BRB No. 00-0788 BLA

JACKIE H. CHATMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROYALTY SMOKELESS COAL	)	DATE ISSUED:
	)	
CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
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 Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

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

John H. Shott (Shott, Gurganus & Williamson), Bluefield, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-1715) of Administrative Law Judge Lawrence P. Donnelly 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] Administrative Law Judge Robert S. Amery found that claimant

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

established sixteen and one-quarter years of coal mine employment and, based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. Judge Amery found that claimant failed to establish the existence of pneumoconiosis and accordingly denied benefits on June 23, 1988. Director's Exhibit 30. Claimant filed a duplicate claim on November 4, 1996 and submitted new evidence. Director's Exhibit 1. Administrative Law Judge Lawrence P. Donnelly (the administrative law judge) reviewed all the newly submitted evidence pursuant to *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); cert. denied, 117 S.Ct. 763 (1997) and found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability and therefore found that claimant failed to establish a material change in conditions.[2] Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find that the newly submitted evidence establishes the existence of pneumoconiosis and total disability, and therefore a material change in conditions. Employer responds, urging affirmance of the

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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). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

[2] Because the only element adjudicated against claimant in his prior claim was the existence of pneumoconiosis, that is the only element he had to show to establish a material change in conditions pursuant to Section 725.309(d). *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); *cert. denied*, 117 S.Ct. 763 (1997). In light of the fact that the administrative law judge made findings on pneumoconiosis and total disability in the instant case, however, we will address both findings.

administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Appeals, has not filed a brief in this appeal.

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 claims, 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 March 9, 2001, to which only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[3] Based on the brief submitted by 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 findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, rational and 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).

Claimant contends that the administrative law judge erred in considering whether the existence of pneumoconiosis was established by failing to apply the proper standard which was set forth by the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, BLR (4th Cir. 2000).[4] The court held in that case that an administrative law judge must weigh together all evidence in the record bearing on the issue of the existence of pneumoconiosis, rather than consider separately and independently the evidence at each subsection set forth at Section 718.202(a)(1)-(4). Additionally, claimant contends that the administrative law judge erred in relying on the opinions of Drs. Vasudevan and Hippensteel inasmuch as Dr. Hippensteel relied on the numerous negative x-rays employer introduced into the record and that the administrative law judge erred in relying on Dr. Vasudevan's unexplained opinion in which he did not find

[3] 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 March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[4] Because claimant's coal mine employment was in West Virginia, the law of the Fourth Circuit is applicable. *See* 33 U.S.C. §921(c), as incorporated by 30 U.S.C. §932(a).

pneumoconiosis despite the positive x-ray evidence taken in conjunction with his examination. Claimant also notes that benefits were awarded by the West Virginia Occupational Pneumoconiosis Board.

In the instant case, the newly submitted evidence contains fourteen readings of five x-ray films. Of the fourteen, only five readings were positive for the existence of pneumoconiosis. Director's Exhibits 20, 21; Claimant's Exhibits 1, 2, 3. The administrative law judge concluded that the readings were in equipoise as they neither established the presence of pneumoconiosis or its absence and that claimant had not therefore met his burden of proof. Decision and Order at 4. This was proper. *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); *see also Napier v. Director, OWCP*, 17 BLR 1-111 (1993).[5] The newly submitted evidence also contains the medical opinions of two physicians, Drs. Hippensteel and Vasudevan.[6] Director's Exhibit 17; Employer's Exhibit 4. Dr. Vasudevan found chronic obstructive pulmonary disease due to smoking, while Dr. Hippensteel found that claimant does not suffer from coal workers' pneumoconiosis or any pulmonary impairment from any cause, including coal dust exposure. The administrative law judge properly found that neither of these opinions was sufficient to establish the existence of pneumoconiosis as defined by the Act. *See* 20 C.F.R. §718.201; *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Roberts v. West Virginia C.W.P Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996). Moreover, contrary to claimant's argument, the record does not support his argument that Dr. Hippensteel relied on negative x-rays alone to find that the existence of pneumoconiosis was not established. Rather, the record shows that the administrative law judge correctly determined that Dr. Hippensteel's finding is based on examination, history, symptoms and objective testing, in addition to x-rays. Employer's Exhibit 4; Decision and Order at 5. Likewise, the record does not support claimant's argument that Dr. Vasudevan's finding regarding the existence of pneumoconiosis was unexplained. Director's Exhibits 17, 18, 20; Decision and Order at 5. As the administrative law judge noted, Dr. Vasudevan's finding is based on examination, objective

[5] We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(c)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The evidence also contains numerous medical records regarding claimant's back injuries and other ailments. Employer's Exhibit 8. As none of these records mention the presence or absence of pneumoconiosis, however, they are not relevant to our discussion at 20 C.F.R. §718.202(a).

testing, history and symptoms, in addition to x-ray evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Nor, is the award of benefits from the West Virginia Occupational Pneumoconiosis Board binding in this case. We therefore affirm the administrative law judge's finding that the x-ray and medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4). *See Compton*, *supra*.

Claimant next contends that the administrative law judge erred in finding that the newly submitted evidence did not establish a totally disabling respiratory impairment by relying solely on claimant's nonqualifying blood gas study, without determining the exertional level of claimant's usual coal mine employment and that claimant was disabled in light of those exertional requirements. Contrary to claimant's argument, however, in addition to the nonqualifying blood gas study, the administrative law judge found that the other newly submitted evidence did not establish total disability as neither of the pulmonary function studies was qualifying, and neither Drs. Vasudevan or Hippensteel found claimant totally disabled *from a pulmonary standpoint*. *Fields*, *supra*; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Woody v. Valley Camp Coal Co.*, 73 F.3d 360, 20 BLR 2-113 (4th Cir. 1995); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995) *aff'g* 16 BLR 1-11 (1991); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 6 (4th Cir. 1994); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd* 9 BLR 1-104 (1986). As claimant failed to establish the existence of pneumoconiosis and total disability, therefore, the administrative law judge properly found that claimant failed to establish a material change in conditions pursuant to *Rutter*, *supra*. *See Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge