BRB No. 01-0614 BLA

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<tr><td>EARL KING<br><br>Claimant-Petitioner<br><br>v.<br><br>ELKHORN JELLICO COAL COMPANY, INCORPORATED<br><br>and<br><br>LIBERTY MUTUAL INSURANCE COMPANY<br><br>Employer/Carrier-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest</td><td>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)</td><td>DATE ISSUED:<br><br><br><br><br><br><br><br><br><br><br><br><br><br>DECISION and ORDER</td></tr>
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Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Earl King, Vansant, Virginia, *pro se*.

Gretchen Nunn Gullett (Boehl, Stopher & Graves), Prestonsburg, Kentucky, for employer.

Timothy S. Williams (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (98-BLA-0415) of Administrative Law Judge Rudolf L. Jansen 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).[2] Pursuant to claimant's request for modification of a previously denied duplicate claim, the administrative law judge, citing *Hess v. Director, OWCP*, 21 BLR 1-141 (1998), considered whether the newly submitted evidence, in conjunction with the evidence submitted with the duplicate claim, was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Considering the new evidence with the evidence submitted with the duplicate claim, the administrative law judge found that it failed to establish a material change in conditions because it failed to establish the existence of pneumoconiosis arising out of coal mine employment or total disability, elements previously adjudicated against claimant. Claimant's request for modification was therefore denied. *See* 20 C.F.R. §§725.309(d)(2000), 725.310, 718.202(a), 718.204(b)(2); *Hess*, *supra*. Accordingly, benefits were denied.

On appeal, claimant generally challenges the findings of the administrative law judge.

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[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, 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).

[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*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to this appeal. He does, however, contend that the revised regulations will not affect the outcome of this case.

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. Failure to establish any one 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*).

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the majority of the negative interpretations by physicians possessing the dual qualifications of Board-certified radiologist and B reader. This was rational. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), *see Perry* , *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Decision and Order at 10. Further, because there were no biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis based on that evidence. 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis by the use of presumptions covering complicated pneumoconiosis, claims filed prior to January 1, 1982, or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306. 20 C.F.R. §718.202(a)(3).

Turning to the newly submitted physicians' opinions, the administrative law judge accorded little weight to Dr. Sundaram's opinion of pneumoconiosis because it lacked sufficient documentation regarding the claimant's work and social histories, including claimant's history of smoking, and because it was based, in part, on a positive x-ray which was subsequently reread negative by four dually qualified physicians. This was rational. Decision and Order at 9; Director's Exhibit 33; *see Clark*, *supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1995); *Winters v.*

*Director, OWCP*, 6 BLR 1-877 n.6 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Similarly, the administrative law judge accorded little weight to Dr. Wicker's opinion of no pneumoconiosis as he found it less than adequately documented because, while noting a correct work and social history, Dr. Wicker did not "indicate the objective medical data that he used to arrive at his conclusion." Decision and Order at 9. This was rational. Director's Exhibit 10. *Clark*, *supra*.[3] Additionally, the administrative law judge credited the opinion of Dr. Jarboe, that claimant showed no evidence of coal workers' pneumoconiosis or any occupationally acquired disease and that claimant's obstructive impairment was due to his smoking history since Dr. Jarboe relied on a correct work and smoking history and, in addition to examining claimant, reviewed and discussed the objective data. This was rational. Decision and Order at 10; Director's Exhibit 32; *Clark*, *supra*. Further, the administrative law judge, noting that the credentials of Drs. Sundaram and Wicker were not in the record, accorded greater weight to the opinion of Dr. Jarboe based on his credentials as a Board-certified internist with a sub-specialty in pulmonary disease. This was rational. Decision and Order at 10; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); *Kozele*, *supra*.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray*, *supra*, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis and, therefore, a material change in conditions on that basis. *See Hess*, *supra*.

Turning to the issue of total disability, the administrative law judge correctly found that the newly submitted pulmonary function and blood gas studies were non-qualifying and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibits 10, 33; Claimant's Exhibit 3. 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)(2)(iii).

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[3] Although, as the administrative law judge noted at p.7 of the Decision and Order, Dr. Wicker reviewed x-rays, pulmonary function and blood gas studies and other testing, there is no discussion in his opinion as to how this documentation supports his finding. Director's Exhibit 10.

Finally, the administrative law judge credited the opinion of Dr. Jarboe that claimant was not totally disabled as it was based on an accurate work history and demonstrated an understanding of claimant's last coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-109 (6th Cir. 2000); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Clark*, *supra*. Additionally, the administrative law judge accorded greater weight to the opinion of Dr. Jarboe based on his superior credentials. *Dillon*, *supra*; *Burns*, *supra*. Decision and Order at 11; Director's Exhibit 32. The administrative law judge accorded less weight to Dr. Wicker's opinion because Dr. Wicker stated that he could not determine the level of claimant's pulmonary function due to claimant's lack of maximum exertion on pulmonary function studies, Director's Exhibit 10, and less weight to Dr. Sundaram's opinion of total disability because Dr. Sundaram was unfamiliar with claimant's last coal mine employment and the exertional level required of that employment, Director's Exhibit 33. *See Cornett*, *supra*; *Eagle*, *supra*; *Walker*, *supra*; *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, the administrative law judge properly found that claimant failed to establish total disability. *Id*. We, therefore, affirm the administrative law judge's finding that the evidence failed to establish total disability and, therefore, failed to establish a material change in conditions on that basis. *See Hess*, *supra*.

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

BETTY JEAN HALL
Administrative Appeals Judge