BRB No. 98-0111 BLA

DIANE FULLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Diane Fuller, Honaker, 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:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denying Benefits (97-BLA-0624) of Administrative Law Judge Michael P. Lesniak on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

[1] 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).

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge determined that the instant case was a request for modification of the district director's May 4, 1995 denial of benefits, pursuant to 20 C.F.R. §725.310.[2] Initially, the administrative law judge credited claimant with at least one and thirty-six hundredths (1.36) years of coal mine employment pursuant to a stipulation of the parties and adjudicated the case pursuant to 20 C.F.R. Part 718, based on claimant's original July 26, 1994 filing date. The administrative law judge found the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Therefore, the administrative law judge found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. He further found that the record does not support a finding that the previous decision contains a mistake in a determination of fact pursuant to Section 725.310. Accordingly, the administrative law judge denied claimant's request for modification.

Claimant, without the assistance of counsel, generally contends that the administrative law judge erred in denying benefits. In response, employer urges affirmance of the administrative law judge's denial of claimant's request for modification as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[3]

[2] The administrative law judge properly considered this case on the documentary record based on claimant's written waiver of her right to a formal hearing, by letter dated July 15, 1997. Decision and Order at 2; 20 C.F.R. §725.461(a); *Churpak v. Director, OWCP*, 9 BLR 1-71 (1986).

[3] The parties do not challenge the administrative law judge's decision to credit claimant with 1.36 years of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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. *Id.*

The administrative law judge considered all of the evidence of record, old and new, relevant to the issue of total disability. Decision and Order at 4. Pursuant to Section 718.204(c)(1), the administrative law judge properly found that the pulmonary function study evidence was insufficient to demonstrate total disability inasmuch as none of the pulmonary function studies of record produced qualifying values.[4] Decision and Order at 4; Director's Exhibits 9, 23; Employer's Exhibit 1; 20 C.F.R. §718.204(c)(1). Likewise, the administrative law judge properly found that all of the blood gas studies produced non-qualifying results and, thus, were insufficient to demonstrate total disability. Decision and Order at 4; Director's Exhibit 11; Employer's Exhibit 1; 20 C.F.R. §718.204(c)(2). In addition, the record contains no evidence of cor pulmonale with right sided congestive heart failure and, therefore, the administrative law judge properly found that total disability was not demonstrated pursuant to Section 718.204(c)(3). Decision and Order at 4; 20 C.F.R. §718.204(c)(3); *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

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

Furthermore, the administrative law judge properly found that total disability was not demonstrated at Section 718.204(c)(4), as none of the medical opinions of record were insufficient to demonstrate total respiratory or pulmonary disability.[5] Decision and Order

[5] A review of the record indicates that Dr. Iosif opined that there was no impairment from a cardiopulmonary disease, *see* Director's Exhibit 9; Employer's Exhibit 3, and Dr. Hippensteel opined that, from a respiratory or pulmonary standpoint, claimant has normal lung function and that she was capable of performing her usual coal mine employment, *see* Employer's Exhibit 1. Both physicians, however, state that claimant was disabled from returning to her previous coal mine employment as a result of her severe disc disease, a non pulmonary condition that is not relevant to establishing a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(4). Employer's Exhibits 1, 3; *see Beatty v. Danri Corp. & Triangle Enterprises*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995).

In addition, the record contains the medical reports of Dr. Partington, dated March 31, 1995 and May 11, 1995, which pertain to claimant's neurological condition, specifically, claimant's pre- and post-operative examinations concerning her diskectomy and fusion of the C5-6 cervical vertebrae. However, Dr. Partington does not comment on claimant's respiratory condition. Director's Exhibit 33.

at 4; Director's Exhibits 10, 33; Employer's Exhibits 1, 3; 20 C.F.R. §718.204(c)(4); *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c), an essential element of entitlement pursuant to 20 C.F.R. Part 718, and further affirm the denial of benefits.[6] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry*, *supra*.

[6] In light of the fact that the evidence in this record precludes a finding of total disability, we need not review the appropriateness of the administrative law judge's consideration of the issue of modification at 20 C.F.R. §725.310.

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