BRB No. 00-0900 BLA

KATHERN S. EVANS (Administratrix of the Estate of RONALD L. MEADE)	)	
Claimant-Petitioner	)	
v.	)	
U.S. STEEL MINING COMPANY, INCORPORATED	)	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 on Remand of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Kathern S. Evans, Asheboro, North Carolina, *pro se*.

Howard G. Salisbury, Jr. (Kay Castro & Chaney PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] representing herself, appeals the Decision and Order on Remand (98-BLA-

0355) of Administrative Law Judge Daniel F. Sutton denying benefits 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).[2] This case, which involves a duplicate claim, is before the Board for the second time. The miner filed a duplicate claim on April 14, 1997.[3] By Decision and Order dated December 28, 1998, Administrative Law Judge Daniel F. Sutton (the administrative law judge) found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). The administrative law judge further found that the newly submitted evidence was insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c) (2000). The administrative law judge also found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) or that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). The administrative law judge, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. By Decision and Order dated February 28, 2000, the Board affirmed several of the administrative law judge's findings: that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000); that the newly submitted evidence was insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c) (2000); and that the newly submitted evidence was insufficient to establish both total disability pursuant to 20 C.F.R. §718.204(c)(2), (c)(3) and (c)(4) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Meade v. U.S. Steel Coal Mining Co.*, BRB No. 99-0435 BLA (Feb. 28, 2000) (unpublished). The Board held, however, that the administrative law judge erred in his consideration of the newly submitted pulmonary function study evidence pursuant to 20 C.F.R. §718.204(c)(1) (2000). *Id.* The Board, therefore, vacated the administrative law judge's finding that the newly submitted pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000) and remanded the case for further consideration. *Id.* The Board noted that if, on remand, the administrative law judge found the newly submitted pulmonary function study evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000), he would be required to weigh all the relevant, newly submitted evidence together, both like and unlike, to determine whether the miner had established total disability pursuant to 20 C.F.R. §718.204(c) (2000), thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.*; *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996).

On remand, the administrative law judge found that the newly submitted pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000). Assuming *arguendo* that the newly submitted pulmonary function

study evidence had been sufficient to establish total disability, the administrative law judge noted that he would have found that all of the newly submitted evidence, when considered together, was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

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 9, 2001, to which employer and the Director have responded.[4] Based on the briefs submitted by employer and the Director,[5] and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board 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 to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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 considering whether the newly submitted pulmonary function study evidence was sufficient to establish total disability,[6] the administrative law judge rationally assigned more weight to the post-bronchodilator values from the miner's 1997 pulmonary function studies because they were more "indicative of the [miner's] ventilatory function with available medical intervention." *See generally Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983); Decision and Order on Remand at 4; Director's Exhibit 8; Employer's Exhibit 1. The administrative law judge noted that the miner's two 1997 pulmonary function studies produced inconsistent, post-bronchodilator results, namely qualifying results in June 1997 and non-qualifying results in October 1997.[7] Decision and Order on Remand at 4. Noting the "inconclusive nature" of the two 1997 pulmonary function studies, the administrative law judge found that the newly submitted pulmonary function study evidence was insufficient to establish total disability. *Id.* Inasmuch as it is based on substantial evidence,

we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i).[8] We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[9] *See Rutter*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge