BRB No. 02-0817 BLA

RODERICK JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED STATES STEEL MINING	)	DATE ISSUED:
COMPANY, LLC	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis, Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis) Chicago, Illinois, for claimant.

James N. Nolan, (Watson, Wells, Anderson & Bains, LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (01-BLA-356) of Administrative Law Judge Gerald M. Tierney rendered 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] The administrative law

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All

judge found twenty years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the date of filing.[2] In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence established the existence of pneumoconiosis, one of the elements of entitlement previously adjudicated against claimant, and thus, found that a material change in conditions was established. Considering all the evidence of record, the administrative law judge concluded that it established the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that claimant was totally disabled due to pneumoconiosis. Accordingly, benefits were awarded, commencing August 1999, the month in which the claim was filed.[3]

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established and erred in finding the existence of pneumoconiosis and total disability due to pneumoconiosis established. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, is not participating in 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 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 establish 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 of these elements precludes entitlement. *Trent v.*

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his first claim for benefits on October 22, 1997. That claim was denied on January 6, 1998, because claimant failed to establish any element of entitlement. Director's Exhibits 23-1, 23-16. Claimant filed the instant, duplicate claim on August 2, 1999.

[3] The administrative law judge' s determinations of the commencement date of benefits and that claimant's pneumoconiosis arose out of coal mine employment are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director, OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first contends that the administrative law judge should have accorded greater weight to the negative x-ray evidence than to the opinion of Dr. Cohen in determining whether the existence of pneumoconiosis and, therefore, a material change in conditions was established. Employer also requests that the Board apply, to the instant case, the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 303, 22 BLR 2-162 (4th Cir. 2000), in which the United States Court of Appeals for the Fourth Circuit held that all relevant evidence must be weighed together in determining whether the existence of pneumoconiosis has been established.

Contrary to employer's contention, the administrative law judge was not required to accord greater weight to the negative x-ray evidence than to the opinion of Dr. Cohen in determining whether the existence of pneumoconiosis was established, because Section 718.202(a)(1)-(4) provides distinct methods for establishing the existence of pneumoconiosis. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226-227 (2002)(*en banc*); *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8, 1-13 (1996) *modif. on other grds* 21 BLR 1-51 (1997); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). Since this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit which has not indicated it agrees with *Compton*, we decline to apply it. *See Furgerson*, 1-226-227; *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).[4] Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence established the existence of pneumoconiosis and, therefore, a material change in conditions.

Employer next contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).[5] Specifically, employer contends that the administrative law judge

[4] Claimant testified that all of his coal mine employment occurred in the state of Alabama. Hearing Transcript at 15.

[5] The administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to Sections 718.204(b)(2)(i)-(iii) are affirmed as

should have accorded greater weight to the opinion of Dr. Fino which was supported by objective test results than to the opinions of Drs. Cohen, Askew, and Marder which were not supported by objective test data.

The administrative law judge found that Drs. Goldstein and Fino, diagnosed a mild restrictive ventilatory defect, as exhibited on pulmonary function and blood gas studies, but found that claimant was not disabled from a respiratory impairment. The administrative law judge, however, found their opinions unpersuasive compared to the contrary opinions of Drs. Marder and Askew who found that the mild respiratory abnormalities claimant had, as exhibited on pulmonary function and blood gas studies, was, when considered in light of the heavy exertional requirements of claimant's last usual coal mine employment, totally disabling to claimant. The administrative law judge further found that the opinions of Dr. Marder and Askew were supported by Dr. Cohen's conclusion of total disability. This was rational. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51 and 13 BLR 1-46, 1-50 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984). Accordingly, we affirm the administrative law judge's finding that claimant established a totally disabling respiratory impairment.

In support of his contention that the administrative law judge erred in finding total disability established based on medical opinions, employer specifically contends that Drs. Cohen, Askew, and Marder did not have the benefit of claimant's December 27, 1997 pulmonary function study, in their first review of claimant's medical records, which Dr. Fino found to be normal and that, even after they were given the opportunity to review this study and the blood gas study conducted on the same day, none of them addressed the significance of the blood gas results on exercise showing that claimant had no difficulty in getting oxygen out of the air in his lungs and into his bloodstream.

Contrary to employer's argument, however, the administrative law judge found

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unchallenged on appeal. *Skrack*, *supra*.

that Drs. Cohen, Askew and Marder had reviewed claimant's 1997 pulmonary function study and blood gas study and sufficiently explained why they still believed that claimant suffered from a totally disabling respiratory impairment based on the totality of their opinions. Claimant's Exhibits 7, 8, 9; *see Compton*, *supra*; *Hicks*, *supra*; *see also Cornett*, *supra*; *Church*, *supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In addition, employer raises several general contentions challenging the administrative law judge's crediting of the opinions of Drs. Marder and Cohen because they relied too heavily on claimant's long term coal dust exposure, because Dr. Cohen was not aware of the exertional requirements of claimant's usual coal mine employment, and because Dr. Cohen ignored the consequences of claimant's non-respiratory impairments, *i.e.*, heart attack, stroke and coronary artery disease. Employer's objections in this regard, however, are tantamount to a request that the Board reweigh the evidence, which it may not do, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985), since the administrative law judge properly considered the totality of the opinions of Drs. Cohen and Marder. *See Hicks*, *supra*.[6] Further, contrary to employer's contention, the administrative law judge properly considered the contrary probative evidence, *i.e.*, the non-qualifying pulmonary function and blood gas studies of record, with the medical opinion evidence. *See Clark*, *supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*). Contrary to employer's contention, the existence of such non-qualifying studies does not require the administrative law judge to disregard evidence supportive of a finding of total disability. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988)(*en banc*). Thus, weighing the non-qualifying pulmonary function studies and blood gas studies along with the medical opinion evidence, the administrative law judge rationally found that claimant established a totally disabling respiratory impairment. *Clark*, *supra*; *Dillon*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see Hicks*, *supra*; *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994).

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom. *Maypray v. Island Creek Coal Co.*, 7

[6] We reject employer's argument that Dr. Cohen was unaware of the exertional requirements of claimant's usual coal mine employment since Dr. Cohen's report gives a detailed description of the exertional requirements of claimant's last usual coal mine employment. Claimant's Exhibit 1.

BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence, *Anderson*, *supra*. Consequently, we affirm the administrative law judge's finding that the new evidence establishes a material change in conditions, and that the evidence of record establish the existence of pneumoconiosis and total disability due to pneumoconiosis.[7]

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding of disability causation. *See* Decision and Order at 9-10; *Skrack*, *supra*.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge