BRB No. 02-0750 BLA

CLABE R. TOMBLIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0679) of Administrative Law Judge Daniel L. Leland 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).[1] In this duplicate claim, the administrative law judge found the newly

[1] 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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

submitted evidence insufficient to establish a material change in conditions because it failed to establish total disability due to pneumoconiosis, the element of entitlement previously adjudicated against claimant. Specifically, the administrative law judge found that the two newly submitted pulmonary function studies and blood gas studies were non-qualifying, that there was no evidence of cor pulmonale with right-sided congestive heart failure, and that the two new medical opinions failed to find that claimant had a totally disabling respiratory impairment. In addition, the administrative law judge found that the new evidence did not establish the existence of complicated pneumoconiosis; so claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304(a)-(c). 30 U.S.C. §921(c)(3). The administrative law judge found, therefore, that inasmuch as claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and failed to establish entitlement to the irrebuttable presumption of totally disabling pneumoconiosis, by showing the presence of complicated pneumoconiosis, he failed to establish a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant alleges that the administrative law judge erred in finding that complicated pneumoconiosis was not established since the preponderance of the evidence shows the presence of large opacities meeting the regulatory standards for invoking the irrebuttable presumption of totally disabling pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 20 C.F.R. Part 718, claimant must prove 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 one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). To determine if there has been a material change in conditions, the administrative law judge must evaluate all the evidence developed since the denial of the prior claim and decide whether it establishes at least one of the elements of entitlement previously adjudicated against claimant. *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 BLR 2-223 (4th Cir. 1995).

Claimant argues that the administrative law judge erred in finding that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304 because employer's physicians did not diagnose large opacities or complicated pneumoconiosis. Instead, claimant contends that the administrative law judge should have found the irrebuttable presumption invoked based on the preponderance of the objective evidence showing the presence of large opacities meeting the regulatory standard for invoking the presumption. At a minimum claimant contends that the case should be remanded to the administrative law judge with instructions to perform the equivalency determinations mandated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Eastern Associated Coal Corporation v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2001) and *Double B Mining v. Blankenship*, 177 F.3d 240 (4th Cir. 1999). Claimant's argument is without merit.

The administrative law judge noted that the only readings of the November 5, 1999 x-ray diagnosing category A opacities were by Dr. Ranavaya, a B-reader, and Dr. Navani, a B-reader and Board certified radiologist, while Drs Wiot and Spitz, Board-certified, B-readers and Drs. Fino, Castle and Hippensteel, B-readers, found only simple pneumoconiosis on this x-ray. The administrative law judge noted that Drs Wheeler, Scott and Kim, Board certified, B-readers found the x-ray negative for pneumoconiosis. The administrative law judge noted that the other new x-ray of April 12, 2000 was not interpreted as showing large opacities by any of the physicians who read it. The administrative law judge concluded, therefore, that the x-ray evidence failed to establish the existence of complicated pneumoconiosis. This was rational. 20 C.F.R. §718.304(a); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 17 BLR 1-31 (1991). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis at Section 718.304(a). 20 C.F.R. §718.304(a).[2]

Turning to Section 718.304(c), the administrative law judge correctly concluded that none of the physicians who interpreted the CT scans of November 29, 1999 or May 3, 2000

[2] The administrative law judge found that the irrebuttable presumption of totally disabling pneumoconiosis would not be invoked at 20 C.F.R. §718.304(b) because there was no biopsy evidence in this case. This finding is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

found evidence that would produce large opacities by chest x-ray. *See Scarbro, supra*; *Blankenship, supra*; *Braenovich v. Cannelton Industries, Incorporated/Cypress Amax*, BLR , BRB No. 02-0365 BLA (Feb. 12, 2003)(Gabauer, J. concurring). The administrative law judge correctly found that the evidence failed to establish complicated pneumoconiosis and that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304(c). 20 C.F.R. §718.304(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge