

BRB No. 98-1595 BLA

HOWARD S. BRAGG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Paul R. Hutchinson, Jr., Beckley, West Virginia, for claimant.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1286) of Administrative Law Judge Jeffrey Tureck 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). On October 29, 1996, claimant filed the current application for benefits, which is a duplicate claim because it was filed more than one year after the denial of his previous claim.<sup>1</sup> Director's Exhibits 1, 14; 20

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<sup>1</sup> Claimant's first three claims were merged and finally denied by the Department of Labor on December 12, 1979. Director's Exhibit 16. Claimant's next claim, filed

C.F.R. §725.309(d). The district director denied benefits and claimant requested a hearing, which was held on November 19, 1997. The administrative law judge issued his Decision and Order on August 6, 1998.

The administrative law judge denied benefits because he found that a material change in conditions was not established as required by Section 725.309(d). The administrative law judge observed that claimant was previously denied benefits because he failed to establish that he is totally disabled by a respiratory or

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on June 8, 1981, was denied by an administrative law judge on November 16, 1987. Director's Exhibit 15. That administrative law judge accepted the concession by the Director, Office of Workers' Compensation Programs (the Director), that claimant suffers from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but found that the medical evidence failed to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 15. The Board affirmed the denial. *Bragg v. Director, OWCP*, BRB No. 87-3652 BLA (May 22, 1990)(unpub.); Director's Exhibit 15. Claimant's next claim, filed on May 28, 1991, was denied on December 9, 1992 by an administrative law judge who found that the medical evidence developed since the previous denial failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 14. Within one year of the administrative law judge's denial, claimant filed another claim which was treated as a request for modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 14. The district director denied claimant's modification request on October 17, 1995, and claimant took no further action until October 29, 1996, when he filed the present claim. Director's Exhibit 1.

pulmonary impairment pursuant to Section 718.204(c). After weighing the evidence submitted with the current claim, the administrative law judge found that the medical evidence developed since the previous denial failed to establish that claimant is totally disabled pursuant to Section 718.204(c). He therefore concluded that a material change in conditions was not established and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the evidence pursuant to Section 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act 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 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant files 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, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *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). If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter, supra*.

Because total respiratory disability was previously decided against claimant, the threshold issue before the administrative law judge was whether the new medical evidence established this element. The administrative law judge concluded that the two new pulmonary function studies, three new blood gas studies, and the new reports submitted by three physicians did not establish the disability element.

Claimant contends that the administrative law judge erred in weighing the new

pulmonary function studies at Section 718.204(c)(1) when he found the November 5, 1997 study to be non-qualifying. Claimant's Brief at 5. Review of the record indicates that the November 5, 1997 pulmonary function study yielded qualifying values.<sup>2</sup> Claimant's Exhibit 1. Nevertheless, the administrative law judge's conclusion that the study was non-qualifying is a harmless error, see *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984), because he permissibly credited the uncontradicted opinion of Dr. Gaziano, a Board-certified Internist and Pulmonologist, that the November 5, 1997 study was invalid due to inadequate effort.<sup>3</sup> Director's Exhibit 18; see *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171, 21 BLR 2-34, 2-43 (4th Cir. 1997). The administrative law judge rationally found Dr. Gaziano's opinion to be "borne out by the exceedingly low FEV1 result" obtained on November 5, 1997 compared to the much higher value obtained ten months earlier on the January 10, 1997 non-qualifying study. Decision and Order at 3; Director's Exhibit 8; see *Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-80 (1984)(administrative law judge may question disparately low objective study values). Because the administrative law judge permissibly found the November 5, 1997 pulmonary function study invalid, see *Lane, supra*, and the January 10, 1997 study was non-qualifying, substantial evidence supports his finding that the new pulmonary function studies did not establish total disability. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).

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<sup>2</sup> A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2). The November 5, 1997 study meets the specified values for FEV1 and the FEV1/FVC ratio. Claimant's Exhibit 1; 20 C.F.R. §718.204(c)(1)(iii).

<sup>3</sup> The physician who administered the study did not record the degree of claimant's effort, cooperation, or understanding. Claimant's Exhibit 1.

Throughout the remainder of his brief, claimant asserts that he has established total disability pursuant to Section 718.204(c) and a material change in conditions pursuant to Section 725.309(d). Claimant's Brief at 1-8. General assertions of entitlement are insufficient to invoke the Board's review. See 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Therefore, as claimant raises no other specific legal or factual challenge to the administrative law judge's weighing of the medical evidence, we affirm the administrative law judge's findings pursuant to Sections 718.204(c)(2)-(4) and 725.309(d).<sup>4</sup> See *Rutter, supra*.

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<sup>4</sup> These findings are supported by substantial evidence. The new blood gas studies were non-qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibit 8; Claimant's Exhibits 2, 3; 20 C.F.R. §718.204(c)(2), (3). At Section 718.204(c)(4), the administrative law judge permissibly deferred to Dr. Gaziano's opinion that claimant has no measureable pulmonary impairment based upon Dr. Gaziano's superior credentials, the reasonedness of his report, and the consistency of his opinion with the objective test data. Decision and Order at 3; Director's Exhibits 8, 18; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 536, 21 BLR 2-323, 2-335, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989).

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge