BRB No. 00-0616 BLA

HASSEL KENDRICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CIMARON MINERALS 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 Second Decision and Order Upon Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Hassel Kendrick, Elkhorn City, Kentucky, *pro se*.

Joanna Han (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Second Decision and Order Upon Remand (95-BLA-0958) of Administrative Law Judge David A. Sarno, Jr., 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).[1] This case is

[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.

before the Board for the third time. In the initial Decision and Order, the administrative law judge found that claimant filed a claim on October 1, 1984, which was denied on March 27, 1985. Director's Exhibit 49. Claimant filed a duplicate claim on May 26, 1993. Director's Exhibit 1. Applying the regulations found at 20 C.F.R. Part 718, the administrative law judge found that claimant's newly submitted evidence was insufficient to establish the existence of pneumoconiosis and insufficient to establish total disability due to pneumoconiosis and therefore found it insufficient to establish a material change in conditions. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied. Claimant appealed, and in *Kendrick v. Cimaron Minerals, Inc.*, BRB No. 97-0782 BLA (Feb. 24, 1998)(unpub.), the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration, with instructions to clarify the contents of the record.

On remand, the administrative law judge again found the evidence insufficient to establish a material change in conditions and denied benefits. Claimant appealed, and in *Kendrick v. Cimaron Minerals, Inc.*, BRB No. 98-1286 BLA (Nov. 17, 1999)(unpub.), the Board affirmed the administrative law judge's finding that the newly submitted evidence failed to establish a material change in conditions by showing that the existence of pneumoconiosis was established, but vacated the administrative law judge's findings regarding total disability and remanded the case with instructions to reconsider the issue of total disability.[2]

On second remand, the administrative law judge reviewed all the newly submitted evidence, found that claimant had failed to establish total disability, and had therefore failed to establish a material change in conditions. Accordingly, benefits were again denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

[2] The Board noted that in his discussion of the medical opinion evidence, the administrative law judge erred in preferring the invalidations of the pulmonary function studies of the reviewing physicians, Drs. Fino and Younes, over the administering physician, without providing a rationale. *See* Board's slip op. at 4 (Nov. 17, 1999); Claimant's Exhibit 4; Employer's Exhibit 17; Director's Exhibit 55.

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 February 21, 2001, to which the Director and the employer have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the Director and the employer, 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 will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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).

Considering all the pulmonary function and blood gas study evidence of record, the administrative law judge properly found that total disability was not established based on pulmonary function studies and blood gas studies as none of the pulmonary function studies or blood gas studies of record yielded qualifying results. 20 C.F.R. §718.204(b)(2)(i), (ii).[3] *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). Moreover, the administrative law judge properly found that total disability could not be established based on a showing of cor pulmonale with right-sided congestive heart failure as there was no evidence of record to suggest that claimant suffered from this condition. 20 C.F.R. §718.204(b)(2)(iii).

Turning to the medical opinion evidence of record, the administrative law judge discredited the opinion of Dr. Sundaram finding claimant totally disabled as it was based upon a pulmonary function study that was subsequently invalidated by Drs. Fino and Younes.

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, (2000) respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(ii).

Employer's Exhibit 17; Director's Exhibits 51, 52, 55; Claimant's Exhibit 4. Pursuant to the Board's instructions, the administrative law judge stated that he credited Dr. Fino's opinion concerning the pulmonary function study values over the opinion of Dr. Sundaram because of Dr. Fino's superior credentials as a pulmonary specialist, whereas the credentials of Dr. Sundaram were not in the record. The administrative law judge further stated that while he did
not specifically rely upon the invalidation report of Dr. Younes, because his credentials were not in the record, he nevertheless found it "corroborative" of Dr. Fino's invalidation report. Second Decision and Order Upon Remand at 2. This was rational. *See Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997).

In addition, the administrative law judge permissibly found that the opinions of Drs. Guberman and Wright were entitled to "insignificant weight," compared to the opinions of Drs. Dahhan, Broudy, Fino and Anderson as their credentials were not in the record, while the record clearly showed that the other physicians were pulmonary specialists. Second Decision and Order Upon Remand at 2; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18, 1-20 (1994); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). Moreover, although Dr. Guberman diagnosed a totally disabling pulmonary impairment related to coal dust exposure, the administrative law judge permissibly determined that Dr. Guberman's finding is "essentially a conclusion without rationale" and that he "made no attempt to explain how the non-qualifying spirometry and blood gas study values led him to conclude that Claimant suffered from a totally disabled pulmonary impairment," when Dr. Fino had invalidated the pulmonary function study upon which he relied and when the contrary opinions of the better qualified physicians were consistent and well-reasoned. Director's Exhibit 52; *Hill, supra*; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J. concurring); *Carson, supra*. Further, the administrative law judge permissibly accorded insignificant weight to the opinion of Dr. Wright, who termed claimant "occupationally disabled for any work that would expose him to noxious dust, gases or fumes," as his credentials were not in the record and as his opinion was insufficient to meet claimant's burden of establishing total disability from a pulmonary impairment as required by the Act. Second Decision and Order Upon Remand at 2. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon*. 9 BLR 1-104 (1986).

Thus, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Dahhan, Broudy, Fino and Anderson all of whom found that claimant was not suffering from a totally disabling pulmonary impairment as they were pulmonary specialists, *see Hill, supra*; *Prater, supra*, and their opinions were consistent with the objective evidence. Second Decision and Order Upon Remand at 2; *Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983); *Seals, supra*; *Carson, supra*. Accordingly, the administrative law judge properly found that the evidence was insufficient to establish total

disability, 20 C.F.R. §718.204(b)(2)(iv), and therefore insufficient to establish a material change in conditions. *Ross*, *supra*.

Accordingly, the Second Decision and Order Upon Remand denying benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge