BRB Nos. 00-0847 BLA
and 00-0847 BLA-A

WAYNE WILLIAMSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
JAGGED COAL, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ISLAND CREEK COAL COMPANY, INCORPORATED	)	
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for Jagged Coal, Inc.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for Island Creek Coal Co., Inc.

Rita Roppolo (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals and employer Island Creek Coal Company (Island Creek) cross-appeals the Decision and Order-Denying Benefits (1999-BLA-0545) of Administrative Law Judge Daniel L. Leland rendered on a 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's initial application for benefits filed on February 9, 1995 was finally denied by the Office of Workers' Compensation Programs (OWCP) on August 1, 1995 because the medical evidence failed to establish that claimant had pneumoconiosis arising out of coal mine employment and was totally disabled due to pneumoconiosis. Director's Exhibit 42. On January 30, 1998, claimant filed the current claim, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d)(2000). The OWCP denied the claim and claimant requested a hearing, which was held on February 16, 2000.

The administrative law judge credited claimant with eighteen years and five months of coal mine employment, found that Island Creek is the responsible operator, and concluded that the medical evidence developed since the prior denial did not establish the existence of pneumoconiosis or that claimant is totally disabled. Because the administrative law judge found that the new evidence did not establish any element of entitlement previously decided against claimant, the administrative law judge found that claimant did not demonstrate a material change in conditions as

[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. Where a citation to the regulations is followed by "(2000)," the reference is to the old regulations.

required by 20 C.F.R. §725.309(d)(2000). *See 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). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the new medical opinion evidence when he found that the existence of pneumoconiosis and total disability were not established. Island Creek responds, urging affirmance of the denial of benefits, and has filed a cross-appeal challenging the administrative law judge's finding that Island Creek is the responsible operator. Jagged Coal, Inc. (Jagged Coal), responds, urging affirmance of both the denial of benefits and of the finding that Island Creek is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the finding that Island Creek is the responsible operator.[2]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals 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 9, 2001, to which all parties have responded. Claimant and the Director agree that none of the regulations at issue in the lawsuit affects the outcome of this case. Jagged Coal, however, contends that two challenged regulations, 20 C.F.R. §718.202(a)(defining "legal pneumoconiosis"), and 20 C.F.R. §718.201(c)(recognizing pneumoconiosis as a latent and progressive disease), affect the outcome of this case. Island Creek contends that 20 C.F.R. §718.201(c) and 20 C.F.R. §718.204(a)(specifying that a nonrespiratory disability is irrelevant to whether a miner is totally disabled due to pneumoconiosis), affect the outcome of this case.

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. The principle that pneumoconiosis is progressive is the same under both the existing law

[2] We affirm as unchallenged on appeal the administrative law judge's finding of eighteen years and five months of coal mine employment, his finding that the weight of the new x-ray readings did not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and his finding that the weight of the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3)(2000). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

recognizing the progressive nature of pneumoconiosis, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996), and 20 C.F.R. §718.201(c), which codifies existing law. 65 Fed. Reg. 79937, 79971-72. Similarly, 20 C.F.R. §§718.201(a)(2) merely codifies existing law recognizing "legal pneumoconiosis." *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, BLR (4th Cir. 2000); 65 Fed. Reg. 79937-38. Additionally, review of the record indicates that although some physicians diagnosed a nonrespiratory disability due to a preexisting back injury, the administrative law judge did not rely on that nonrespiratory diagnosis in any way when he found that total respiratory disability was not established. Thus, contrary to Island Creek's contention, revised 20 C.F.R. §718.204(a) is not implicated on this record. Finally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, we will proceed with the adjudication of this appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, and the subsequent claim is filed prior to January 20, 2001, 20 C.F.R. §725.2(c), the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Rutter, supra*. If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id*.

Claimant's prior claim was denied because the record did not establish the existence of pneumoconiosis or the presence of a totally disabling respiratory or

pulmonary impairment. Therefore, the administrative law judge properly considered whether the evidence developed since the prior denial established either the existence of pneumoconiosis or total disability.

Having found that the weight of the new x-ray readings by the most highly qualified readers did not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), Decision and Order at 8; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), the administrative law judge considered the medical opinions of five physicians pursuant to 20 C.F.R. §718.202(a)(4). Dr. Rasmussen, who is Board-certified in Internal Medicine, examined and tested claimant and diagnosed coal workers' pneumoconiosis by chest x-ray and chronic bronchitis due to both cigarette smoking and coal dust exposure. Director's Exhibit 13; Claimant's Exhibit 1. By contrast, examining physicians Drs. Crisalli and Zaldivar, who are Board-certified in Internal Medicine and Pulmonary Disease, stated that claimant's chest x-rays show that he does not have coal workers' pneumoconiosis, and concluded that claimant has mild, nondisabling chronic obstructive pulmonary disease due to smoking. Director's Exhibit 18; Employer's Exhibits 4, 6, 16. Consulting physicians Drs. Fino and Morgan, who also possess pulmonary medicine credentials,[3] reviewed claimant's medical records and reached the same conclusion. Employer's Exhibits 5, 9.

The administrative law judge noted that Dr. Rasmussen stood alone in diagnosing clinical coal workers' pneumoconiosis or any pulmonary disease related to coal dust exposure. The administrative law judge found that, compared to the "well reasoned" opinions diagnosing no lung disease related to coal dust exposure, "Dr. Rasmussen's rationale for his finding is very weak as it was based solely on claimant's history of coal dust exposure and the x-ray evidence of pneumoconiosis." Decision and Order at 8. The administrative law judge questioned Dr. Rasmussen's medical rationale because, "[a]s noted, the preponderance of the x-ray evidence is negative for pneumoconiosis." *Id*. Consequently, the administrative law judge found that "[a] preponderance of the evidence does not support a finding of the existence of pneumoconiosis at (a)(4)." Decision and Order at 9.

[3] The record indicates that Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease and is qualified as a B-reader of chest x-rays. Employer's Exhibit 9. Doctor Morgan's curriculum vitae lists credentials conferred by British medical authorities. Employer's Exhibit 4. On appeal, claimant does not contest Island Creek's description of Dr. Morgan's credentials as similar to U.S. Board-certifications.

On the issue of total disability, the administrative law judge found Dr. Rasmussen's opinion diagnosing claimant totally disabled based on an impairment in exercise blood gas exchange to be outweighed by the contrary opinions of Drs. Crisalli, Zaldivar, Fino, and Morgan, and by the objective test results of record. The administrative law judge noted that Dr. Rasmussen relied on the results of an April 27, 1998 exercise blood gas study which yielded qualifying[4] values, but found that "Dr. Crisalli and Dr. Morgan provided persuasive reasons for questioning the validity of this study," and found additionally that "further doubt is cast on this test by the much higher p02 values from the other exercise studies of record. . . ." Decision and Order at 9. The administrative law judge found that the contrary opinions diagnosing a mild impairment "which would not prevent [claimant] from doing his last coal mine job as a bulldozer operator,"[5] were better supported by the generally non-qualifying pulmonary function and blood gas studies of record, and were entitled to greater weight based on the authoring physicians' superior qualifications in pulmonary medicine. *Id*.

Claimant does not challenge the administrative law judge's analysis of the opinion of Dr. Rasmussen, but instead argues that the reports of Drs. Crisalli, Zaldivar, Fino, and Morgan merit no weight because they are flawed in various ways and because they express opinions that are hostile to the Act. Claimant's Brief at 1-8.

We need not address claimant's contention. Claimant bears the burden of establishing the existence of pneumoconiosis and total disability, and here, substantial evidence supports the administrative law judge's unchallenged finding that the opinion of Dr. Rasmussen does not support claimant's burden with respect to either element. Specifically, the administrative law judge permissibly analyzed Dr. Rasmussen's reasoning and the underlying bases of Dr. Rasmussen's diagnosis of pneumoconiosis and total disability, and reasonably considered the physicians' comparative credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Additionally, the administrative law judge correctly weighed Dr. Rasmussen's opinion as to the existence of pneumoconiosis against all of the relevant evidence of record, including the x-ray readings. *See*

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[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

[5] Review of the record indicates that Dr. Crisalli was familiar with the specific physical requirements of claimant's job as a bulldozer operator. Employer's Exhibit 16 at 35; *see Walker v. Director, OWCP*, 927 F.2d 181, 184, 15 BLR 2-16, 2-22 (4th Cir. 1991). Dr. Fino opined that even assuming that claimant's job as a bulldozer operator required heavy labor, claimant retained the respiratory capacity to perform it. Employer's Exhibit 9.

Island Creek Coal Co. v. Compton, 211 F.3d 203, 208, BLR (4th Cir. 2000).

Because the administrative law judge's unchallenged findings are supported by substantial evidence, we affirm his findings that the new evidence did not establish either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment. Therefore, we affirm the administrative law judge's finding that a material change in conditions was not established pursuant to 20 C.F.R. §725.309(d)(2000) and that benefits must therefore be denied. *See Rutter, supra*. Consequently, we need not address Island Creek's cross-appeal.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge