

BRB No. 03-0358 BLA

ROBERT SPEED, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JIM WALTER RESOURCES, INCORPORATED)	DATE ISSUED: 01/30/2004
)	
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 Gerald M. Tierney,
Administrative Law Judge, United States Department of Labor.

Robert Speed, Jr., Mulga, Alabama, *pro se*.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham,
Alabama, for employer.

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

Claimant appeals, without the assistance of counsel, the Decision and Order -
Denying Benefits (01-BLA-0597) of Administrative Law Judge Gerald M. Tierney
rendered on a duplicate 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

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.

In this duplicate claim,² the administrative law judge found the newly submitted evidence insufficient to establish a material change in conditions because it failed to establish the existence of pneumoconiosis or total disability, elements previously adjudicated against claimant.³ Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. In response, employer argues that the Decision and Order denying benefits should be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) is not participating in 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. *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); *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, claimant must prove that he suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

In finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge correctly found that none of the three interpretations of two new x-rays were read as positive for the existence of pneumoconiosis. Decision and Order at 3; Director's Exhibits 8, 9, 20. Thus, the administrative law judge correctly found that the newly submitted x-ray evidence was

² Claimant filed his first claim for benefits on August 16, 1994. Benefits were denied by Administrative Law Judge Thomas M. Burke. Claimant appealed, and the Board affirmed the denial of benefits in *Speed v. Jim Walters Resources, Inc.*, BRB No. 97-0790 BLA (January 26, 1998)(unpublished).

³ Since the miner's last coal mine employment took place in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1).

Turning to the new medical opinion evidence, the administrative law judge found that it consisted of the treatment notes of Dr. Avsar, claimant's treating physician, and a report from Dr. Goldstein. In his treatment notes, Dr. Avsar refers to a "...thoracotomy that showed atrocillicosis." Director's Exhibit 20. The administrative law judge, however, found it was unclear as to whether "atrocillicosis" was meant to convey a term included within the legal definition of pneumoconiosis at Section 718.201(a). Decision and Order at 3. Considering Dr. Goldstein's report, the administrative law judge properly found that Dr. Goldstein's diagnosis of chronic obstructive pulmonary disease without a causal link to coal mine employment was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 6; 20 C.F.R. §718.201. Accordingly, the administrative law judge properly found the new medical opinion evidence insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.201; *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).

Turning to the issue of total disability, the administrative law judge correctly found that the newly submitted pulmonary function study and blood gas study 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 9, 12. 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 new physicians' opinions, the administrative law judge found that Dr. Avsar's treatment notes did not assess a degree of pulmonary impairment, or claimant's ability from a respiratory standpoint to perform his usual coal mine employment as a general inside laborer. As to Dr. Goldstein's opinion of a mild pulmonary impairment, the administrative law judge noted that even considering the opinion in light of claimant's usual coal mine employment, he could not infer that it showed that claimant could not perform his usual coal mine employment. Decision and Order at 5; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Considering the non-qualifying pulmonary function and blood gas study evidence together with the medical opinion evidence, the administrative law judge determined that it did not establish total disability and, therefore, a material change in conditions. This was rational. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *see also Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Allen v. Mead Corp.*, 22 BLR 1-61 (2000); *Anderson v. Valley Camp of Utah, Inc.*, 11 BLR 1-111, 1-113 (1989).

Accordingly, the administrative law judge's the Decision and Order - 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