BRB Nos. 96-1678 BLA
and 96-1678 BLA-A

CARL N. BALL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BEATRICE POCAHONTAS COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED:
Cross-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Carl N. Ball, Raven, Virginia, *pro se.*

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMTIH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel[2], and employer cross-

[1]Claimant is Carl N. Ball, the miner, whose initial claim for benefits, filed on May 7,

appeals, the Decision and Order (95-BLA-1443) of Administrative Law Judge Frederick D. Neusner 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). This case involves a duplicate claim.[3] The administrative law judge, in the instant case, found that the newly submitted evidence does not support a finding of the existence of pneumoconiosis, but due to employer's concession on the pneumoconiosis issue in the prior, that the existence of pneumoconiosis is law of the case. The administrative law judge then found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance of the administrative law judge's Decision and Order and contends, on cross-appeal, that the administrative law judge in holding that the prior finding of the existence of pneumoconiosis is law of

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1981, was denied on May 30, 1991. Director's Exhibit 22. Claimant filed the instant claim for benefits on June 3, 1994. Director's Exhibit 1.

[2]Tim White, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested an appeal on behalf of claimant but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3]In the Decision and Order in the prior claim, Administrative Law Judge Giles J. McCarthy noted that employer conceded the existence of pneumoconiosis at the hearing and, thus, found that claimant established the existence of pneumoconiosis, as well as that the pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge then found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On modification, Administrative law judge Charles P. Rippey again found that claimant failed to establish total respiratory disability. Director's Exhibit 22.

the case. Claimant has not responded to employer's cross-appeal. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 2-223 (4th Cir. 1995). In the instant claim, because it was previously determined that claimant established the existence of pneumoconiosis, the evidence developed subsequent to the prior denial must establish that claimant is totally disabled by his pneumoconiosis. Decision and Order at 4; *see Rutter, supra.*

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 findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. In the instant claim, the administrative law judge properly found that the record contains no qualifying pulmonary function study or arterial blood gas study evidence and no evidence of cor pulmonale with right sided congestive heart failure.[4] Decision and Order at 3-5; Director's Exhibits 10, 11; Employer's Exhibits 1, 7. Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R.

[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. A

§718.204(c)(1)-(3).

"non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Iosif, Fino, Renn, Castle and Sargent, and properly found that none of these physicians opined that claimant has total respiratory disability. Decision and Order at 3-5; Director's Exhibits 12; Employer's Exhibits 5-8; *Gee v. W. G. Moore & Sons, 9 BLR 1-4 (1986)*. However, the administrative law judge failed to consider the March 3, 1992 opinion of Dr. Kabaria. Director's Exhibit 20. In that opinion, Dr. Kabaria stated that claimant has coal workers' pneumoconiosis and that claimant's coal workers' pneumoconiosis "was diagnosed as been due to working in underground mine for 37 years, therefore, this makes [claimant] totally disabled to work in or around mines." Director's Exhibit 20. Dr. Kabaria also notes the results of the pulmonary function studies taken on January 16, 1990, November 30, 1990 and February 28, 1992. We hold that Dr. Kabaria's opinion is not a well reasoned or documented opinion given that it is based solely on the diagnosis of pneumoconiosis, claimant's coal mine employment and non-qualifying pulmonary function studies and thus the administrative law judge's failure to consider this opinion is harmless error. Director's Exhibit 20*; see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4), and, as a result, the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309 and the denial

of benefits.[5]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

[5]Because we affirm the denial of benefits, we need not address employer's contentions on cross-appeal.