BRB No. 01-0655 BLA

FELIX BOYD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	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 Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Felix Boyd, Haysi, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (00-BLA-0948) of Administrative Law Judge Alice M. Craft rendered 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] In this duplicate claim, the

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The Department of Labor has amended the regulations implementing the Federal

administrative law judge found that claimant's prior claim was finally denied on March 9, 1998 because, although claimant established that he was totally disabled, he failed to establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, or that his total disability was due to pneumoconiosis. Director's Exhibit 27-47. After accepting the parties' stipulation to 36.36 years of coal mine employment, the administrative law judge found the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis and, therefore, insufficient to establish a material change in conditions. *See* 20 C.F.R. §§718.202(a)(1)-(4), 725.309(d)(2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal on the merits. Both employer and the Director contend that application of the revised regulations will not affect the outcome of this case.

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 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 into the Act 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*).

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.

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997), in deciding whether claimant demonstrated a material change in conditions. In *Rutter*, the court held that in ascertaining whether claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In his prior claim, claimant failed to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, or that the pneumoconiosis was totally disabling. *See* Proposed Decision and Order - Memorandum of Conference of March 9, 1998. Director's Exhibit 27-47. The administrative law judge, therefore, properly reviewed the evidence submitted following the denial of claimant's prior claim to determine whether it established the existence of pneumoconiosis since the other elements of entitlement adjudicated against claimant, *i.e.*, cause of pneumoconiosis and cause of total disability, rest on first finding the existence of pneumoconiosis established. *Rutter*, *supra*.

In reviewing the newly submitted evidence regarding the existence of pneumoconiosis, the administrative law judge concluded that all of the x-ray films had been read as negative by all the readers. Director's Exhibits 8, 10, 21, 22. The administrative law judge, therefore, correctly found the x-ray evidence insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis is affirmed.

Turning to the newly submitted physicians' opinions, the administrative law judge accorded little weight to Dr. Forehand's opinion, the only newly submitted medical opinion to diagnose clinical pneumoconiosis and a respiratory impairment arising out of coal mine employment,[3] as he found that it relied on "a grossly inaccurate understanding of the [c]laimant's smoking history." Decision and Order at 9; Director's Exhibit 1. This was rational. *See Bobick v. Saginaw Mining Co.*, 13 BLR1-52 (1988); *Stark*, *supra*; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1983). Further, the administrative law judge accorded little weight to this opinion, which was submitted in connection with the duplicate claim, because it was based "on essentially the same medical findings," as his first opinion, which

[3] The other newly submitted medical opinion from Dr. McSharry found no evidence of coal workers' pneumoconiosis or any lung disease caused or aggravated by coal mine employment. Director's Exhibits 24, 29; *see* 20 C.F.R. §718.201.

was submitted with the prior claim and which was rejected. This was rational. *See Rutter* at 1361-1362, 2-235-236. 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. *Rutter*, *supra*.[4]

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[4] Although the administrative law judge also refers to evidence submitted in connection with claimant's first claim, since it is clear that the administrative law judge was relying on the newly submitted evidence to find that a material change in conditions, *i.e.*, the existence of pneumoconiosis, was not established, any error in his discussion of the prior evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).