BRB No. 01-0113 BLA

BERTICE COLEMAN	)	
	)	
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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Bertice Coleman, Vansant, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (00-BLA-0630) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, has requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge found that the instant claim constituted a duplicate claim[3] pursuant to 20 C.F.R. §725.309 (2000), and that the case was thus governed by the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *cert. denied*, 117 S.Ct. 763 (1997). Decision and Order at 3-4. The administrative law judge proceeded to find that the newly submitted evidence, *i.e.*, that evidence submitted subsequent to the previous denial, failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(2000). Decision and Order at 5-16. The administrative law judge further found that the newly submitted evidence

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[2] 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, 722, 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, 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 any arguments made by the parties regarding the impact of the challenged regulations.

[3] Claimant initially filed a claim for benefits on August 9, 1985 which was finally denied in a Decision and Order issued by Administrative Law Judge Henry W. Sayrs on April 26, 1988. Director's Exhibit 29. Claimant subsequently filed a second claim on April 4, 1994. Director's Exhibit 30. In a Decision and Order issued August 29, 1996, Administrative Law Judge Pamela Lakes Wood denied benefits. Judge Wood concluded that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(2000) and thus claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The Board affirmed this denial of benefits. *Coleman v. Island Creek Coal Co.*, BRB No. 96-1657 BLA(Jun. 30, 1997)(unpub.). On April 27, 1999, claimant filed the instant duplicate claim.

failed to establish the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). The administrative law judge thus concluded that inasmuch as the failure to establish a totally disabling respiratory impairment defeated entitlement in claimant's previous claim, the failure to establish that element in the instant claim mandated a denial of benefits on the basis of the failure to establish a material change in conditions pursuant to Section 725.309 (2000). Decision and Order at 17. Accordingly, benefits were denied.

On appeal, claimant contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (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).

After careful consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that the administrative law judge's decision denying benefits is supported by substantial evidence, contains no reversible error and, therefore, it is affirmed. In *Rutter*, *supra*, the Fourth Circuit held that, in order to establish a material change in conditions pursuant to Section 725.309 (2000), claimant must establish at least one of the elements of entitlement adjudicated against him in the past. Because claimant was previously denied benefits on the basis of having failed to establish a totally disabling respiratory impairment, *see Coleman*, slip op. at 2-3, the administrative law judge properly determined that, in order to establish a material change in conditions pursuant to Section 725.309 (2000), the burden rested with claimant to affirmatively establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2000). *See* 20 C.F.R. §718.204(b); *Rutter*, *supra*; *see generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In finding that the evidence of record failed to demonstrate total disability pursuant to Section 718.204(c)(1)(2000), the administrative law judge concluded that, notwithstanding the fact that the newly submitted evidence consisted of three qualifying pulmonary function

studies,[4] Director's Exhibits 6, 24; Employer's Exhibit 3, claimant was unable to carry his burden at this subsection because none of these qualifying studies were deemed credible by well-qualified physicians. Decision and Order at 8-12. The administrative law judge considered the opinions of Drs. Hippensteel, Castle, Fino, Zaldivar and Michos, all of whom reviewed the studies and found that they were not valid indicators of the state of claimant's disability based on the poor or inconsistent effort of claimant in undergoing the test. Director's Exhibits 8, 20, 24, 25; Employer's Exhibit 3.[5] Consultive opinions by well-qualified physicians which call into question the validity of a pulmonary function study constitute relevant evidence and may be used, if credible, to discredit the study. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *see generally Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280 (7th Cir. 1988); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984). In the absence of any credible newly submitted qualifying pulmonary function studies, claimant was thus precluded from demonstrating the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1)(2000), and we thus affirm the administrative law judge's finding that claimant was unable to demonstrate a totally disabling respiratory impairment at this subsection. *See* 20 C.F.R. §718.204(b)(2)(i); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In finding that the newly submitted blood gas studies failed to demonstrate the

[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. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2)(2000); 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] Two of the qualifying studies, Director's Exhibit 24 and Employer's Exhibit 3 were performed by Dr. Castle and Dr. Hippensteel.

presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2)(2000), the administrative law judge found that, of these three newly submitted studies, only one produced qualifying values, Director's Exhibit 9, while the remaining two studies, Director's Exhibit 24; Employer's Exhibit 3, were non-qualifying. Decision and Order at 12-13. Thus, the administrative law judge, in a permissible exercise of his discretion, found that the weight of the blood gas study evidence failed to affirmatively demonstrate the presence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(ii); *see Ondecko, supra*.

We further affirm the administrative law judge's determination that claimant failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to 718.204(c)(3)(2000) as there is no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds*, 933 F.2d 510 15 BLR 2-124 (7th Cir. 1991).

Finally, we affirm the administrative law judge's determination that claimant failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4)(2000). In reaching this determination, the administrative law judge considered all the newly submitted medical opinion evidence and, permissibly accorded greatest weight to the opinions of Drs. Castle and Hippensteel, both of whom concluded that claimant was able to return to his previous coal mine employment from a pulmonary standpoint and suffered from no pulmonary or respiratory disability, based on their superior credentials.[6] Director's Exhibit 24; Employer's Exhibit 3; *see Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Further, the administrative law judge, also permissibly concluded that Dr. Forehand's opinion, that claimant was unable to return to his previous coal mine employment due to pulmonary disability, was unreasoned and entitled to little weight, *see* Director's Exhibit 7; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and failed to address evidence of claimant's other medical conditions. *See Hicks, supra*; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see generally Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985)(administrative law judge may accord less weight to medical opinions which present less than complete picture of miner's health).

[6] While both Drs. Hippensteel and Castle acknowledge that claimant was disabled from a "whole-man" standpoint, neither physician attributes any disability to pulmonary or respiratory problems. Accordingly, their opinions are not supportive of claimant's burden. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 1-136 (3d Cir. 1995).

Because the administrative law judge has addressed all the relevant medical evidence at Section 718.204(c)(4), *see* 20 C.F.R. §718.204(b)(2)(iv), and provided an affirmable basis for his determinations, we affirm his conclusion that the medical opinion evidence failed to demonstrate the presence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv); *see Ondecko, supra*. We thus affirm the administrative law judge's determination that the newly submitted medical evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2000), *see* 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Because we affirm the administrative law judge's finding that total disability is not established, we need not consider the administrative law judge's causation finding, and we affirm the administrative law judge's determination that the newly submitted medical evidence failed to establish a material change in conditions pursuant to Section 725.309 (2000); *see Rutter, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge