

BRB No. 98-0714 BLA

DENVER MADDEN	)		
	)		
Claimant-Petitioner	)		
	)		
v.	)		
	)	DATE	ISSUED:
GOPHER MINING COMPANY	)		
	)		
and	)		
	)		
WEST VIRGINIA COAL WORKERS'	)		
PNEUMOCONIOSIS FUND	)		
	)		
Employer/Carrier-	)		
Respondents	)		
	)		
DIRECTOR, OFFICE OF WORKERS'	)		
COMPENSATION PROGRAMS, UNITED	)		
STATES DEPARTMENT OF LABOR	)		
	)		
Party-in-Interest	)	DECISION and ORDER	

Appeal of the Decision and Order-Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ira D. Newman, Richmond, Kentucky, for claimant.

Stephen E. Crist (State of West Virginia, Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (94-BLA-0420) of

Administrative Law Judge Daniel J. Roketenetz on a duplicate claim<sup>1</sup> 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). After accepting the parties' stipulation to twelve years of coal mine employment, the administrative law judge found that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), and, therefore, determined that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's finding under 20 C.F.R. §718.204(c), arguing that the administrative law judge's failure to consider and weigh claimant's testimony at the hearing constitutes reversible error. In response, carrier argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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).

The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, has held that in order to establish a material change in conditions pursuant to Section 725.309(d), claimant must establish by a preponderance of the newly submitted evidence at least one of the elements of entitlement that formed the basis for the denial of the prior claim. See *Lisa Lee*

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<sup>1</sup>Claimant initially filed for benefits on May 23, 1986. Director's Exhibit 22. This claim was denied by Administrative Law Judge Richard Mills because claimant failed to establish total disability. *Id.* The Board affirmed Judge Mills' Decision and Order denying benefits. *Madden v. Gopher Mining Co.*, BRB No. 89-1101 BLA (Dec. 14, 1990)(unpub.). The instant claim, filed on January 26, 1993, is claimant's second application for benefits. Director's Exhibit 1.

*Mines v. Director, OWCP [Ruttter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir.1996)(*en banc*), *cert. denied*, 117 S. Ct. 763 (1997). Accordingly, in this case, in order to establish a material change in conditions under Section 725.309(d), claimant must establish, by a preponderance of the newly submitted evidence, the existence of a pulmonary or respiratory impairment under Section 718.204(c)(1)-(4). *Id.*

In challenging the administrative law judge's findings at Section 718.204(c), claimant cites his testimony at the hearing that he had "extreme difficulty performing even the simplest tasks and would become short of breath and extremely tired." Claimant's Brief at 2. Claimant argues that the administrative law judge's failure to consider and weigh claimant's testimony constitutes reversible error. We disagree. Claimant does not challenge the administrative law judge's analysis of the newly submitted medical evidence relevant to 20 C.F.R. §718.204(c)(1)-(4) or his conclusions that there is no evidence of total disability under any of the relevant subsections. As such, we affirm the administrative law judge's findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6-8. With respect to the lay testimony offered by claimant at the hearing, the Board has held that in a living miner's case, lay testimony is generally insufficient to establish total respiratory disability unless it is corroborated by at least a quantum of medical evidence. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Because we have affirmed the administrative law judge's finding that there is no medical evidence of total disability submitted in support of this duplicate claim, the testimony provided by claimant is insufficient to carry claimant's burden to establish a material change in conditions under Section 725.309(d). *Rutter, supra; Trent, supra.*

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

**Deskbook Section: Part IV.D.5 - Lay Testimony.**

The Board held that in a living miner's case, lay testimony is generally insufficient to establish total respiratory disability unless it is corroborated by at least a quantum of medical evidence. ***Madden v. Gopher Mining Co.***, BLR , BRB No. 98-0714 BLA (Feb. 19, 1999).