BRB No. 00-0882 BLA

RALPH H. STEWART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
	)	
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Ralph H. Stewart, Williamsburg, Kentucky, *pro se*.

Sarah M. Hurley (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: DOLDER and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denial of Benefits (99-BLA-0333) of Administrative Law Judge Robert L. Hillyard 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] In this duplicate

[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.

claim, the administrative law judge found that claimant's prior claim was finally denied on August 3, 1983.[2] The administrative law judge then considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 under the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[3] After crediting claimant with six years and seven months of coal mine employment, the administrative law judge found the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment and therefore insufficient to establish a material change in conditions.[4]

[2] Claimant filed his initial claim on May 23, 1983 which was denied by the district director on August 3, 1983 because claimant had not established any element of entitlement under the Act. Director's Exhibit 32. Claimant took no further action on that claim until he filed the present claim for benefits. Director's Exhibit 32.

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The administrative law judge states that a material change in conditions will be established if the newly submitted evidence establishes the existence of pneumoconiosis since the prior claim was denied because claimant did not establish the existence of pneumoconiosis and, therefore, any of the elements necessary for entitlement. Decision and Order at 11. However, inasmuch as the administrative law judge ultimately concluded that a material change in conditions was not established after considering the evidence relevant to

Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director argues that inasmuch as the administrative law judge rationally concluded that the newly submitted evidence established neither clinical nor legal pneumoconiosis, even if the evidence obtained in conjunction with claimant's previous claim was considered, the result would not change. Specifically, the Director citing *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988), contends that the preponderance of x-ray readings by the highly qualified readers would still be negative for pneumoconiosis and Dr. Baker's April 26, 1983 opinion would be too remote in time to outweigh Dr. Westerfield's 1998 well-reasoned opinion.

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 March 9, 2001. Claimant asserts generally that the challenged regulations will have an affect on the outcome of the case and that he is entitled to benefits. The Director responds, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the responses from the parties and our review, 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must

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both the existence of pneumoconiosis and total disability, Decision and Order at 12-19, we will consider his findings on both elements as they relate to a material change in conditions. Decision and Order at 11.

affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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 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. 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*).

In finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the majority of negative interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader. This was rational. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), *see Perry*, *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Decision and Order at 10. Further, inasmuch as there were no biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis based on that evidence. 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis by the use of presumptions covering complicated pneumoconiosis, claims filed prior to January 1, 1982, or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Turning to the newly submitted physicians' opinions, the administrative law judge accorded little weight to Dr. Baker's opinion as he found it inconsistent and equivocal as to the cause of claimant's obstructive impairment, and unsupported by the most recent objective evidence.[5] This was rational. Director's Exhibits 8, 22, 24. *See Justice v. Island Creek Coal*

[5] Dr. Baker attributed claimant's impairment to both coal mine employment and cigarette smoking, but also stated that if claimant had less than seven years of coal mine employment, coal dust exposure would have played a "negligible" role in claimant's impairment. Director's Exhibit 22. The administrative law judge found that claimant established six years and seven months of coal mine employment. Decision and Order at 6. The administrative law judge's finding on length of coal mine employment is affirmed as rational and supported by substantial evidence. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

Co., 11 BLR 1-91 (1988). Similarly, the administrative law judge rationally accorded little weight to Dr. Sundaram's opinion because it provided an insufficient basis for his diagnosis, and was inconsistent and equivocal.[6] Decision and Order at 14; Director's Exhibit 34; Claimant's Exhibit 1; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Justice*, *supra*. The administrative law judge also rationally accorded less weight to Dr. Moses's opinion, as his opinion was not supported by underlying testing. Decision and Order at 14-15; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Finally, the administrative law judge credited the opinion of Dr. Westerfield, that claimant showed no evidence of coal workers' pneumoconiosis or any occupationally acquired disease, and that claimant's obstructive impairment was due to his smoking history, as the opinion was well-reasoned, documented and supported by the objective studies. Director's Exhibit 36. The administrative law judge did not abuse his discretion in finding Dr. Westerfield's opinion entitled to determinative weight, as this was the only opinion which he found to be supported by the underlying objective evidence. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence. *See Clark*, *supra*; *Anderson*, *supra*. Thus, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis and, therefore, a material change in conditions on that basis. *Ross*, *supra*.

Turning to the issue of total disability, the administrative law judge correctly found that the newly submitted blood gas studies were non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. § 718.204(b)(ii)(2); Director's Exhibits 9, 34, 36. Likewise, the administrative law judge correctly found that inasmuch as the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(iii).

Regarding the pulmonary function studies, the administrative law judge gave less

[6] Although Dr. Sundaram interpreted an x-ray as positive, he stated that he based his diagnosis of pneumoconiosis on the duration of coal dust exposure. Decision and Order at 14; Director's Exhibit 34.

weight to the pulmonary function tests which were invalidated and he accorded more weight to the July 23, 1998 non-qualifying test than to the July 13, 1993 qualifying test, because the more recently performed test was a more accurate reflection of claimant's current condition. Decision and Order at 17; Director's Exhibits 7, 36. The administrative law judge may accord greater weight to the more recent evidence on the issue of total disability. *Cooley*, *supra*. In the instant case, however, the administrative law judge accorded little weight to tests which he found were subsequently invalidated, including a qualifying pulmonary function study conducted on June 16, 1997 and a non-qualifying study conducted on October 7, 1997. The Board has held that while an administrative law judge may reject a qualifying pulmonary function study which is subsequently invalidated, he must provide a rationale for preferring the opinion of the consulting physician over the administering physician. *Siegel v. Director, OWCP*, 8 BLR 1-156 (Brown, J., dissenting)(1985). In addition, the Board has held that any deficiency in claimant's cooperation or comprehension in the performance of a pulmonary function study which results in non-qualifying results should not affect the reliability of the test results inasmuch as claimant's results would only be higher with better cooperation or comprehension. *See Crapp v. United States Steel Corp.*, 6 BLR 1-476 (1983). Accordingly, on remand, the administrative law judge must reconsider the pulmonary function study evidence. 20 C.F.R. §718.204(b)(i); *Cooley*, *supra*; *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1986).

Turning to the physicians' opinions, the administrative law judge accorded greater weight to Dr. Westerfield's opinion, that claimant retains the respiratory capacity to perform the work of a miner, even though Dr. Westerfield found a mild obstructive impairment based on pulmonary function testing. The administrative law judge found that Dr. Westerfield's opinion, which relied on non-qualifying pulmonary function and blood gas study results, was well-reasoned, well-documented and supported by the evidence, as opposed to the opinions of Drs. Baker, Sundaram and Moses, which the administrative law judge found to be not as well- reasoned, documented or supported by the evidence. In light of the holding in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, BLR 2- (6th Cir. 2000), that even a mild respiratory impairment may preclude the performance of the miner's usual duties, depending on the exertional requirements of those duties, however, this case must be remanded for reconsideration of the physicians' opinions thereunder. In assessing the relative credibility of the physicians on the issue of total disability, the administrative law judge must consider their knowledge of the exertional requirement of claimant's usual coal mine employment, *see Cornett*, *supra*. Even if the doctors are unfamiliar with claimant's usual coal mine employment, the administrative law judge may make a total disability finding by comparing the exertional requirements of claimant's usual coal mine employment with the limitations set out in the doctors' reports which he credits. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). After considering whether the physicians' opinions are sufficient to establish a totally disabling respiratory impairment under Section 718.204(b)(iv) pursuant to the

directives set forth in *Cornett*, *supra*, the administrative law judge must weigh all the evidence on total disability together at Section 718.204(b)(i)-(iv), to determine if a totally disabling respiratory impairment is established, *see Fields*, *supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*) and, therefore, a material change in conditions. *See Ross*, *supra*. If, on remand, the administrative law judge finds that a material change in conditions is established, he must consider all the evidence, both old and new, to determine if claimant has established the necessary elements of entitlement.

Although the Director argues that the administrative law judge's decision denying benefits can be affirmed, he does so on the basis that the evidence in the prior claim is too remote in time to support a finding of pneumoconiosis. We reject the Director's contention because it is the responsibility of the administrative law judge to evaluate the evidence in the first instance and the administrative law judge in the instant case has yet to consider this evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge