BRB No. 99-0892 BLA

CHESTER H. BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
R & J ENERGY COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Respondent/Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Virginia Thornsbury, Iaeger, West Virginia, for claimant.

K. Keian Weld (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Edward Waldman (Henry L. Solano, 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1649) of Administrative Law Judge Richard T. Stansell-Gamm 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). The parties stipulated, and the administrative law judge found, that claimant[1] established at least twenty-two years of coal mine employment, and the administrative law judge considered the claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found that claimant's newly submitted evidence established the existence of pneumoconiosis, and thus, demonstrated a change in conditions pursuant to 20 C.F.R. §725.309 and the holding in *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert denied,* 519 U.S. 1090 (1997),[2] but that the totality of the record evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

[1]Claimant is the miner, Chester H. Blankenship, who filed his initial application for benefits on June 29, 1973, which claim was finally denied on October 6, 1980. Director's Exhibit 22. Claimant filed a duplicate claim on February 11, 1992, which was denied by the district director on August 3, 1992. Director's Exhibit 21. On January 10, 1995, claimant filed the present duplicate claim. Director's Exhibit 1.

[2]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the State of West Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

On appeal, claimant argues that the administrative law judge erred by finding that claimant had received a complete pulmonary evaluation and by exhibiting bias in favor of employer by admitting Dr. Fino's medical report. Claimant further contends that the Director removed relevant evidence from the record. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director), responds that claimant has not established that the Director has failed to fulfill its statutory obligation to provide claimant with a complete pulmonary evaluation.

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 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order denying benefits is supported by substantial evidence and contains no reversible error therein. The administrative law judge considered the relevant evidence and found that the requirements of 20 C.F.R. §718.204(c)(1)-(3) were not met since all of the pulmonary function studies and blood gas studies produced non-qualifying values[3] and there was no evidence of cor pulmonale with right sided congestive heart failure. Director's Exhibits 12, 13, 21, 22, 26; Claimant's Exhibit 1; *see generally Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992); *Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987).

[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, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge considered all the relevant medical reports of record. The administrative law judge rationally accorded little weight to Dr. Odom's opinion since he did not explain how his objective findings of a mild impairment supported his diagnosis of total disability. Director's Exhibit 22; *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1988). The administrative law judge also reasonably accorded Dr. Hatfield's diagnosis of a mild respiratory disability little weight since it was rendered in 1980 and, therefore, was not probative of claimant's present condition. Director's Exhibit 22; *see Wilt v. Wolverine Mining Co.,* 14 BLR 1-70 (1990); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Because they did not address the specific issue of whether claimant was totally disabled due to a respiratory or pulmonary impairment, the administrative law judge properly rejected the West Virginia Occupational Pneumoconiosis Board awards in both 1983 and 1987 for a 15 percent respiratory disability, as well as the opinions of Drs. Guberman, Najjar, and Koenig. Decision and Order at 26; Director's Exhibits 21, 26, 31; Claimant's Exhibits 2 at 1-6, 4; *Clark*, *supra*; *Budash*, *supra*; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). The reports of Drs. Jabour and Boutros were also rationally given little weight since they did not explain how their non-qualifying objective tests supported their diagnoses of total respiratory disability, particularly since Dr. Boutros characterized his arterial blood gas study as showing only a mild impairment, and Dr. Jabour characterized claimant's condition as mild restrictive lung disease. Director's Exhibit 26; *Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Clark, supra*; *Tackett, supra*. The administrative law judge rationally credited the opinions of Drs. Rasmussen and Fino, that claimant did not have a total respiratory disability, as most consistent with the objective evidence of record, and as supported by the opinion of Dr. Vasudevan, who also found no evidence of total respiratory disability, and the opinion of Dr. Hatfield. Director's Exhibits 14, 21, 22; Claimant's Exhibits 1, 3; Employer's Exhibit 3; *Trumbo, supra; Clark, supra; Tackett, supra.*

Claimant argues that he has been taking bronchodilators since 1992, including immediately before Dr. Rasmussen administered his pulmonary function study for the Department of Labor on April 19, 1995. Claimant therefore contends that he has not been given a pre-bronchodilator pulmonary function study, and that the instant case must be remanded in order for this test to be administered properly in order to satisfy the Director's burden to provide claimant with a complete pulmonary examination. 30 U.S.C. §923(b); 20 C.F.R. §718.103(b)(8). Claimant further alleges that it is Dr. Rasmussen's burden to establish that his test was given both before and after bronchodilators and that Dr. Rasmussen should have performed a blood test to determine whether claimant was taking breathing medication prior to performing the pulmonary function study. Claimant additionally argues that the administrative law

judge erred by finding that there was no evidence in the record that claimant took bronchodilators before the administration of Dr. Rasmussen's study.

We find no merit in claimant's allegations. The administrative law judge correctly found that the record contains no direct evidence that claimant took his breathing medication before Dr. Rasmussen's test was performed. 20 C.F.R. §718.403; *see Ondecko, supra.* The only evidence in the record relating to this issue is the March 10, 1997 letter to Dr. Rasmussen from claimant's representative.[4] Director's Exhibit 31. Moreover, the record indicates that Dr. Rasmussen responded to claimant's allegation by stating that even if claimant had taken his breathing medication prior to the administration of the study, he believed that the results obtained were accurate. Claimant's Exhibit 3. Accordingly, we hold that substantial evidence supports the administrative law judge's finding that claimant failed to meet his burden of establishing that he was not provided with a complete, credible pulmonary evaluation. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see generally Hodges v. Bethenergy*, *Inc.,* 18 BLR 1-84 (1994); *Pettry v. Director, OWCP,* 14 BLR 1-98 (1990); *Hall v. Director, OWCP,* 14 BLR 1-51 (1990).

We also find no merit in claimant's contention that the administrative law judge demonstrated bias in favor of employer by allowing the medical report of Dr. Fino into the record, but refusing to accept claimant's submission of Dr. Najjar's report. The Decision and Order indicates that Dr. Najjar's summary with diagnosis, addressed to claimant, Claimant's Exhibit 2 at 1, was not admitted into the record because the administrative law judge determined that this evidence was made available to claimant while the instant claim was under consideration by the district director, but was not produced until the case was assigned to an administrative law judge. Thus, the administrative law judge found that claimant failed to satisfy the provisions of 20 C.F.R. §725.456(d), which state that documentary evidence which is obtained by a party during the time a claim is pending before the district director, but is withheld until the claim is forwarded to the Office of Administrative Law Judges, shall not be admitted into the record unless extraordinary circumstances are found, or another party requests the admission of such evidence. In the present case, the administrative law judge rationally determined that claimant had not demonstrated any extraordinary circumstances for failing to introduce Dr. Najjar's letter into the record and as no other party requested the admission of this evidence, it was

[4]We note that claimant has submitted a sworn statement to the Board regarding this issue. However, this evidence was never submitted to the administrative law judge, and the Board may not consider new evidence on appeal. We therefore return this evidence to claimant. *Berka v. North American Coal Corp.,* 8 BLR 1-183 (1985).

properly excluded.[5] 20 C.F.R. §725.456(d); *Hall v. Director, OWCP,* 10 BLR 1-107 (1987); *Adams v. Island Creek Coal Co.,* 6 BLR 1-677 (1983).

We also find no evidence of bias in favor of employer based on the administrative law judge's admission of Dr. Fino's April 1997 medical report. The Decision and Order on Reconsideration indicates that the administrative law judge found that Dr. Fino's report was not in existence at the time the district director was considering claimant's eligibility, and thus, that employer had satisfied the requirements of 20 C.F.R. §725.414(e)(2), which requires employer to make a good faith effort to develop its evidence while the claim is pending before the district director. 20 C.F.R. §725.414(e)(2). Since employer submitted Dr. Fino's report shortly after it was developed, and claimant did not object on the basis that it violated the provisions of 20 C.F.R. § 725.456(b), the administrative law judge did not err in admitting this evidence into the record. *Pruitt v. USX Corp.,* 14 BLR 1-129 (1990); *Morris v. Freeman United Coal Mining Co.,* 8 BLR 1-505 (1986).

Lastly, we reject claimant's contention that the Director removed a second 1992 medical report by Dr. Vasudevan from the record which indicated that claimant was totally disabled. The record contains no indication that a second 1992 report by Dr. Vasudevan was ever introduced by any party. Decision and Order on Reconsideration at 4. Since claimant has offered no evidence to establish the existence of this report in the record, claimant's argument is rejected. *See generally Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991)(*en banc*); *Inman v. Peabody Coal Co.,* 6 BLR 1-1249 (1984). As we find no error in the administrative law judge's findings at Section 718.204(c), they are affirmed as supported by substantial evidence.

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *see Maypray v. Island Creek Coal Co.,* 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

[5]It is noteworthy that the record contains several reports from Dr. Najjar, which the administrative law judge fully considered. Decision and Order at 23-24; Director's Exhibits 26, 31; Claimant's Exhibit 2.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge