BRB No. 01-0114 BLA

HARVEY J. COOPER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAGGARD COAL COMPANY,	)	DATE ISSUED:
	)	
INCORPORATED	)	
	)	
Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Harvey J. Cooper, Jewell Ridge, Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denial of Benefits (98-BLA-1301) of Administrative Law Judge Richard T. Stansell-Gamm 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] Based on the date of filing, the

[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, 722,725 and 726). All citations to the regulations, unless otherwise

administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis and total disability and, therefore, insufficient to establish a material change in conditions.[3] *Lisa Lee Mines v. Director, OWCP, [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert denied*, 510 U.S. 1090 (1997). Accordingly, benefits were denied.

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

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on July 10, 2001, to which the West Virginia Coal-Workers' Pneumoconiosis Fund (the Fund) and the Director have responded. The Director asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer, however, asserts that application of the challenged regulation at 20 C.F.R.

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noted, refer to the amended regulations.

[2] Claimant's prior claims filed June 26, 1973, October 31, 1988, and December 5, 1990, were denied. Director's Exhibits 33, 34, 35. Claimant's December 5, 1990 claim was denied March 4, 1991. Claimant filed the instant claim on December 23, 1997. Director's Exhibit 1.

[3] Claimant failed to establish any elements of entitlement in his prior claim.

§718.201(a)(2), (c)(defining pneumoconiosis as both a restrictive and obstructive pulmonary disease arising out of coal mine employment and as a latent and progressive disease) will alter the outcome of this case.

Having reviewed the briefs submitted by the Fund and the Director, and reviewed the record, we hold that the disposition of this case is not altered by the challenged regulations. Revised Section 718.201(a)(2), (c) will not alter the outcome of this case since the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recognized the progressive nature of pneumoconiosis and that obstructive impairments can fall within the definition of pneumoconiosis. *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 379 (4th Cir. 1996); 65 Fed. Reg. 79937, 79971-72. Additionally, based on our review, we conclude that none of the other challenged regulations affect the outcome of this case. Therefore, we will proceed with the adjudication of this 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. *McFall v. Jewell Ridge Coal Corp.*, 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); *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 establish 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge rationally determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge permissibly found the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis based on the preponderance of negative x-ray interpretations by physicians with superior qualifications. Director's Exhibits 17, 18, 24, 27; Employer's Exhibits 1, 2, 4, 6; Decision and Order at 10; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see 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 addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3)(2000) as there was no biopsy or autopsy evidence in the record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 6; 20 C.F.R. §§718.304, 718.305, 718.306 (2000); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Turning to the new medical opinion evidence, the administrative law judge found that Dr. Forehand's opinion diagnosing pneumoconiosis was outweighed by the contrary opinions of Drs. Fino and Hippensteel because they were better supported by the objective evidence of record. This was rational. Director's Exhibit 13; Employer's Exhibits 1, 6. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (186); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Considering the x-ray and medical opinion evidence together, the administrative law judge properly found that it failed to establish the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, BLR (4th Cir. 2000).

Turning to the issue of total disability, the administrative law judge rationally found the newly submitted evidence insufficient to establish a total respiratory disability. *Piccin*, *supra*. The administrative law judge found the newly submitted evidence insufficient to establish total disability pursuant to Section 718.204(c)(1)-(3)(2000) as none of the pulmonary function studies produced qualifying values, one out of three blood gas studies produced qualifying values[4] and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. This was rational. 20 C.F.R. §718.204(b)(2)(i)-(iii); Director's Exhibits 12, 14; Employer's Exhibit 1; Decision and Order at 13; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Fields*, *supra*. Further, the administrative law judge permissibly found the newly submitted medical opinions insufficient to establish total respiratory disability as all of the physicians opined that claimant was not totally disabled due to a respiratory impairment. Director's Exhibit 13; Employer's Exhibits 1, 6; Decision and Order at 14. *Jewell Smokeless*

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

Coal Corp. v. Street, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). Because claimant failed to establish the existence of pneumoconiosis and total disability by the newly submitted evidence, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions and must affirm the denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge