

BRB No. 88-3661 BLA

C. LAVERNE RUTH))
))
 Claimant-Petitioner))
))
 v.))
))
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
COMPENSATION PROGRAMS, UNITED))
STATES DEPARTMENT OF LABOR))
))
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

C. Laverne Ruth, Eau Claire, Pennsylvania, pro se.

Patricia M. Nece (Marshall J. Breger, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without legal representation, the Decision and Order (86-BLA-395) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

Safety

*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).

Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). The administrative law judge determined that this claim, filed on April 2, 1984, was denied by the deputy commissioner on September 7, 1984, and that claimant submitted new evidence in support of his claim within the one-year period for modification pursuant to 20 C.F.R. §725.310. After reviewing the new evidence, the deputy commissioner again denied benefits, based on his finding that claimant had failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. After a formal hearing, the administrative law judge credited claimant with less than ten years of qualifying coal mine employment, and found that the Director, Office of Workers' Compensation Programs (the Director), had conceded the issue of the existence of pneumoconiosis, but that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and thus modification of the deputy commissioner's denial of benefits pursuant to Section 725.310 was determined not to be warranted. Claimant appeals, challenging the administrative law judge's denial of benefits. The Director responds, urging affirmance.

In an appeal by a claimant filed 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, supported by substantial evidence, and 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 pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Turning to the merits of this claim, the administrative law judge performed a de novo review of all of the evidence of record relevant to the issue of total disability, and determined that it was insufficient to sustain claimant's burden pursuant to Section 718.204(c). Specifically, the administrative law judge first found that the pulmonary function study evidence of record was non-qualifying and therefore insufficient to establish total disability pursuant to Section 718.204(c)(1).¹ The administrative law judge then determined that although a 1984 blood gas study

¹ 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 yields values that exceed those values.

produced qualifying values at rest, the values on exercise were non-qualifying, and the two remaining blood gas studies of record were non-qualifying. Moreover, the administrative law judge noted that Dr. Cander, a pulmonary specialist, reviewed the qualifying study and found that it was not technically acceptable. Decision and Order at 5, 6; Director's Exhibit 8; see generally Minton v. Director, OWCP, 6 BLR 1-307 (1983). Consequently, the administrative law judge reasonably found that the weight of the blood gas study evidence, including the most recent test, was insufficient to establish total disability pursuant to Section 718.204(c)(2). See Sexton v. Southern Ohio Coal Co., 7 BLR 1-411 (1984); Keen v. Jewell Ridge Coal Corp., 6 BLR 1-454 (1983). The administrative law judge further determined that the record contained no evidence of cor pulmonale with right-sided congestive heart failure, and therefore total disability pursuant to Section 718.204(c)(3) was not established.

Finally, in finding that the medical opinions of record were insufficient to establish total disability pursuant to Section 718.204(c)(4), the administrative law judge found that Dr. Fee examined claimant in 1980 and concluded that claimant was not able to work due to pneumoconiosis, and also that the physician had ordered a pulmonary function study and a blood gas study, but had not reported or analyzed the results of such tests. Consequently, the administrative law judge could not examine the validity of Dr. Fee's reasoning in light of the objective evidence upon which his conclusions were based, and thus he permissibly accorded Dr. Fee's opinion less weight. Decision and Order at 6, 7; Director's Exhibits 15, 16;

see generally Director, OWCP v. Rowe, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). Further, the administrative law judge acted within his discretion in according determinative weight to the opinion of Dr. Bella, who examined claimant in 1987 and found no respiratory disability, as it was based on the most recent examination and testing of claimant and the physician's conclusions were consistent with the weight of the objective evidence of record.² Decision and Order at 7; Director's Exhibit 23; see King v. Consolidation Coal Co., 8 BLR 1-262 (1985); Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); Lucostic, supra. The administrative law judge's findings pursuant to Section 718.204(c) are supported by substantial evidence and we hereby affirm them.

Inasmuch as claimant has failed to establish an essential element of entitlement, i.e., total disability, claimant is precluded from entitlement to benefits under Part 718, and thus we need not reach the issue of the length of claimant's coal mine employment. See Trent, supra. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to support modification pursuant to Section 725.310.

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

² The administrative law judge properly found that the remaining medical opinion of record was insufficient to establish total disability pursuant to Section 718.204(c)(4), as the physician did not diagnose any respiratory or pulmonary condition. Decision and Order at 7; Director's Exhibit 6.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge