds that claimant failed to establish that his pneumoconiosis arose out of coal mine employment and that he suffered from a totally disabling respiratory impairment due to pneumoconiosis. *See* Director's Exhibit 26. Claimant took no further action.

On August 21, 1987, claimant filed his second application for benefits which the district director denied on November 12, 1987, and after consideration of additional evidence on February 25, 1988 on the grounds that claimant did not establish that his pneumoconiosis arose out of his coal mine employment and that he suffered from a totally disabling respiratory impairment due to pneumoconiosis. *See* Director's Exhibit 27. Following a review of additional evidence, the district director again denied this claim in a Proposed Decision and Order of No Material Change in Conditions and Denial of Claim dated March 16, 1989 on the grounds that claimant failed to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis and thus, there was no material change in conditions established. *Id*.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 one of these elements precludes entitlement.[2] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 Decision and Order of the administrative law judge is supported by substantial evidence. Initially, the administrative law judge permissibly credited claimant with twenty-three years of coal mine employment based on claimant's Social Security earnings record, employment verification evidence, and hearing testimony. *See Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). We, therefore, affirm the findings of the administrative law judge on the length of coal mine employment.

As this case arises within the appellate jurisdiction of the United States Court of Appeals for the Eighth Circuit, the administrative law judge properly applied the standard enunciated in *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997) in deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Harvey*, 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 administrative law judge correctly concluded that claimant established the existence of pneumoconiosis arising out of coal mine employment in his prior claim, but not the presence

[2] Since the claimant's last coal mine employment took place in Iowa, the Board will apply the law of the United States Court of Appeals for the Eighth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). *See* Decision and Order at 5-6; *Harvey*, *supra*. The administrative law judge also properly reviewed only the evidence submitted following the denial of claimant's prior claim. *Harvey*, *supra*.

In reviewing the newly submitted evidence, the administrative law judge permissibly concluded that the pulmonary function studies performed on September 20, 1995, November 20, 1995, June 24, 1996, and September 10, 1997, and the blood gas studies performed on June 24, 1996 and September 10, 1997 were non-qualifying under the regulatory criteria, and thus, insufficient to demonstrate the presence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(c)(1)-(2), Appendices B and C; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); Decision and Order at 6. Likewise, the administrative law judge correctly concluded that the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure, a diagnosis necessary to establish total disability at Section 718.204(c)(3). *See* 20 C.F.R. §718.204(c)(3). Thus, the administrative law judge rationally found this evidence insufficient to meet claimant's burden of proving the presence of a totally disabling respiratory impairment. We, therefore, affirm the determination of the administrative law judge at Section 718.204(c)(1)-(c)(3) as it is supported by substantial evidence and is in accordance with law.

At Section 718.204(c)(4), the administrative law judge properly found that claimant did not meet his burden of proving the presence of a totally disabling respiratory impairment. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-139 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). In so doing, the administrative law judge properly found that medical opinions of Drs. Repsher and Broudy were insufficient to meet claimant's burden of proof because each physician opined that claimant did not have a respiratory impairment which would prevent him from performing his usual coal mine employment.[3] *Id.* Furthermore, the administrative law judge permissibly declined to accord determinative weight to Dr. Hillyer's pulmonary diagnosis because the physician did not explain how his diagnosis of a moderate to severe pulmonary impairment disabled claimant from his usual coal mine employment in light of his nonqualifying objective tests which were supported by the other nonqualifying objective tests of record.[4] *See Carson v. Westmoreland Coal Co.*, 18

[3] Dr. Repsher did opine that claimant was totally disabled from his usual coal mine employment due to peripheral vascular disease. *See* Director's Exhibit 22.

[4] When a medical opinion diagnoses a pulmonary or respiratory disability or otherwise assesses the severity of a pulmonary or respiratory impairment, the administrative law judge, not the physician as stated by the administrative law judge, is required to consider the exertional requirements of claimant's usual coal mine employment and compare these

BLR 1-16 (1994). Thus, the administrative law judge permissibly found that the weight of the medical opinion was insufficient to meet claimant's burden of proof at Section 718.204(c)(4). *Danri, supra*; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, affirm the findings of the administrative law judge that the newly submitted evidence was insufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(4), and thus, the evidence was insufficient to establish a material change in conditions at Section 725.309 as supported by substantial evidence.[5] We, therefore, affirm the denial of benefits.

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findings to the physicians' disability diagnosis. *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

[5] As claimant notes in his appeal, he received a copy of a letter dated November 23, 1974 to the Administrator of Mining Enforcement and Safety Administration advising that claimant had simple coal workers pneumoconiosis. Since claimant has already established the existence of pneumoconiosis, the letter is not relevant to this claim as it does not address the presence of a totally disabling respiratory impairment, the element of entitlement which claimant must establish in this claim. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); Director's Exhibits 26, 27.

Claimant also submitted copies of a letter from ITT Hartford(Hartford) dated July 3, 1996 and a letter from his attorney dated April 20, 1988. *See* Director's Exhibits 15, 26; unmarked exhibit. In its letter, Hartford neither admits liability nor assures payment of medical bills. Thus, this letter is not relevant to claimant's burden of proof. *Trent, supra*. The 1988 letter relates to claimant's prior claim which the administrative law judge properly did not consider as claimant failed to establish a material change in conditions in the present claim. *See* 20 C.F.R. 725.309; *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997). We note that since a hearing was held in this case, claimant's due process rights to a hearing have been satisfied.

In addition to the above matters, claimant submitted a copy of a letter dated October 22, 1996 from the district director indicating that an informal conference would be held. Claimant wrote that he and his wife appeared for this conference, but that no informal conference was held as employer and Hartford did not appear. The district director may, but is not required to, schedule such conferences if the district director believes that the conference will resolve some or all of the issues in the claim. *See* 20 C.F.R. §725.416. Because employer and Hartford failed to appear for the conference, claimant's rights were not prejudiced by the district director's decision not to schedule another hearing as it appears such an effort would have been futile. Again, as a hearing was held in this claim, claimant's due process rights were not violated.

Accordingly, the Decision and Order of the administrative law judge 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

Finally, claimant submitted a copy of a letter from the Social Security Administration advising that he would receive disability benefits. As this letter is not part of the record, this Board cannot consider this evidence on appeal. If claimant wishes to have this letter considered, he may file a request for modification with the district director. We note that this letter does not address the reasons for which claimant was awarded disability benefits.