BRB No. 97-0778 BLA

BILLY OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLUE CHIP COAL COMPANY/ BALD EAGLE COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Vernon M. Williams (Wolfe & Farmer), Norton, Virginia, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-00567) of Administrative Law Judge Robert D. Kaplan 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 found twenty-one years of coal mine employment, Director's Exhibit 50, and based on the date of filing, adjudicated the claim

pursuant to 20 C.F.R. Part 718.[1] The administrative law judge concluded that although the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine pursuant to 20 C.F.R. §§718.202(a), 718.203, a review of the prior decision indicated that there was no mistake in a determination of fact and the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and thus, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310.

[1] Claimant filed his initial claim for benefits on May 11, 1989, which was denied by the district director on November 1, 1989. Director's Exhibits 1, 18. Claimant appealed on December 1, 1989, but filed a motion to remand the case to the district director on March 9, 1990. Director's Exhibits 19, 23. The claim was denied on July 7, 1992, because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 50, 56. On appeal, the Benefits Review Board remanded the case for reconsideration on February 23, 1994. Director's Exhibit 55. On remand, the administrative law judge again denied benefits because claimant failed to establish total disability. Director's Exhibit 57. Subsequently, on February 22, 1995, claimant filed a motion to remand and a request for modification which was denied by the district director on September 6, 1995. Director's Exhibits 62, 63, 72. Claimant requested a hearing and the findings are the subject of the instant appeal.

Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding total disability was not established pursuant to Section 718.204(c).[2] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.[3]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 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 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).

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[2] We note that claimant, without informing his counsel, submitted additional evidence consisting of a report by Dr. Robinette dated August 14, 1997. The Board does not have the authority to consider evidence which was not submitted into the record before the adjudication officer below. *Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323 (1979). If claimant believes that this evidence will support his claim for benefits, then he may seek modification with the district director pursuant to 20 C.F.R. §725.310.

[3] The administrative law judge's length of coal mine employment determination, his findings pursuant to 20 C.F.R. §§718.202, 718.203 and 718.204(c)(2), (3), and his conclusion that there was no mistake in determination of fact in the prior Decision and Order are not challenged on appeal, and are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge properly found that total disability was not established pursuant to Section 718.204(c)(1) as all of the pulmonary function studies of record produced non-qualifying values.[4] Director's Exhibit 68; Employer's Exhibit 12; Decision and Order at 10; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Further, the administrative law judge considered the entirety of the medical opinion evidence of record and rationally found that total disability was not established pursuant to Section 718.204(c)(4). The administrative law judge permissibly accorded more weight to Dr. Sargent's opinion, that claimant had the respiratory capacity to perform his usual coal mine employment, than to Dr. Robinette's opinion, that claimant was totally disabled, as Dr. Sargent's opinion was better supported by the objective evidence and better reasoned and documented. Director's Exhibit 68; Employer's Exhibit 7, 8; Decision and Order at 13; *Dillon v. Peabody Coal Co.*, 11 BLR 1-26 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge is empowered to weigh the medical evidence and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability and modification as it is supported by substantial evidence and is in accordance with law. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to Part 718, entitlement thereunder is precluded. *Trent, supra; Perry, supra*.

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

SO ORDERED.

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[4] A "qualifying" pulmonary function 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, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge