BRB No. 00-1150 BLA

DONALD R. BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
SHAMROCK COAL COMPANY	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Donald R. Brock, Manchester, Kentucky, *pro se*.

Denise M. Davidson (Barrett, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (99-BLA-1362) of Administrative Law Judge Robert L. Hillyard 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] The administrative law judge credited

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9,

claimant with nine years and nine and one-half months of coal mine employment and found employer to be the responsible operator. Considering the evidence of record, the administrative law judge found it sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, but insufficient to demonstrate the presence of a totally disabling respiratory impairment. Accordingly, benefits were denied.[2]

2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Because an earlier claim was filed in the 1970's, the administrative law judge noted that the instant claim filed on April 29, 1991 was a duplicate claim. The administrative law judge further noted, however, that even though a previous claim had been filed, because the records relevant to that claim were lost, he had no way of knowing when that claim was denied or the reasons for the denial. Accordingly, the administrative law judge noted that he would consider all the evidence of record to determine whether entitlement was established. Decision and Order at 2, 9; *see Brock v. Shamrock Coal Co.*, BRB No. 96-1622 BLA (July 28, 1997)(unpub.); *Brock v. Shamrock Coal Co., Inc.*, 94-BLA-1317 (1996).

On appeal, claimant contends that the administrative law judge erred in finding only nine years and nine and one-half months of coal mine employment and erred in finding that the physicians' opinions did not establish a totally disabling respiratory impairment. 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), while urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence, further contends that, even though the administrative law judge did not address the issue of abandonment, which was identified as a contested issue, the district director properly denied this claim by reason of abandonment due to claimant's repeated, unreasonable refusals to submit to further medical examinations.[3]

[3] Administrative Law Judge Fletcher E. Campbell issued a Decision and Order dated August 9, 1996 in which he found: that Shamrock Coal Company was the properly designated responsible operator; that a coal mine employment history of nine and one-quarter years was established; that the existence of pneumoconiosis by x-ray and medical opinion evidence was established; and that pneumoconiosis arising out of coal mine employment was established. However, Judge Campbell found that claimant failed to establish a totally disabling respiratory impairment. Benefits were accordingly denied. Director's Exhibit 39. Claimant appealed. Over the objections of claimant and employer that the record contained sufficient evidence upon which to render a determination, the Benefits Review Board granted the request of the Director, Office of Workers' Compensation Programs (the Director), that the case be remanded to the district director for further development of the evidence because the Director had not fulfilled his statutory obligation of providing claimant with a complete, credible pulmonary examination sufficient to substantiate the claim. The Board further held: that because the administrative law judge failed to consider all of the evidence relevant to claimant's coal mine employment history, the administrative law judge must reconsider that evidence when the case was before him again, but the Board did not address the remainder of claimant's arguments concerning the merits of entitlement. Accordingly, the administrative law judge's Decision and Order denying benefits was vacated and the case was remanded to the district director. *Brock*, BRB No. 96-1622 BLA, *supra*.

In the present appeal, the Director contends that the district director's finding of abandonment is affirmable due to claimant's repeated, unreasonable refusals to submit to medical examinations. However, in the prior appeal before the Board the Director conceded, in his Motion to Remand, that it was not necessary that claimant receive a new, complete pulmonary examination on remand, but that the defect in the medical reports could be remedied by asking the doctors to provide supplemental opinions addressing whether claimant's impairment would prevent him from performing his usual coal mine employment, noting that it would first be necessary to develop evidence on the physical requirements of claimant's last coal mine job. With the exception of one form dated March 17, 1998 in which claimant responded to the Director's questions regarding the nature of his last coal

mine employment, it does not appear that the record contains any supplementary information showing that any physicians were requested to submit supplemental opinions addressing claimant's ability to perform his usual coal mine employment. Because we affirm the administrative law judge's denial of benefits in the instant claim, however, we need not determine whether the district director properly found the claim to be abandoned.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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).

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(2000). 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*).

Initially, we will address claimant's assertion that the administrative law judge erred in not crediting him with ten years of coal mine employment. Because the administrative law judge found that the evidence established that claimant's pneumoconiosis arose out of coal mine employment, the establishment of ten years of coal mine employment would not further assist him in establishing entitlement. Accordingly, error, if any, in the administrative law judge's finding regarding the length of coal mine employment is harmless. *See* 20 C.F.R. §718.203(b); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Turning to the issue of total disability, the administrative law judge correctly found that the results of the two blood gas studies of record were non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(ii)(2); Director's Exhibits 9, 34, 36. Likewise, the administrative law judge correctly found that because the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(iii).

Regarding the pulmonary function studies, the administrative law judge properly found all three studies to be unreliable and entitled to no weight, Decision and Order at 11, because: the tracings of the January 11, 1979 study were not a part of the record, and the study did not show the results of three efforts or record an FVC result, Director's Exhibit 32; the June 10, 1991 study was found by Dr. Baker to show less than the maximum effort required for valid results, and the tracings of the study were not a part of the record, Director's Exhibit 9; and the June 17, 1991 study was found invalid by Dr. Kraman due to

less than optimal effort, cooperation and comprehension by claimant,[4] Director's Exhibits 10; *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1986); *Estes v. Director, OWCP*, 7 BLR 1-414 (1984); *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141 (1984); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984). The administrative law judge, therefore, permissibly found that the results of the pulmonary function studies did not establish total disability, 20 C.F.R. §718.204(b)(2)(i).

Turning to the physicians' opinions, the administrative law judge properly determined: that Dr. Baker's opinion was undermined because the tracings for the pulmonary function study on which he relied were not reproducible; Dr. Wheeler's opinion did not address total disability, and the opinions of Dr. Becknell that claimant was "minimally impaired" due to "minimal pneumoconiosis" and Dr. Ison, that claimant was advised to avoid all damp and dusty areas due to his diagnosis of pneumoconiosis, failed to support a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee*, *supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Likewise, the administrative law judge properly found that Dr. Bushey's note, stating claimant was totally disabled from gainful work, was insufficient to establish a totally disabling respiratory impairment because it was unreasoned, undocumented and unsupported by the evidence of record. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). Accordingly, the administrative law judge's finding that total disability was not established by the medical opinion evidence is affirmed, *see* 20 C.F.R. §718.204(b)(2)(iv); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Further, because the administrative law judge correctly found that total disability was not established, he properly concluded that claimant could not establish entitlement under the Act, and it was unnecessary to address the issue of abandonment. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Gee*, *supra*; *see also Larioni*, *supra*.

[4] The pulmonary function study included a notation of fair effort. Director's Exhibit 10.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge