

BRB No. 00-0191 BLA

VIVIAN S. SLUSS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BEATRICE POCAHONTAS COMPANY)	DATE ISSUED:
)	
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 Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Vivian S. Sluss, Clintwood, Virginia, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant¹, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (98-BLA-0883) of Administrative Law Judge Lawrence P. Donnelly on 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 relevant procedural history of this claim is as follows: claimant filed his first claim for benefits with the Department of Labor (DOL) on November 16, 1989. Following a hearing, Administrative Law Judge Edward Terhune Miller issued a Decision and Order dated November 24, 1992 denying benefits pursuant to Section 718.204(c). Director's Exhibit 46. Claimant appealed, and the

¹ Claimant is Vivian S. Sluss, the miner, who filed two applications for benefits with the Department of Labor (DOL).

Board affirmed the administrative law judge's denial of benefits pursuant to Section 718.204(c). *Sluss v. Beatrice Pocahontas Co.*, BRB No. 93-0764 BLA (March 30, 1994) (unpub.). Director's Exhibit 46. On March 30, 1995, claimant filed a motion for modification with the Office of Administrative Law Judges. Administrative Law Judge Miller found that the evidence established the existence of pneumoconiosis but failed to demonstrate that claimant was totally disabled, and therefore, denied the motion in a Decision and Order dated November 21, 1995. *Id.* Claimant took no further action on this claim and the denial became final. Claimant then filed the instant duplicate claim for benefits on March 24, 1997. Director's Exhibit 1. Following a hearing, Administrative Law Judge Lawrence P. Donnelly issued a Decision and Order dated September 23, 1999, denying benefits. The administrative law judge found that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), and thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(c). Accordingly, the administrative law judge denied the claim. Claimant then filed the instant appeal with the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *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). Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c) is supported by substantial evidence, and accordingly, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in the instant appeal.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §718.3, 718.202, 718.203, 718.204; *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 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. With respect to the administrative law judge's finding at Section 718.204(c), the administrative law judge

correctly found that two of the five pulmonary function studies of record produced qualifying values. Director's Exhibits 10, 31, 35. The administrative law judge rationally found that the validity of the two qualifying studies was "highly questionable", based upon the handwritten notes on the November 11, 1997 study and the invalidation reports of the November 24, 1997 study by two reviewing physicians. Decision and Order at 4, 8; Director's Exhibit 32; Employer's Exhibit 8. The administrative law judge then acted within his discretion to find that claimant failed to establish total disability pursuant to Section 718.204(c)(1), since the majority of the 1997 pulmonary function studies are non-qualifying. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

The administrative law judge also correctly found that since two newly submitted blood gas studies of record did not produce qualifying values, they are insufficient to establish total disability pursuant to Section 718.204(c)(2). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987); *Tucker v Director v. OWCP*, 10 BLR 1-35 (1987); Director's Exhibits 15, 35.

The administrative law judge further correctly found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(c)(3). Decision and Order at 7; *see Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987).

The administrative law judge also found that the medical opinions of record were insufficient to establish total disability at Section 718.204(c)(4). The administrative law judge found that the record contained the opinions of six doctors. The administrative law judge concluded that only the opinion of Dr. Smiddy, Claimant's Exhibit 1, if credited, would establish total disability, while the opinions of Drs. Paranthaman, Director's Exhibit 14, Castle, Director's Exhibit 35, Employer's Exhibits 2, 10, Dahhan, Employer's Exhibit 5, Fino, Employer's Exhibit 8, and Morgan, Employer's Exhibit 9, opined that claimant was not totally disabled. Decision and Order at 7. The administrative law judge then rationally gave greater weight to the opinions of Drs. Paranthaman, Castle, Dahhan, Fino and Morgan on the basis of their superior pulmonary credentials, *see Worhach v. Director, OWCP*, 17 BLR 1-105(1993); *Clark, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988), and because their opinions were more consistent with the credible objective data of record, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). The administrative law judge's findings that the evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4), are supported by substantial evidence, and thus, are affirmed. Inasmuch as claimant has failed to establish that he is totally disabled, the administrative law judge properly concluded that the evidence is insufficient to establish a material change in conditions pursuant to Section 725.309(c). *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). As this finding precludes entitlement pursuant to the Part 718 regulations, we affirm the administrative law judge's denial of benefits. *See Trent, supra; Perry, supra.*

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