BRB No. 00-0606 BLA

JOHN WUJCIK, JR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
	)	
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.

C. Patrick Carrick (Law Office of C. Patrick Carrick), Morgantown, West Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Helen H. Cox (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: SMITH, McGRANERY, and McATEER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-

0023) of Administrative Law Judge Daniel L. Leland 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] The administrative law judge noted the stipulation of the parties regarding the length of coal mine employment and credited claimant with twenty-seven years of coal mine employment. The administrative law judge considered the newly submitted evidence and found it insufficient to establish a material change in conditions as set forth in *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, benefits were denied.

On appeal, claimant asserts that he has submitted evidence in support of his claim which should establish a material change in conditions, and maintains that the administrative law judge erred by relying on evidence developed by employer for the "sole forensic purpose of defeating this claim," Claimant's Brief at 3. In addition, claimant asserts that any conflict in the evidence should be resolved in his favor. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a brief in this appeal.

[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.

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 February 21, 2001, to which employer and the Director have responded.[2] The Director states that the amended regulations have no impact on this appeal. Employer asserts that the amended regulations do not affect the disposition of the issues before the Board on appeal. Employer further asserts, however, that if the amended regulations are upheld, remand would be required for further development of the evidence. Based on the briefs submitted by employer and the Director, 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.

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

The procedural history of this case is as follows. Claimant filed an application for benefits on December 5, 1983. On April 3, 1987, Administrative Law Judge Michael P. Lesniak issued a Decision and Order - Denying Benefits. Judge Lesniak credited claimant with twenty-seven years of coal mine employment and noted that employer stipulated to the existence of pneumoconiosis arising out of coal mine employment. However, Judge Lesniak found the evidence insufficient to establish that claimant was totally disabled due to pneumoconiosis. Consequently, he denied benefits. Director's Exhibit 28.

On December 11, 1990, claimant filed a new application for benefits. On May 20, 1991, the claims examiner issued a denial of benefits. The claims examiner denied benefits finding that the evidence did not show that claimant was totally disabled by

[2] 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 February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

pneumoconiosis and that the evidence did not establish a material change in conditions. Director's Exhibit 29.

Claimant filed a new application for benefits on April 1, 1998. Director's Exhibit 1. On February 24, 2000, Administrative Law Judge Daniel L. Leland (the administrative law judge) issued his Decision and Order - Denying Benefits. The administrative law judge summarized the evidence submitted with the most recent claim for benefits and found it insufficient to establish a material change in conditions. Consequently, benefits were denied.

Claimant asserts that the administrative law judge erred by relying on the opinions of physicians "who[se] services were engaged by the employer for the sole forensic purpose of defeating this claim." Claimant's Brief at 3. The Board has held that medical opinions prepared for litigation purposes may be credited by an administrative law judge. *See Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Further, the Board has held that a finding that a physician is biased must be based on the evidence in the record. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Consequently, we hold that claimant's assertion lacks merit.

Claimant also asserts that the pre-bronchodilator result of the pulmonary function study and a medical opinion he submitted are sufficient to establish a material change in conditions. In order to establish a material change in conditions, claimant must prove, by a preponderance of the newly submitted evidence, at least one of the elements of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309 (2000); *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); *Church v. Eastern Associated Coal Co.*, 21 BLR 1-51 (1997), *modifying on recon.*, 20 BLR 1-8 (1996). In determining whether claimant has established a material change in conditions, the administrative law judge must consider all of the newly submitted evidence on the issue of total disability, which in this case includes the results of two pulmonary function studies, Director's Exhibits 9, 23, two blood gas studies, Director's Exhibits 12, 23, and medical opinions from four physicians, Director's Exhibits 11, 23; Employer's Exhibits 1, 4-7. *See Rutter, supra*. We, therefore, reject claimant's assertion that the medical opinion and the result of one pulmonary function study are sufficient to establish a material change in conditions and we affirm the administrative law judge's consideration of the evidence in rendering his material change in conditions finding. In addition, we note that the Board is not empowered to reweigh the evidence. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Finally, claimant urges that any conflict in the evidence must be resolved in

claimant's favor. We reject this assertion. The current regulations no longer include a statement providing claimants with the benefit of reasonable doubt. *See* 20 C.F.R. §718.3; *see also* 65 Fed. Reg. 79925-27. Moreover, the United States Supreme Court held in *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), that the true doubt rule is inapplicable in the adjudication of black lung claims, and that, therefore, claimant must establish each element of entitlement by a preponderance of the evidence.

Inasmuch as claimant makes no other assertions on appeal, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a material change in conditions.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge