BRB No. 00-1079 BLA

DONNIE R. BEGLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LESLIE RESOURCES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-0224) of Administrative Law Judge Thomas F. Phalen, Jr. 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] The administrative law judge found twenty-

[1] The Department of Labor has amended the regulations implementing the Federal

one years and nine months of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. 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, an element previously adjudicated against claimant, and thus, found that a material change in conditions was not established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4) and erred in failing to address the issue of total disability. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would 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 May 18, 2001, to which employer and the Director have responded. Based on the briefs submitted by employer and the Director and our review, we hold that the outcome of this case is not altered by the challenged regulations.[2] Therefore, we will proceed to adjudicate the merits of this appeal.

Coal Mine Health and Safety Act of 1969, as amended. Theses regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 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.

[2] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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*).

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days following receipt of the Board's Order issued on May 18, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

First, claimant contends that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis. We disagree. Contrary to claimant's arguments, the administrative law judge correctly found that the newly submitted x-ray evidence of record was insufficient to establish the existence of pneumoconiosis as the x-rays taken subsequent to the prior denial were all read negative. Director's Exhibits 5, 7, 8, 29; Decision and Order at 8; 20 C.F.R. §718.202(a)(1). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the newly submitted x-ray evidence.[3]

Next, claimant contends that the administrative law judge erred in his weighing of the newly submitted medical opinion evidence and that the opinion of Dr. Varghese, claimant's treating physician, is sufficient to establish the existence of pneumoconiosis. We disagree. Dr. Varghese found that claimant suffered from a "severe restrictive and obstructive pulmonary disease from probably black lung." Director's Exhibits 23, 25.

[3] The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2) and (3) (2000) are affirmed as unchallenged on appeal. 20 C.F.R. §718.202(a)(2), (3); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Contrary to claimant's arguments, the administrative law judge accorded less weight to the opinion of Dr. Varghese because it was equivocal, and not well-reasoned and documented as the physician failed to consider claimant's smoking and employment history, failed to provide the x-ray and objective studies he relied on, and failed to explain his diagnosis. This was rational. *Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); Director's Exhibits 23, 25; Decision and Order at 9. Further, contrary to claimant's argument, the administrative law judge is not required to accord greater weight to the opinion of a treating physician. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Halsey v. Richardson*, 441 F.2d 1230, 1236 (6th Cir. 1971); *Tedesco v. Director, OWCP*, 18 BLR 1-103 1994). In addition, the administrative law judge rationally accorded more weight to Dr. Wicker's opinion, finding no pneumoconiosis, as it was unequivocal and was better reasoned, documented and supported by the objective evidence of record. Director's Exhibit 5; Decision and Order at 9; *Clark*, *supra*; *Dillon*, *supra*; *Justice*, *supra*; *Fields*, *supra*; *King*, *supra*. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis on the basis of medical opinions. Thus, inasmuch as claimant failed to establish the existence of pneumoconiosis by the newly submitted evidence, the element of entitlement previously adjudicated against him,[4] 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 - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[4] Claimant's contention that the administrative erred by failing to consider the issue of total disability lacks merit inasmuch as the district director previously found the existence of a totally disabling respiratory impairment, but denied benefits because claimant failed to establish the existence of pneumoconiosis. Thus, the administrative law judge properly considered only the issue of pneumoconiosis in determining whether a material change in conditions was established. *Ross*, *supra*.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge