BRB No. 97-0586 BLA

JAMES R. KAISER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING 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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James R. Kaiser, Uniontown, Pennsylvania, *pro se*.

D. Scott Newman (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals, without the aid of counsel, the Decision and Order (96-BLA-0182) of Administrative Law Judge Daniel L. Leland 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 initially noted that the parties stipulated that claimant had thirty years of coal mine employment and noted that, inasmuch as the instant claim was a duplicate claim,[1]

[1] Claimant originally filed a claim on June 3, 1980, which was denied on October 10, 1980, Director's Exhibit 26. Claimant took no further action on this claim. Claimant

claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), in accordance with the standard enunciated by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge noted that claimant's prior claim was denied inasmuch as claimant failed to establish total disability due to pneumoconiosis and considered the evidence submitted subsequent to the denial of claimant's prior claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that the newly submitted pulmonary function study, blood gas study and medical opinion evidence was insufficient to establish total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204(b), (c), and found, therefore, that a material change in conditions was not established pursuant to Section 725.309(d). In addition, the administrative law judge noted that even if he considered all of the evidence of record, there was no evidence of pulmonary disability, *see* 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant's appeal, herein, followed. Employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to this appeal.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp*., 12 BLR 1-176 (1985). 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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filed a second, duplicate claim on February 16, 1984, which was denied on May 18, 1984, inasmuch as claimant failed to establish total disability due to pneumoconiosis, Director's Exhibit 27. Claimant took no further action on this claim. Finally, claimant filed the instant, duplicate claim on May 23, 1994, Director's Exhibit 1.

[2]The instant claim cannot be considered a request for modification under 20 C.F.R. §725.310, inasmuch as it was filed more than a year after the denial of claimant's prior claim, *see* 20 C.F.R. §725.310; Director's Exhibits 1, 27.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge denying benefits is supported by substantial evidence. In order to establish a material change in conditions under Section 725.309(d), in this case arising within the jurisdiction of the United States Court of Appeals for the Third Circuit, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, *see Swarrow, supra*. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change, *id*. Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits, *id*. In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from 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).[3] Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Moreover, pursuant to Section 718.204(b), in this case arising within the jurisdiction of the Third Circuit court, claimant must prove that pneumoconiosis was a substantial contributor to his disability, *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

[3]The presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to this claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1.

Initially, the administrative law judge properly found that all of the newly submitted pulmonary function study and blood gas study evidence of record, Director's Exhibits 6, 8, 18, 20; Employer's Exhibit 4, was non-qualifying, *see* 20 C.F.R. 718.204(c)(1)-(2),[4] and there was no evidence of cor pulmonale with right-sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3). Decision and Order at 10. Next, the administrative law judge considered the newly submitted medical opinion evidence. Drs. Morgan, Director's Exhibit 20, Shively, Employer's Exhibit 4, and Fino, Employer's Exhibit 5, all found that claimant did not have coal workers' pneumoconiosis and was not totally disabled from a pulmonary or respiratory standpoint. In addition, although Dr. Cho diagnosed mild interstitial lung disease due to coal dust and smoking, *see* 20 C.F.R. §718.201, he found that claimant suffered only from a "mild" disability, Director's Exhibit 7. Finally, Dr. Heymach found claimant had coal workers' pneumoconiosis and was totally disabled from a pulmonary standpoint, Director's Exhibit 18; Claimant's Exhibit 1.

The administrative law judge found that, inasmuch as only Dr. Heymach found claimant to be totally disabled due to coal workers' pneumoconiosis, the weight of the newly submitted evidence failed to establish total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204(b), (c), or, therefore, a material change in conditions pursuant to Section 725.309(d). Inasmuch as the administrative law judge's finding that the weight and/or preponderance of the medical opinion evidence, *see Snorton v. Zeigler Coal Co.,* 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-128 (1984), failed to establish total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204(b), and, therefore, a material change in conditions pursuant to Section 725.309(d) is supported by substantial evidence, the administrative law judge's findings are affirmed.

Consequently, inasmuch as claimant failed to establish total disability due to pneumoconiosis, a requisite element of entitlement, entitlement under Part 718 is precluded, *see Trent, supra; Perry, supra*.

[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), (2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge