BRB No. 00-0739 BLA

PAUL D. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Robert Austin Vinyard), Abingdon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-BLA-0967) of Administrative Law Judge John C. Holmes (the administrative law judge) denying benefits on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1]The instant claim was filed on October 30, 1998. Director's Exhibit 1. Claimant's prior claim, filed on September 16, 1994, was denied by the district director on November 16, 1994 based on claimant's failure to establish any element of entitlement. Director's Exhibit 35 at 1, 13. Claimant took no action until he filed the instant claim.

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] The administrative law judge initially found that claimant has the burden to establish a material change in conditions under 20 C.F.R. §725.309(d) (2000)[3] pursuant to *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). He noted that under *Rutter*, claimant must prove one of the elements of entitlement previously adjudicated against him. Based on his weighing of the evidence of record, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment. Further considering the evidence of record, the administrative law judge also determined that claimant was totally disabled from performing his last coal mining job as a supply motorman. The administrative law judge, however, found that claimant's disability did not arise from a coal dust related pulmonary impairment, but was due solely to his cardiac conditions, namely mitral stenosis which causes shortness of breath, pulmonary congestion and congestive heart failure. The administrative law judge concluded:

> I find that Mr. Owens has failed to meet his burden of proof regarding any of the elements previously decided against him. My decision, whether based upon the old evidence, new evidence, or a combination thereof, mandates a denial of the application for benefits.

Decision and Order at 9. Accordingly, benefits were denied.

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[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.

[3]The amendments to the regulation at 20 C.F.R. §725.309(2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

On appeal, claimant contends that the administrative law judge found that claimant established a totally disabling respiratory or pulmonary impairment. Claimant argues that he thereby established a material change in conditions under 20 C.F.R. §725.309(d) (2000). Claimant contends that the administrative law judge was thus obligated under *Rutter* to consider all the evidence of record on the merits of the claim, which he failed to do. Claimant also asserts that the administrative law judge erroneously considered the issue of whether claimant is totally disabled due to a respiratory or pulmonary condition together with the issue of whether his disability is due to pneumoconiosis, which issues are properly considered separately. 20 C.F.R. §718.204(b), (c).[4] Claimant further contends, relying on the opinions of Drs. Robinette and Forehand, that the administrative law judge erred in not finding the existence of pneumoconiosis based on the medical opinion evidence. Lastly, claimant asserts that Dr. Gaziano's reading of the x-ray dated December 1, 1998, which was positive for pneumoconiosis, should be given substantial weight since Dr. Gaziano was neither an expert for claimant or the employer, but an independent consultant for the Department of Labor. Employer responds in support of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in the 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 Ass'n 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 March 2, 2001, to which claimant, employer and the Director have responded.[5] Each party responds that application of the relevant revised

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[5]On March 26, 2001, the Board received "Claimant's Pro Se Statement On Whether the

regulations will not affect the outcome of this case. Employer adds, however, that the revised regulation at 20 C.F.R. §718.204(a) may affect the outcome of the case. Employer argues:

> Judge Holmes found that claimant had respiratory symptoms and problems that were due to claimant's cardiac disease, not any pulmonary disease or condition due to coal mine employment. The regulation [at 20 C.F.R. §718.204(a)] does not appear to mandate a finding of total respiratory or pulmonary disability, if the cause of any respiratory or pulmonary impairment is a condition that is not respiratory or pulmonary. It appears to only require that the nonrespiratory or nonpulmonary condition or disease be considered. If interpreted this way, the revised regulation will not affect the outcome of the case, as the ALJ did consider claimant's heart disease and its resultant pulmonary symptoms and impairments in finding that claimant did not prove that he was disabled due to pneumoconiosis.
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> However, another interpretation of the regulation could require a finding of a totally disabling respiratory impairment, even if the cause is a nonrespiratory or nonpulmonary condition or disease. In that case, the revised regulation will affect the outcome. If the ALJ must make a finding of a disabling respiratory impairment, then he must make a finding of a material change in condition. Since he did not, the Board would have to remand the case for consideration of the entire evidential record.
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> Clinchfield asserts that this regulation is impermissibly retroactive, as it applies to this case. Nothing in the prior regulations or in the decisions of the Board or the Fourth Circuit Court of Appeals required a finding of a disabling respiratory impairment when the only disabling disease suffered by the miner was a nonrespiratory condition or disease, such as heart disease. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994).

Employer's Response to the Board's Order dated March 2, 2001 at 3-4.

New Regulations Will Affect the Outcome of the Case," in response to the Board's Order dated March 2, 2001. Therein, claimant, who is represented by counsel in the instant appeal, responds that application of the new regulations will not affect the outcome of this case.

Based on the pleadings submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the application of any challenged regulation. Specifically, no amendment to 20 C.F.R. §725.309 (2000) is invoked in the instant duplicate claim. Further, the regulation at 20 C.F.R. §718.204(a) was amended, *inter alia*, to state that non-respiratory or non-pulmonary impairments are irrelevant to the inquiry of whether a miner is totally disabled under the Act. Thus, the Department of Labor clarified that a miner may be totally disabled for purposes of the Act notwithstanding the existence of any independently disabling non-respiratory or non-pulmonary impairments. 65 Fed. Reg. 79946–79947, 80049. This amendment is consistent with the decision of the United States Court of Appeals for the Fourth Circuit in *Street*.[6] While employer argues the potential impact of the revised regulation at 20 C.F.R. §718.204(a) on the outcome of the case, inasmuch as we dispose of the case on its merits based on the administrative law judge's consideration of the record evidence at 20 C.F.R. §718.202(a)(1)-(4), we hold that there is no actual impact in this case. In this regard, we note that the regulation at 20 C.F.R. §718.202(a)(2) was amended to add that a finding in an autopsy *or biopsy* of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. Because the record in the instant case contains neither autopsy nor biopsy evidence, this amendment is not implicated herein. Therefore, the Board will proceed to adjudicate the merits of 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).

Weighing the x-ray and medical opinions of record, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis, and further found that the medical opinions of record failed to establish that claimant is totally disabled due to pneumoconiosis. Inasmuch as the administrative law judge's finding that the evidence of record fails to establish the existence of pneumoconiosis is rational, supported by substantial evidence and in accordance with law, we affirm that finding. *See* discussion, *infra*. We hold, therefore, that any error in the administrative law judge's finding that claimant failed to establish a material change in conditions under 20 C.F.R. §725.309 (2000) is harmless as it cannot affect the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must

[6]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, that he is totally disabled due to a respiratory or pulmonary impairment, and that his pneumoconiosis is a substantially contributing cause of this impairment. 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 establish any element will preclude a finding of entitlement to benefits.

Considering the x-ray evidence of record pursuant to 20 C.F.R. §718.202(a)(1) (2000), the administrative law judge properly found that it was "overwhelmingly negative," Decision and Order at 10, and properly resolved conflicting readings of certain x-rays by relying on the interpretations rendered by the better or dually qualified physicians of record, namely those physicians who were both B readers and Board-certified radiologists. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). With regard to the x-ray dated December 1, 1998, upon which claimant relies, the administrative law judge correctly noted that the film was read as positive for pneumoconiosis by two B readers, and negative for pneumoconiosis by two B readers and two dually qualified physicians. The administrative law judge properly resolved the conflicting readings, determining that the December 1, 1998 x-ray film did not show the existence of pneumoconiosis. *Id.* Contrary to claimant's suggestion, the administrative law judge was not obligated to accord substantial weight to Dr. Gaziano's positive reading based on his status as an independent consultant for the Department of Labor. *Id.*

The administrative law judge also correctly determined that there is no biopsy or autopsy evidence of record. Thus, claimant cannot meet his burden to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2).

Further, since there is no evidence of complicated pneumoconiosis and the instant claim is a living miner's claim filed after January 1, 1982, the administrative law judge properly determined that claimant cannot establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(3) (2000) because none of the presumptions referred to therein is applicable, *see* 20 C.F.R. §§718.304, 718.305, 718.306.

In weighing the medical opinions of record, the administrative law judge correctly found that only Drs. Forehand and Robinette diagnosed occupational pneumoconiosis. The administrative law judge properly accorded less weight to the opinions of Drs. Robinette and Forehand as their medical assessments of claimant's health failed to take into account claimant's heart problems. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). A review of the record reveals that while Dr. Forehand noted claimant's complaint of chest pain or "mitral valve prolapse" and a history of heart disease, and Dr. Robinette noted claimant's history of cardiac disease and that claimant apparently

had valvular heart disease, neither physician addressed these conditions in assessing claimant's condition. Director's Exhibit 13; Unnumbered Claimant's Exhibit.

In this regard, the administrative law judge found persuasive the findings of Drs. McSharry and Hippensteel that claimant does not have pneumoconiosis and that his pulmonary problems are not related to his coal mine employment but to his heart condition, as well as these physicians' opinion that Dr. Robinette's assessment of claimant was lacking. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Dr. Hippensteel opined pertinent to Dr. Robinette's opinion:

> I think Dr. Robinette was remiss in his interpretation of data from this examination. It is not irreversible lung disease when his FEV 1 improved by 26% post bronchodilator to within almost normal range. It appears that no post bronchodilator diffusion was done as referenced by him in his report. His failure to comment on mitral valve disease as a possible
> cause for back pressure and vascular congestion with infiltration in his lungs is also a significant oversight on Dr. Robinette's part. In addition, even though he read his electrocardiogram as showing evidence of a possible old infarction, he did not discuss this as a diagnosis in his report either.
>
> In addition to Dr. Robinette's interpretation of his chest x-ray as positive for pneumoconiosis, Dr. Mullens also reviewed this chest x-ray and only interpreted pulmonary hyperinflation and bilateral basilar parenchymal scarring. This is not typical for coal workers' pneumoconiosis, I would note...
>
> Conclusions
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> ...The additional readings of this man's chest x-ray are indicative of a lack of appreciation of his heart disease and how it can cause abnormalities on the chest x-ray that can be similar to those caused by pneumoconiosis, but can be differentiated from pneumoconiosis by the association they would have with the cardiac abnormalities, not only clinically, but as noted occasionally by some of the B-readers who have interpreted this man's x-ray.
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> Dr. Robinette is careless in his examination and reporting of findings in this case by not considering the differential diagnosis of breathing and pulmonary abnormalities to include possible cardiac diagnoses that could make for such abnormalities.

Employer's Exhibit 45. Dr. McSharry opined, in part, pertinent to Dr. Robinette's opinion:

> I do not believe that [Dr. Robinette's] examination provides compelling evidence that Mr. Owens has pneumoconiosis. Dr. Robinette does believe that the chest radiograph obtained in his office shows changes of coal workers' pneumoconiosis. He additionally notes that pulmonary function test abnormalities are present and notes symptoms that Mr. Owens has and his history of coal mine exposure. His examination appears to make note of mitral valve disease but this is not mentioned in his assessment of the patient.

Employer's Exhibit 44. It is within the administrative law judge's discretion to determine the credibility of the medical evidence, *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), and claimant's argument that it was error for the administrative law judge to rely on the opinions of Drs. McSharry and Hippensteel over the "better reasoned opinions of Drs. Robinette and Forehand" is an impermissible request for the Board to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Based on the foregoing, we hold that the administrative law judge properly determined that claimant failed to establish that he suffers from pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4); *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). We, therefore, affirm the administrative law judge's findings. 20 C.F.R. §718.202; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000).

Inasmuch as claimant fails to establish the existence of pneumoconiosis, an essential element of entitlement under Part 718, a finding of entitlement in the instant claim is precluded. *See Trent, supra; Perry, supra*.[7] We, therefore, affirm the administrative law

[7]Claimant contends that the administrative law judge's finding that the sole source of claimant's respiratory problems is his heart condition, Decision and Order at 11, conflicts with Dr. Blackwell's opinion. Dr. Blackwell opined:

> Mr. Owens has exam, EKG, x-ray, and echo evidence of clinically important mitral valve disease. He does have a component of underlying lung disease which significantly contributes, but I suspect his major decompensation relates to his heart.

Director's Exhibit 34. Dr. Blackwell indicated that the precise etiology of claimant's chronic lung disease had not been determined. *Id.* Claimant's argument does not pertain to the issue of the existence of pneumoconiosis but to the issue of the cause of claimant's total disability. Because we affirm the administrative law judge's finding that claimant failed to prove the existence of pneumoconiosis, we do not reach the merits of the administrative law judge's findings regarding the cause of claimant's disability. *Trent v. Director, OWCP*, 11 BLR 1-26

judge's denial of benefits in the instant case.

(1987). Further, in assessing this evidence with regard to the existence of pneumoconiosis, the administrative law judge correctly characterized, *inter alia*, Dr. Blackwell's report as containing no opinion on the presence or absence of pneumoconiosis or any disease related to claimant's coal mine employment. Decision and Order at 10.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge