BRB No. 02-0668 BLA

JEWELL ANDERSON (o/b/o EMANUEL ANDERSON)	)	
Claimant-Petitioner	)	
v.	)	
WESTMORELAND COAL COMPANY)		DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Jewell Anderson, Big Stone Gap, Virginia, *pro se*.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] the Decision and Order -

[1] The instant duplicate claim, filed by the miner on December 15, 1994, Director's Exhibit 1, is being pursued by the miner's widow, Jewell Anderson (hereinafter, claimant). The miner died on January 19, 1996. Director's Exhibit 27.

[2] By letter dated July 2, 2002, the Board acknowledged the June 21, 2002 letter from Ron Carson, Program Director, Stone Mountain Health Services, St. Charles, Virginia. The Board indicated that it would consider claimant to be representing herself in this appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995).

Rejection of Claim (99-BLA-0690) of Administrative Law Judge Edward Terhune Miller on a request for modification in a miner's duplicate 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).[3] By Decision and Order dated February 26, 1996, Administrative Law Judge Edward J. Murty, Jr. denied benefits in the instant claim filed in 1994, which is the third claim filed by the miner. Judge Murty found that the miner failed to establish any element of entitlement. Director's Exhibit 26. Considering the request for modification under 20 C.F.R. §725.310 (2000), Administrative Law Judge Edward Terhune Miller (the administrative law judge) found that the most recent evidence of record, consisting of the pathological autopsy evidence and the reasoned medical opinions based thereon, establish that the miner had simple coal workers' pneumoconiosis. The administrative law judge further found, based on his weighing of the evidence filed in connection with this claim, that a preponderance of the x-ray evidence was negative for pneumoconiosis under 20 C.F.R. §718.202(a)(1). The administrative law judge concluded that, nevertheless, the pathologic evidence and the reasoned medical opinions of physicians who considered the pathologic evidence establish, at 20 C.F.R. §718.202(a)(2) and 20 C.F.R. §718.202(a)(4), respectively, that the miner had "a minimal degree of simple coal workers' pneumoconiosis." Decision and Order at 15. The administrative law judge thus found a mistake in a determination of fact "based on a more complete medical evaluation of the Miner." Decision and Order at 15. The administrative law judge also found that the evidence establishes that the miner's pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203(b). The

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

administrative law judge determined, however, that the "overwhelming preponderance of the evidence" fails to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b). Decision and Order at 17. The administrative law judge further found that the evidence is insufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, benefits were denied.[4]

In response to claimant's appeal, employer urges the Board to affirm the administrative law judge's denial of benefits on the merits of the claim. Employer contends that the administrative law judge properly found that the evidence of record fails to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b). The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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, supported by substantial evidence, and in accordance with 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).

[4] The administrative law judge's "Order" reflects a denial of the request for modification. Decision and Order at 17. The administrative law judge, however, found a mistake in a determination of fact under 20 C.F.R. §725.310 (2000) based on his finding that the newly submitted evidence establishes that the miner had simple coal workers' pneumoconiosis. *See* Decision and Order at 15. The administrative law judge had found no mistake in a determination of fact upon his review of the evidence before Judge Murty. *See* Decision and Order at 13. We hold harmless any error by the administrative law judge in ordering a denial of the request for modification, in light of his denial of benefits on the merits of the claim. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We affirm the administrative law judge's denial of benefits on the merits of the claim since the administrative law judge's finding, that claimant failed to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b), is rational, supported by substantial evidence, and in accordance with law.[5] Specifically, under 20 C.F.R. §718.204(b)(2)(i), the administrative law judge correctly noted that the two pulmonary function studies dating from 1995 and submitted in connection with this claim resulted in non-qualifying values. *See* Director's Exhibit 5; Employer's Exhibit 3.[6]

[5] The administrative law judge, in considering the claim on its merits, did not weigh all the evidence of record. Rather, the administrative law judge weighed all the evidence submitted in connection with the instant claim filed in 1994 and determined what the miner's condition was at the time of his death on January 19, 1996. However, the Board, in *Anderson v. Westmoreland Coal Co.*, BRB No. 92-0829 BLA (June 25, 1993)(unpublished), affirmed Administrative Law Judge Edward J. Murty, Jr.'s December 17, 1991 denial of benefits, based on his review of all the rest of the evidence of record, namely evidence submitted in connection with the two prior claims. Accordingly, we hold harmless the administrative law judge's error as it cannot affect the outcome of the case. *Larioni*, *supra*.

[6] All the other pulmonary function studies of record produced non-qualifying values. *See* 20 C.F.R. §718.204(b)(2)(i).

Under 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge properly found that the two blood gas studies dating from 1995 and submitted in connection with this claim produced non-qualifying values. Director's Exhibit 5; Employer's Exhibit 3. The administrative law judge then correctly noted that the remaining five blood gas studies submitted in this claim were conducted throughout a seventeen-hour period during the miner's final hospitalization, which ended in his demise, during which the miner "experienced pulmonary emboli, cardiac arrest and extensive deep venous thrombosis." Decision and Order at 16; *see* Director's Exhibit 27.[7] The administrative law judge next set

[7] The miner died at 1:02pm on January 19, 1996 at Norton Community Hospital, Norton, Virginia, where he had been admitted on January 18, 1996. Director's Exhibit 27. Dr. Gary Williams, the miner's attending physician, in his report dated February 8, 1996, detailed the miner's treatment and demise. He diagnosed pulmonary emboli with recurrent pulmonary emboli and associated cardiac arrest with unsuccessful resuscitation - suspect massive saddle embolus; extensive deep venous thrombosis, right; large pleural effusion, left - malignant based on previous thoracentesis and cytology from the last admission; dementia - multi infarct and Alzheimer's; history of questionable congestive heart failure. Director's Exhibit 27. Dr. Williams signed the miner's death certificate wherein he listed the immediate cause of death as cardiac arrest due to massive pulmonary emboli due to deep vein thrombosis.

forth the revised regulation at 20 C.F.R. §718.105(d), which provides:

> If one or more blood-gas studies producing qualifying results...is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.

20 C.F.R. §718.105(d).

Weighing these five blood gas studies taken on January 18 and 19, 1996, the administrative law judge stated:

> Four of the five arterial blood gas studies produced qualifying values; however, because the studies are unaccompanied by any reports whatsoever,

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Other significant conditions contributing to death, but not resulting in the underlying cause are listed as chronic obstructive pulmonary disease, coal workers' pneumoconiosis by history, and acute exacerbation prostatitis. *Id.* Dr. Sanderson, the autopsy prosector, who found evidence of coal workers' pneumoconiosis, opined:

> The patient's immediate cause of death is mostly attributable to the large pulmonary embolus which caused respiratory failure and cardiovascular collapse. Other compromising factors were two vessel coronary artery atherosclerosis, emphysema, and the above mentioned pulmonary adenocarcinoma with metastases.

Director's Exhibit 27.

> this tribunal cannot rely on those studies as evidence that the Miner was totally disabled at the time of death. Moreover, Drs. Zaldivar, Castle and Kleinerman explained that the Miner's severely reduced arterial blood gases during his final hospital admission occurred in conjunction with, and were due to, his life-ending massive pulmonary embolus which clogged his pulmonary arteries and prevented oxygen transfer. (E-1 at 31-32, 13, 14, 17 at 18.) Therefore, the Claimant as not established that the Miner was totally disabled under [20 C.F.R.] §718.204(b)(2)(ii).

Decision and Order at 16. Insofar as the administrative law judge relied on the newly promulgated regulation at 20 C.F.R. §718.105(d) to determine the weight and credibility of the blood gas study evidence, he erred.[8] The newly promulgated regulation at 20 C.F.R. §718.105(d) is applicable to all evidence developed by any party after January 19, 2001. 20 C.F.R. §718.101(b). Because these five blood gas studies, dating from January 18 and 19, 1996, were not developed after January 19, 2001, the administrative law judge erred in applying the newly promulgated regulation at 20 C.F.R. §718.105(d). The administrative law judge, however, provided a valid, alternative basis for his decision not to rely on the four blood gas studies dating from January 18, 1996 which resulted in qualifying values. *See generally Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). Specifically, the administrative law judge additionally relied on the opinions of Drs. Zaldivar, Castle and Kleinerman that the severely reduced arterial blood gas studies performed during the miner's final hospitalization occurred in conjunction with, and were due to, his life-ending massive pulmonary embolus which clogged his pulmonary arteries and prevented oxygen transfer. *See* Employer's Exhibit 14 (Dr. Zaldivar); Employer's Exhibits 13, 17 at 18 (Dr. Castle); Employer's Exhibit 1 at 31-32 (Dr. Kleinerman). The medical opinions offered by Drs. Zaldivar, Castle and Kleinerman constitute substantial evidence in support of the administrative law judge's decision not to rely on the four qualifying blood gas studies administered during the miner's final hospitalization, as evidence that the miner was totally disabled due to a respiratory or pulmonary impairment at the time of his death. *See generally Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). We, therefore, affirm the administrative law judge's finding that the blood gas study evidence fails to establish total disability under 20 C.F.R. §718.204(b)(2)(ii).

Further, the administrative law judge correctly found that there is no evidence in this record that the miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

[8] All the other blood gas studies of record produced non-qualifying values. *See* 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge also properly determined that the "reasoned medical opinions of record also do not establish that the Miner was totally disabled by a respiratory or pulmonary impairment under [20 C.F.R.] §718.204(b)(2)(iv)." Decision and Order at 17. The administrative law judge indicated that Drs. Paranthaman, Dahhan, Abernathy, Zaldivar, Castle, Kleinerman, Bush, Caffrey, Naeye, and Morgan all opined that the miner was not disabled due to a respiratory or pulmonary impairment. The administrative law judge recognized that Dr. Williams alone opined, in a one-page letter dated October 17, 1995,[9] that the miner was totally disabled due to a respiratory impairment.[10] *See* Claimant's Exhibit 1. The administrative law judge, within his discretion, accorded no weight to Dr. Williams' opinion because he found that it was "unreasoned and not based on any specified objective evidence." Decision and Order at 17; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also found that Dr. Williams was "the least qualified of the opining physicians." Decision and Order at 17; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because substantial evidence supports the administrative law judge's finding that the medical opinions fail to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), we affirm it.

Based on the foregoing, we affirm the administrative law judge's finding that claimant failed to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b). We thus affirm the administrative law judge's denial of benefits on the merits of the instant

[9] In his October 17, 1995 letter, Dr. Williams opined that while the miner had "underlying problems with CFH," he thought he also had "a significant component of COPD/CWP which are responsible for the significant component of his respiratory problems." Claimant's Exhibit 1. Dr. Williams added that the miner was "certainly disabled and requires assistance with affairs of daily living because of his respiratory impairments." *Id.*

[10] The only other physician of record to find a totally disabling respiratory or pulmonary impairment is Dr. Modi. Dr. Modi's reports are dated February 19, 1987 and March 31, 1987, Claimant's Exhibits 5 and 6, and are not pertinent to what the miner's condition was at the time of the 1995 hearing before the administrative law judge.

claim. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge