BRB No. 00-0626 BLA

JACK BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
UNITED POCAHONTAS COAL COMPANY	)	
	)	
and	)	
	)	
ANGELA-ANN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
PINNACLE CREEK DEVELOPMENT COMPANY	)	
	)	
and	)	
	)	
B&M COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
ROLFE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WV CWP Fund	)	
	)	
Employers/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 of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0673) of Administrative Law Judge Jeffrey Tureck, denying benefits 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).[1] After accepting the parties' stipulation to at least eighteen years of coal mine employment, the administrative law judge found that Pinacle Creek (employer) is the responsible operator. Additionally, the administrative law judge found the evidence insufficient

[1]Claimant's first claim for benefits, filed on July 24, 1995, was denied by the Office of Workers' Compensation Programs on January 18, 1996. This duplicate claim was filed on March 17, 1997. Director's Exhibit 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. 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.

to establish a totally disabling respiratory or pulmonary impairment, and thus, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §§718.204(c) (2000) and 725.309(d) (1999). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's finding that the blood gas study and medical opinion evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), declined to file a brief regarding the merits of claimant's appeal in this case.[2]

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

[2]We affirm as unchallenged on appeal, the administrative law judge's findings on the length of claimant's coal mine employment, the designation of the responsible operator, that the pulmonary function study evidence failed to establish total disability, and that "there is no contention that the claimant is suffering from cor pulmonale." Decision and Order at 2-4; 20 C.F.R.§718.204(c)(1), (3)(2000). *Skrack v. Island Creek Col Co.*, 6 BLR 1-710 (1983).

by order issued on February 21, 2001, to which the Director and employer have responded.[3] Claimant's has not responded to the Board's order.[4] Based on the briefs submitted by the Director and 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.

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

Where a claimant filed a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d) (1999). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish a material change in conditions pursuant to Section 725.309(d) (1999), claimant must establish by a preponderance of the newly submitted evidence at least one of the elements of entitlement that formed the basis for the denial of the prior claim. *See Lisa Lee Mines v. Director, OWCP* [*Ruttter*], 86 F.3d

[3]The Director's brief, dated March 6, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer's brief, dated March 15, 2001, contends that the expanded definition in 65 Fed. Reg. 80, 048 (2000)(to be codified at 20 C.F.R.§718.201(c)) that pneumoconiosis is a latent and progressive disease which may first become detectable after the cessation of coal mine dust exposure, will have an impact on the outcome.

[4]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, is construed as a position that the challenged regulations will not affect the outcome of this case.

1358, 20 BLR 2-227 (4th Cir.1996)(*en banc*), *cert. denied*, 117 S. Ct. 763 (1997). Accordingly, in this case, the administrative law judge correctly stated that in order to establish a material change in conditions claimant must establish, by a preponderance of the newly submitted evidence, the existence of a totally disabling pulmonary or respiratory impairment. *Id;* Decision and Order at 3.

Claimant alleges that the administrative law judge erred in finding that the blood gas studies did not establish total disability as two of the three newly submitted blood gas studies, including the most recent one, indicate a totally disabling respiratory impairment. Claimant further argues that the administrative law judge ignored the objective medical evidence by characterizing the blood gas studies as equivocal. We disagree. The administrative law judge found that of the blood gas studies performed at rest, the April 16, 1997 study yielded qualifying values,[5] the July 30, 1999 study produced "barely" qualifying values, and the February 23, 1998 study yielded non-qualifying values. Decision and Order at 4; Director's Exhibits 9, 47; Claimant's Exhibit 1. Weighing the qualifying 1999 and 1997 blood gas studies at rest against the non-qualifying 1998 study, the administrative law judge, within a proper exercise of his discretion, found the "at rest" blood gas study evidence to be equivocal. *Id.* Further, the administrative law judge correctly found the only exercise blood gas study non-qualifying. Decision and Order at 4; Director's Exhibit 47. Therefore, as the trier-of-fact, the administrative law judge rationally found that the blood gas studies did not establish by a preponderance of the evidence the existence of a totally disabling impairment. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 4.

Claimant also alleges that the administrative law judge erred in finding the medical opinions insufficient to establish a totally disabling respiratory impairment without comparing the "requirements of the claimant's usual coal mine employment" with the pulmonary capacity assessment by the physicians of record. Claimant's Brief at 4-5(unnumbered). We disagree. The administrative law judge rationally found Dr. Jabour's opinion, that claimant had a ten percent respiratory impairment, insufficient to establish a total respiratory or pulmonary impairment as he did not indicate that claimant's respiratory condition prevented claimant from performing his usual coal mine work. Decision and Order at 4; Director's Exhibit 9. The administrative law judge correctly found that Dr. Jabour opined that claimant is disabled due to a "severe low back disc disease." *Id.*

Additionally, the administrative law judge, properly found Dr. Ranavaya's opinion that claimant has "a 30% permanent partial disability from a pulmonary standpoint" insufficient to

[5]A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.,* Appendix C of Part 718. *See* C.F.R. §718.204(c)(2)(2000). A "non-qualifying" study yields values which exceed those values.

establish a totally disabling respiratory opinion because he failed to explain his diagnosis. Decision and Order at 4; Claimant's Exhibit 1; *Tackett v. Cargo Minning Co.*, 12 BLR 1-11(1988)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the administrative law judge correctly found that Dr. Rasmussen's diagnosis that claimant suffered from only a mild respiratory impairment which would not prevent claimant's "resumption of his last regular coal mine job" is insufficient to establish total disability. *McMath v. Director, OWCP*,12 BLR 1-6 (1988); *Clay v. Director, OWCP*, 7 BLR 1-82 (1984); Decision and Order at 4; Director's Exhibit 49. Therefore, we affirm the administrative law judge's finding that the medical opinions of Dr. Jabour, Ranavaya and Rasmussen, the only medical opinions of record that attributed part of claimant's impairment to a respiratory condition,[6] are insufficient to establish the existence of a totally disabling respiratory impairment, as it is supported by substantial evidence.

Inasmuch as substantial evidence supports the administrative law judge's finding that the newly submitted evidence failed to establish a total respiratory disability under Section 718.204(c)(1)-(4) (2000) or 65 Fed. Reg. 80,049 (2000) to be codified at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that claimant failed to demonstrate a material change in conditions pursuant to Section 725.309(d) (1999).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[6]The administrative law judge correctly found that Drs. Vasudevan and Fino concluded that claimant did not have a pulmonary impairment. Decision and Order at 4; Director's Exhibits 35, 38; Employer's Exhibit 4.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge