BRB No. 00-0195 BLA

BURLEY G. WAMPLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Burley G. Wampler, South Apopka, Florida, *pro se.*

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-0071) of Administrative Law Judge David W. Di Nardi 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 filed his initial application for benefits on March 26, 1973, which was finally denied by the Social Security Administration on August 12, 1975. Director's Exhibit 37. On November 5, 1975, claimant filed a claim with the Department of Labor which was denied by Administrative Law Judge Frank J. Marcellino in a Decision and Order issued on April 20, 1983. Judge Marcellino found that although claimant established the invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). Director's Exhibit 37. This denial of benefits was affirmed by the Board on appeal. *Wampler v. Director, OWCP*, BRB No. 83-1205 BLA (May 30,

1986)(unpub.). Claimant filed a duplicate claim for benefits on March 14, 1991, which was denied by Administrative Law Judge Frederick D. Neusner in a Decision and Order issued on June 23, 1993, due to claimant's failure to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204, or a material change in condition pursuant to 20 C.F.R. §725.309. Director's Exhibits 1, 49. On appeal, the Board affirmed the denial of benefits. *Wampler v. Slab Fork Coal Co.*, BRB No. 93-2006 BLA (June 23, 1994)(unpub.). Claimant filed a motion for reconsideration on July 5, 1994, which was denied by the Board on August 6, 1997. Director's Exhibits 56, 57. Claimant then filed an appeal with the United States Court of Appeals for the Fourth Circuit.[1] While the appeal was pending however, the West Virginia Coal Workers' Pneumoconiosis Fund filed a motion to remand the case to the district director to consider evidence newly submitted by claimant. The motion to remand was granted by the Fourth Circuit, and the Board remanded the case to the district director. Director's Exhibits 60, 61. On remand, the district director considered the claim as a request for modification, and benefits were denied on December 2, 1998. Director's Exhibit 63. Claimant requested a formal hearing, and the case was assigned to Administrative Law Judge Di Nardi, who noted that the parties agreed, and the record supported a finding of twenty-eight years of coal mine employment and the presence of pneumoconiosis arising out of coal mine employment. However, the administrative law judge denied benefits finding that the evidence was insufficient to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), or a mistake of fact or change in condition pursuant to 20 C.F.R. §725.310.

In the instant appeal, claimant generally contends that he is entitled to benefits. Employer and the Director, Office of Workers' Compensation Programs, have not participated in this appeal.

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 Corp.*, 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

[1]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 37.

evidence, 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 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*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

In considering claimant's request for modification in his duplicate claim, the administrative law judge must apply the holding in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997), for establishing entitlement in a duplicate claim pursuant to Section 725.309, in conjunction with the modification provisions contained at Section 725.310. Accordingly, the administrative law judge must consider the evidence submitted in support of the request for modification along with the evidence submitted in support of the duplicate claim, to determine whether claimant established a required element of proof which could establish a material change in condition. *See Hess v. Director, OWCP*, 21 BLR 1-142 (1998).

We hold that the administrative law judge's determination that the existence of a totally disabling respiratory impairment was not established pursuant to Section 718.204(c)(1)-(2), is supported by substantial evidence. The administrative law judge found that claimant failed to establish this element since he did not submit any objective studies in support of his modification request. The administrative law judge did not specifically consider the objective tests submitted in support of the duplicate claim in conjunction with the regulations. This error is harmless however, since all of the pulmonary function studies and arterial blood gas studies submitted in support of the duplicate claim produced non-qualifying results, and therefore support the administrative law judge's finding on this issue.[2] *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Director's Exhibits 24, 27, 37. We therefore, affirm the administrative law judge's finding that the objective evidence of record failed to satisfy claimant's affirmative burden of proof on this issue. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267 (1994).[3]

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[2]A "qualifying" pulmonary function or blood gas study yields values equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(c)(2).

[3]Although the Decision and Order does not include a specific finding pursuant to 20 C.F.R. §718.204(c)(3), total disability may not be established by this section since the record contains no evidence of cor pulmonale with right-sided congestive heart

We further hold however, that the administrative law judge's findings pursuant to Section 718.204(c)(4) are not supported by substantial evidence since the administrative law judge did not consider and discuss all the relevant medical reports of record. Although the administrative law judge noted claimant's submission of the reports of Drs. Akerman, Benner and Kim, all of whom diagnosed pneumoconiosis, and opined that claimant was totally disabled, the administrative law judge provided no findings regarding the weight to be accorded these opinions. Accordingly, we hold that remand of this case is required for reconsideration of this evidence. Director's Exhibit 62. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 ((1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge also erred in his consideration of Dr. Fino's report by according little weight to the opinions on the ground that they were internally inconsistent on the diagnoses of pneumoconiosis although Dr. Fino's opinion were consistent regarding the absence of a totally disabling impairment. Director's Exhibit 45; Employer's Exhibit 1. However, the administrative law judge rationally gave little weight to Dr. Norris's report since he did not directly address the degree of claimant's disability. *Ondecko, supra*. Nevertheless since we cannot affirm the administrative law judge's finding that claimant failed to establish a material change in condition, it is necessary to remand this case to the administrative law judge to reconsider his findings pursuant to Sections 725.309 and 725.310. *Ondecko, supra; Rutter, supra.*

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

failure. *See Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge