BRB No. 01-0959 BLA

TED RAY DARBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John P. Scherer (File, Payne, Scherer & File), Beckley, West Virginia, for claimant.

Lenore S. Ostrowsky (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0312) of Administrative Law Judge Robert L. Hillyard denying benefits 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 credited claimant with twenty-one years of coal mine employment and found employer to be the responsible operator. In this duplicate claim, the administrative law judge found that claimant's prior claim was finally denied on October 18, 1988 because claimant did not establish any of the elements of entitlement. Considering the evidence submitted since the prior denial, the administrative law judge found that it failed to establish a material change in conditions because it failed to establish either the existence of pneumoconiosis or total disability. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not finding that the evidence established the existence of pneumoconiosis and total disability due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are 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).

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 (2000). 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*).

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *Lisa*

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[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Lee Mines v. Director, OWCP [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997), for deciding whether claimant demonstrated a material change in conditions at Section 725.309 (2000). In *Rutter*, the Court held that in ascertaining whether a claimant established a material change in condition pursuant to Section 725.309 (2000), the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him.

Claimant first contends that a number of positive x-rays taken from 1983 through 2000 establish the existence of pneumoconiosis. The administrative law judge, however, properly reviewed only the evidence submitted following the denial of claimant's prior claim to determine whether the newly submitted x-ray evidence established the existence of pneumoconiosis. *Rutter*, *supra*. In reviewing this newly submitted x-ray evidence, the administrative law judge concluded that all of the x-ray films were read negative by all of the readers. Director's Exhibits 7, 8, 9; Employer's Exhibit 4; Claimant's Exhibit 2. The administrative law judge, therefore, correctly concluded that the x-ray evidence failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis is affirmed.

Claimant next argues that the medical opinions, including the opinion of Dr. Hoynes, claimant's treating physician, establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge, however, accorded little weight to the opinion of Dr. Hoynes, claimant's treating physician, because he found the opinion which consisted of a one paragraph letter to be undocumented, conclusory and unreasoned. This was rational. Decision and Order at 13; Director's Exhibit 15; 20 C.F.R. §718.104(d); *see Milburn Colliery v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark*, *supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge accorded greater weight to the opinions of Drs. Katzman, Pacht, Branscomb and Fino, that claimant showed no evidence of coal workers' pneumoconiosis or any occupationally acquired disease, as they were well-reasoned, documented and supported by the objective studies. This was rational. Decision and Order at13; Director's Exhibits 5; Employer's Exhibit 1; *Clark*, *supra*; *McMath*, *supra*; *Fields*, *supra*. Further, the administrative law judge also accorded greater weight to the opinions of Drs. Pacht, Branscomb and Fino, because they were highly qualified in pulmonary medicine. Employer's Exhibits 1, 2, 3, 5. This was also rational. *See Hicks*, *supra*; *Akers*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). Thus, contrary to claimant's argument, the administrative law judge properly found that claimant failed to establish the

existence of pneumoconiosis at Section 718.202(a)(4).

Further, contrary to claimant's argument, Dr. Fino's deposition testimony that he could not rule out the possibility that claimant's mild impairment could have been caused by coal dust exposure, Employer's Exhibit 5, pp 16, 17, is insufficient to carry claimant's burden of establishing the existence of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Nor, contrary to claimant's argument can the 1983 decision of the West Virginia Occupational Pneumoconiosis Board, which was part of the previous record, be used to establish the existence of pneumoconiosis. *See Rutter*, *supra*.

Finally, claimant argues that the administrative law judge erred in not finding that the medical opinion evidence established a totally disabling respiratory impairment. In considering the evidence relevant to total disability, however, the administrative law judge properly weighed the non-qualifying pulmonary function study and blood gas study evidence together with the medical opinion evidence to find that claimant failed to establish a totally disabling respiratory impairment. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*). Further, the administrative law judge properly found that the medical opinion evidence failed to establish total disability because none of the opinions found a totally disabling respiratory impairment. Contrary to claimant's contention, the fact that physicians "were not able to rule out that there might be some pulmonary impairment" is not sufficient to carry claimant's burden of proof. *See Justice*, *supra*; *see also Ondecko*, *supra*. Nor, contrary to claimant's contention can reports submitted in support of prior claims be used to establish the requisite material change in a duplicate claim. *See Rutter*, *supra*.

We, therefore, affirm the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis or total disability and thereby failed to establish a material change in conditions. *Id*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge