

BRB No. 90-1510 BLA

NEWMAN DIAL, JR. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 UNITED STATES STEEL )  
 CORPORATION )  
 ) 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 A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Newman Dial, Jr., Birmingham, Alabama, pro se.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.\*

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (88-BLA-1738) of Administrative Law Judge A. A. Simpson, 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). The administrative law judge reviewed the merits of this duplicate claim filed on June 19, 1987, pursuant to 20 C.F.R. Part 718 and determined that the newly submitted medical evidence does not

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

establish a material change in conditions.<sup>1</sup> 20 C.F.R. §725.309(d). Accordingly, the benefits were denied. Neither employer nor the Director, Office of Workers' Compensation Programs has responded to this appeal.

In an appeal filed by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the decision 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). 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. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement, a claimant must establish that the miner has or had pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling or caused the miner's death. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; Trent v. Director, OWCP, 11 BLR 1-26 (1987). Failure to prove any of these requisite elements compels a denial of benefits. See Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989).

As noted by the administrative law judge, claimant's earlier claim filed on June 4, 1979, was denied by Administrative Law Judge Kenneth Jennings on January 10, 1985, because claimant did not establish the existence of pneumoconiosis, or that he is totally disabled by pneumoconiosis pursuant to 20 C.F.R. Parts 727 and 410. See Decision and Order at 2; Decision and Order - Rejection of Claim at 5, 6. Claimant then filed another claim for benefits on February 11, 1985 which was considered a request for modification of the January 10, 1985 denial. The February 11, 1985 claim was denied when claimant failed to submit evidence in support of the request as instructed by the Office of Workers' Compensation Programs. See Letter dated May 7, 1987; Director's Exhibit 22. The claim which is the subject of this appeal was filed on June 19, 1987 and denied by the deputy commissioner on September 9, 1987, on the basis that this claim was a duplicate claim and the evidence failed to establish a material change in conditions. Director's Exhibit 12. The administrative law judge also determined this claim constitutes a duplicate claim of the June 4, 1979 claim pursuant to 20 C.F.R. §725.309(d) and that the evidence is insufficient to establish a material change in conditions.

When considering a duplicate claim, the administrative law judge must deny the duplicate claim on the basis of the denial of the first claim, unless claimant demonstrates a material change in conditions. See Lukman v. Director, OWCP, 11 BLR 1-71 (1988). The Board has defined a material change in conditions as evidence which is relevant and probative, demonstrating that there is a reasonable possibility that it would, if fully credited, change the prior administrative result. See Rice v. Sahara Coal Co., Inc., BLR , BRB No. 88-1347 BLA (Aug. 31, 1990)(en banc); Spese v. Peabody Coal Co., 11 BLR 1-174 (1988).

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<sup>1</sup>The administrative law judge did not specifically cite the regulations applied in his analysis, however, the appropriate sections pursuant to 20 C.F.R. Part 718 may be inferred from the administrative law judge's findings and the date of filing. 20 C.F.R. §725.309(d).

In this case, the administrative law judge properly determined that there was no material change in conditions on the grounds that claimant failed to establish the presence of a totally disabling respiratory or pulmonary impairment.<sup>2</sup> The administrative law judge then reviewed the newly submitted evidence and determined that claimant failed to establish that he is totally disabled from a respiratory impairment. The evidence submitted relevant to claimant's total disability consisted of one pulmonary function study, one arterial blood gas study, and one medical report. The administrative law judge found that the pulmonary function study, dated July 30, 1987, failed to produce results which establish total disability.<sup>3</sup> See Director's Exhibit 6; 20 C.F.R. §718.204(c)(1). The administrative law judge also noted that Dr. Risman, the doctor who administered the test, found the validity of the test results to be questionable due to claimant's fair to poor cooperation and understanding. See Decision and Order at 3; 20 C.F.R. §718.103. Thus, the administrative law judge properly determined that the pulmonary function study of record failed to establish that claimant is total disabled. See Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986); Winchester v. Director, OWCP, 9 BLR 1-177 (1986); Estes v. Director, OWCP, 7 BLR 1-414 (1984).

The administrative law judge then considered the arterial blood gas study, dated July 30, 1987, and found it insufficient to establish total disability. The administrative law judge found that the blood gas study produced results that exceed those provided in the regulations. See Decision and Order at 3; Director's Exhibit 8; 20 C.F.R. §718.204 (c)(2). Thus, the administrative law judge properly determined that the blood gas study of record failed to establish that claimant is totally disabled. See Shedlock, supra; Horn v. Jewell Ridge Coal Corp., 6 BLR 1-933 (1984).

The final piece of evidence considered by the administrative law judge was the report of Dr. Risman, dated July 31, 1987. The administrative law judge found that Dr. Risman was unable to conclude that there is evidence of broncho pulmonary disease in claimant that might be attributable to exposure to industrial coal dust. The report indicated further that claimant's impairment is attributable to the complications of his cerebral thrombosis and left hemiparesis. See Decision and Order at 3; Director's Exhibit 7. Thus, the administrative law judge properly determined that the medical report of record failed to establish that claimant is totally disabled. See 20 C.F.R. §718.204(b), (c); Shedlock, supra; York v. Jewell Ridge Coal Corp., 7 BLR 1-766 (1985). Thus, the new evidence, even if fully credited, will not change the prior administrative result on the issue of total disability. Rice, supra; Spese, supra.

Inasmuch as the administrative law judge properly analyzed the evidence relevant to total disability pursuant to 20 C.F.R. §718.204(c)(1)-(c)(4), and his finding is supported by substantial evidence, the Board hereby

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<sup>2</sup>Claimant's initial claim for benefits was denied by Administrative Law Judge Jennings, who found that claimant failed to establish that he suffered from pneumoconiosis or that he was totally disabled by a pulmonary condition. In the instant case, employer has stipulated that claimant has pneumoconiosis arising out of coal mine employment, but contends that claimant is not totally disabled. Administrative Law Judge Simpson found that the newly submitted evidence contained two x-ray readings which support the conclusion that claimant is now suffering from pneumoconiosis. See Decision and Order - Rejection of Claim at 3.

<sup>3</sup>A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, i.e. Appendices B and C of Part 718. See 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" test yields values which exceed the requisite table values.

affirms the decision of the administrative law judge that claimant has failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), and thus is not entitled to an award of benefits under the Act. See Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989).

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

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

RENO E. BONFANTI  
Administrative Law Judge