BRB No. 00-0952 BLA

AUDLEY W. BARGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CORNETT COAL COMPANY,	)	DATE ISSUED:
	)	
INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Rejection of Claim of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Gretchen Nunn Gullett (Boehl, Stopher & Graves), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order - Rejection of Claim (00-BLA-0008) of

[1] Claimant filed his first claim for benefits on August 4, 1993, which was denied by

Administrative Law Judge Rudolf L. Jansen 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).[2] The administrative law judge found, and the parties stipulated to, six and one-half years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis and total disability, elements previously adjudicated against claimant, and thus, found that a material change in conditions was not established. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.

On appeal, claimant contends that the newly submitted evidence of record is sufficient to establish the existence of pneumoconiosis and total disability, and thus, sufficient to establish a material change in conditions. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

---

the district director on January 24, 1994. Director's Exhibit 26. Claimant took no further action on that claim. Claimant filed a second claim for benefits on October 13, 1998, which is the claim before us now. Director's Exhibits 1, 8.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. Theses regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 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.

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 16, 2001, to which only the Director has responded. Based on the response submitted by the Director and our review, we hold that the outcome of this case is not altered by the challenged regulations.[3] Therefore, we will proceed to adjudicate the merits 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 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 establish 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 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*).

First, claimant contends that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis. We disagree. Contrary to claimant's arguments, the administrative law judge rationally found that the existence of pneumoconiosis was not established because all of the newly submitted x-ray readings by physicians with superior qualifications were negative for the existence of pneumoconiosis. Director's Exhibits 7, 22-25; Employer's Exhibits 1-5; Decision and Order at 8; *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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the newly submitted x-ray evidence.[4]

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[4] The administrative law judge's findings pursuant to 20 C.F.R. 718.202(a)(2) and

Next, claimant contends that the administrative law judge erred in his weighing of the newly submitted medical opinion evidence and that the opinion of Dr. Baker is sufficient to establish the existence of pneumoconiosis. We disagree. Contrary to claimant's arguments, the administrative law judge permissibly accorded less weight to the opinion of Dr. Baker as his placing of a question mark before the words "coal dust exposure" when reporting the etiology of claimant's respiratory condition rendered his opinion equivocal and vague. Director's Exhibit 7. Rather, the administrative law judge rationally accorded more weight to Dr. Westerfield's opinion, of no coal worker's pneumoconiosis and no respiratory impairment arising out of coal mine employment, because it was unequivocal, and better reasoned and documented. The administrative law judge also rationally accorded greater weight to the opinion of Dr. Westerfield based on his superior qualifications. Employer's Exhibit 2 at 12; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibit 7; Employer's Exhibit 6; Decision and Order at 6. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis on the basis of medical opinions.

Claimant next contends that the administrative law judge erred in finding that claimant was not totally disabled pursuant to Section 718.204(c). We disagree. The administrative law judge correctly determined that total disability was not established as the newly submitted pulmonary function and blood gas studies produced non-qualifying values and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); Director's Exhibits 18, 25; Decision and Order at 10; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Likewise, the administrative law judge also rationally determined that the newly submitted opinions of record were insufficient to establish total disability as Dr. Baker opined that claimant had the respiratory capacity to perform his coal mine work and Dr. Westerfield found no evidence of respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon*. 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director OWCP*, 8 BLR 1-245 (1985); Director's Exhibits 17, 25; Employer's Exhibit 6; Decision and Order at 11. Further, contrary to claimant's contention, the administrative law judge did consider the exertional requirements of claimant's duties as a belt man, his last job in coal mine employment, in his

---

(3)(2000) are affirmed as unchallenged on appeal. 20 C.F.R. §718.202(a)(2), (3); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

weighing of the evidence. Decision and Order at 4; *see Cornett v. Benham Coal Inc.*, 227 F.3d 569, BLR 2- (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Moreover, claimant's contention that the administrative law judge erred by failing to consider claimant's age, education and work experience in determining total disability lacks merit as such factors are not relevant in determining whether claimant can do his usual coal mine work. *Taylor v. Evans and Gambrel Co, Inc.*, 12 BLR 1-83 (1988). Finally, although, as claimant contends, pneumoconiosis has been recognized as a progressive disease, claimant still bears the burden of establishing that he suffers from a totally disabling respiratory impairment. *See Director, OWCP v. Greenwich Colleries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Colleries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2)(iv). Thus, inasmuch as claimant has failed to establish the existence of pneumoconiosis and total disability by the newly submitted evidence, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions and must affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order - Rejection of Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge