BRB No. 99-1264 BLA

SIDNEY STILTNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHADY LANE COAL 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Sidney Stiltner, Grundy, Virginia, *pro se*.

Steven H. Theisen (Midkiff & Hiner, P.C.), Richmond, Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (99-BLA-0542) of Administrative Law Judge Thomas F. Phalen, Jr., 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 October 31, 1984. Director's Exhibit 39. This claim was denied on November

[1] Claimant is the miner Sidney Stiltner. Ron Carson, 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. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

13, 1989, due to claimant's failure to establish any element necessary to establish entitlement.[2] Director's Exhibit 39. Claimant filed a second claim on November 12, 1993, which was denied by the district director on May 11, 1994, due to claimant's failure to establish total disability due to pneumoconiosis, although claimant was found to have established the presence of pneumoconiosis. Director's Exhibit 40. Claimant filed the present duplicate claim on August 23, 1997. Director's Exhibit 1. In a Decision and Order issued on August 27, 1999, the administrative law judge found that the evidence of record established twenty-one years of coal mine employment. The administrative law judge also found that the evidence of record was insufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), or a material change in condition pursuant to §725.309(d) as enunciated 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).[3]

In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has 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 evidence, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated

[2] The record does not contain the medical evidence submitted in conjunction with claimant's original claim, as the district director was unable to locate this evidence. Director's Exhibit 39.

[3] 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 Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 40.

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*.

Where a claimant filed a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against the claimant. *Rutter, supra*.

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of a totally disabling respiratory impairment was not established pursuant to Section 718.204(c). The administrative law judge properly found that claimant failed to demonstrate a totally disabling respiratory impairment under Section 718.204(c)(1), as all of the pulmonary function tests submitted in support of the duplicate claim produced non-qualifying results.[4] Director's Exhibits 12, 29; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992). Pursuant to Section 718.204(c)(2), the administrative law judge considered the qualifying arterial blood gas study dated October 7, 1997, and the non-qualifying studies performed on May 19, 1995, and March 25, 1998, and rationally credited the most recent non-qualifying study as most probative of claimant's current condition. Director's Exhibits 16, 29; Employer's Exhibits 1, 4. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). We also affirm the administrative law judge's findings at Section 718.204(c)(3), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. *See generally Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27

[4] 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).

(1991). The administrative law judge then considered the relevant medical reports of record pursuant to Section 718.204(c)(4), and rationally credited the reports of Drs. Castle and Fino, both of whom found no evidence of a totally disabling respiratory impairment, as well documented and reasoned, and based upon their qualifications as Board-certified pulmonologists. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Director's Exhibit 29; Employer's Exhibits 4, 7. Moreover, it was within the administrative law judge's discretion to find that Dr. Forehand's diagnosis of totally disabling pneumoconiosis was unreasoned as it was not supported by its underlying documentation, since this physician stated that claimant's physical exam and pulmonary function studies were normal, and he relied on the results of the qualifying arterial blood gas study whose results improved greatly in a later test.[5] Director's Exhibit 15; Employer's Exhibits 7, 9. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). As the administrative law judge's finding that claimant failed to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c) is supported by substantial evidence, it is affirmed. Inasmuch as claimant has failed to establish an element of entitlement previously decided against him, we also affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309, and thus, is ineligible for benefits. *Ondecko, supra*; *Rutter, supra*.

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

[5] The record indicates that Dr. Forehand is board-certified in the areas of pediatrics, allergy and immunology.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge