BRB No. 97-0767 BLA

JOHN ELLIS BOSTIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTH HOLLOW COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
VIRGINIA COAL PRODUCER GROUP SELF-INSURANCE 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 of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

John Ellis Bostic, Counsil, Virginia, *pro se*.

S. Parker Boggs (Buttermore, Turner & Boggs, P.S.C.), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order (96-BLA-833) 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). The administrative law judge credited claimant with at least thirty years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that the recent evidence submitted with the instant claim was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1)-(4). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On 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. *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, are supported by substantial evidence, and are in accordance with law. 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).

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[1] Tim White, 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. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed his first claim for black lung benefits on June 20, 1973, which was denied on October 29, 1983. Decision and Order at 2; Director's Exhibit 52. Claimant filed his second claim on June 30, 1987, which was denied on June 25, 1992. Decision and Order at 2; Director's Exhibit 53. Claimant filed the instant claim on April 10, 1995. Decision and Order at 2; Director's Exhibit 1.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The record contains no qualifying pulmonary function study evidence and thus establishing total disability pursuant to Section 718.204(c)(1) is precluded.[3] In considering whether total disability was established under Section 718.204(c)(2), the administrative law judge rationally found that inasmuch as the credible blood gas study evidence of record was non-qualifying, total disability was not established pursuant to Section 718.204(c)(2). *See* Decision and Order at 2-3; Employer's Exhibit 1. In addition, the record contains no evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3), and establishing total disability by this method is precluded.

In considering whether total disability was established by the medical opinions of record, *see* 20 C.F.R. §718.204(c)(4), the administrative law judge permissibly gave greater weight the opinions of Drs. Paranthaman and Hippensteel, that claimant has no significant pulmonary impairment and is capable of doing his usual coal mine employment from a respiratory standpoint, based on their superior qualifications and since he found their opinions consistent with the results of their examinations. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 3; Director's Exhibits 44, 50; Employer's Exhibit 2. Moreover, the administrative law judge permissibly gave diminished weight to the opinion of Dr. Forehand since he found that his diagnoses was not supported by the objective evidence of record and the underlying documentation did not support the physician's conclusions. *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985); Decision and Order at 2-3; Director's Exhibit 4. Consequently, the administrative law judge properly

[3] 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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

found that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c). Inasmuch as the administrative law judge properly considered the newly submitted medical evidence and rationally concluded that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and in accordance with law. *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).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge