BRB No. 00-1121 BLA

BEN RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONG TRUCKING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WASSAU	)	
	)	
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 on Remand-Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Ben Ratliff, Mouthcard, Kentucky, *pro se*.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand-Denial of Benefits (00-BLA-0407) of Administrative Law Judge Joseph E. Kane 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] Claimant filed his first application for benefits on October 14, 1994, which was denied on March 24, 1995. Director's Exhibit 15. Claimant filed a second claim on April 15, 1996, which was denied on August 20, 1996. Director's Exhibit 16. Claimant filed the present, third claim, on June 30, 1999. Director's Exhibit 1. The administrative law judge reviewed this duplicate claim under the regulations found at 20 C.F.R. Part 718, and found that claimant established twenty-two and one-half years of coal mine employment. Noting that claimant had failed to establish any element of entitlement on his previous claim, the administrative law judge reviewed the newly submitted evidence to determine whether a material change in conditions had been established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Upon reviewing the newly submitted evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) and (c). According, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), and denied benefits. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. The employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Appeals, has not filed a brief 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

[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 noted, refer to the amended regulations.

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 21, 2001, to which employer and the Director have responded.[2] Based on the briefs submitted by employer and the Director and our review of the record, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

[2] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

In reviewing the newly submitted x-ray evidence, the administrative law judge found it insufficient to establish the presence of pneumoconiosis. Since claimant's last denial, claimant submitted four interpretations of two x-ray films. Of these four, only one reading, that of Dr. Younes, a B-reader, was read as positive. Director's Exhibit 5. The remaining three were read as negative by Dr. Dahhan, a B-reader, and Drs. Sargent and Barrett, both of whom are B-readers and Board-certified radiologists.[3] Director's Exhibits 5, 14. The administrative law judge permissibly accorded greater weight to the more highly qualified readers, and properly found that the majority of the x-ray readings by the best qualified readers were negative for the existence of pneumoconiosis. *Staton v. Norfolk & Western Railway Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 10-11. We therefore affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1). Additionally, as the record contains no autopsy or biopsy evidence, or evidence of complicated pneumoconiosis, and as this claim was filed after January 1, 1982, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis at Section 718.202(a)(2) and (3)(2000).

[3] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the Nathional Institute of Safety and Health. *See* 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

The administrative law judge next found that the newly submitted medical opinions failed to establish the existence of pneumoconiosis. The new evidence contained the opinions of two physicians: Dr. Younes diagnosed coal workers' pneumoconiosis, while Dr. Dahhan found no evidence of occupational pneumoconiosis. Director's Exhibits 5, 14. The administrative law judge permissibly assigned greater weight to the opinion of Dr. Dahhan based on his superior qualifications, board-certification in internal and pulmonary medicine, and because his opinion was better supported by the objective evidence.[4] *See Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis.

The administrative law judge next considered the evidence relevant to total disability and determined that claimant failed to establish total disability due to pneumoconiosis. The newly submitted evidence contained the results of two pulmonary function studies and two blood gas studies, none of which yielded qualifying results.[5] Director's Exhibits 5, 14. Additionally, the record contained no evidence of cor pulmonale with right-sided congestive heart failure. The administrative law judge therefore properly found that claimant failed to establish total disability thereon. 20 C.F.R. §718.204(b)(1)-(3); *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

The administrative law judge further found that the medical opinions failed to establish total disability. Dr. Younes found a "moderate obstructive ventilatory impairment that may interfere with [claimant's] last coal mining job," and noted that the primary cause of the impairment was tobacco smoking, with occupational dust exposure as a contributing factor. Director's Exhibit 5. Dr. Dahhan found no pulmonary impairment secondary to the claimant's coal dust exposure and determined that claimant could return to his former coal mine employment. Director's Exhibit 14. The administrative law judge permissibly accorded greater weight to the opinion of Dr. Dahhan, in light of his superior credentials and as his opinion was better supported by objective tests. *See Hill*, *supra*; *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich*, *supra*; *Wetzel*, *supra*; *Fuller v.*

[4] The administrative law judge correctly noted that the record contained no evidence of any board-certifications of Dr. Younes. Decision and Order at 12.

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

Gibralter Coal Corp., 6 BLR 1-1291 (1984). Further weighing all the evidence together, the administrative law judge properly determined that claimant failed to establish total disability. *See Fields*, *supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). As claimant failed to establish elements of entitlement which were previously adjudicated against him, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). *See Ross*, *supra*.

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge