BRB No. 03-0823 BLA

LEON F. HUEBNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 05/19/2004
	)	
Respondent	)	DECISION and ORDER

Appeal of Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Leon F. Huebner, Lansdale, Pennsylvania, pro se.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

Claimant, without the assistance of counsel, appeals the Decision and Order (03-BLA-5253) of Administrative Law Judge Ralph A. Romano 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] Claimant filed his duplicate claim on April 19, 2001.[2] The administrative law judge credited claimant with two years of coal mine

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

[2] Claimant initially filed a claim for benefits on July 21, 1994, which was denied by the district director on January 23, 1995 because claimant failed to establish any

employment, but found that he failed to establish the existence of coal workers' pneumoconiosis and a totally disabling respiratory impairment. Accordingly, benefits were denied.

On appeal, claimant generally contests the denial of benefits and argues that the administrative law judge should have considered whether the existence of legal pneumoconiosis, not just clinical pneumoconiosis, was established. The Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance of the denial of benefits.

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. *McFall v. Jewell Ridge Coal Corp.*, 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).

The Director correctly points out on appeal that the administrative law judge failed to conduct a material change analysis in conjunction with claimant's duplicate claim. Since claimant's current claim was filed more than one year after the denial of his prior claim, it is considered a duplicate claim under 20 C.F.R. §725.309(d). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this claim arises, has held that an administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). If the miner establishes the existence of that element, he has demonstrated a material change in conditions. *Id.* The administrative law judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports an award of benefits. *Id.*

Although the administrative law judge did not properly consider whether the new evidence, presented with claimant's duplicate claim, was sufficient to establish a material change in condition, the Board considers this error to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Even assuming that claimant established the

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element of entitlement. Director's Exhibit 1. He filed a second claim on January 3, 2000. The second claim was deemed to be abandoned on February 2, 2001. Director's Exhibit 2. Claimant took no action with respect to those prior claims until he filed his current claim on April 19, 2001. Director's Exhibit 4.

existence of legal pneumoconiosis, as he contends on appeal, he is still required to establish a totally disabling respiratory impairment, an essential element of entitlement. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Although the administrative law judge did not fully discuss the earlier evidence, there was no evidence presented with claimant's prior claim to support a finding of total disability.[3] The administrative law judge properly considered the new evidence and found that claimant failed to establish a totally disabling respiratory impairment. Under 20 C.F.R. §718.204(b)(2)(i), the administrative law judge correctly determined that the pulmonary function studies dated September 11, 2001 and February 11, 2003 were non-qualifying for total disability. Decision and Order at 9; Director's Exhibits 14, 36. The administrative law judge acted within his discretion in rejecting the one qualifying pulmonary function study dated July 6, 2001 as unreliable based on Dr. Michos's opinion that the study was invalid due to an insufficient number of FVC, FEV_1 and MVV tracings. Decision and Order at 6, 9; Director's Exhibit 15. 20 C.F.R. §718.103(b); *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Because substantial evidence supports the administrative law judge's finding that the one qualifying pulmonary function study is invalid, we affirm the administrative law judge's finding that the evidence was insufficient to establish a totally disabling respiratory impairment based on pulmonary function studies under Section 718.204(b)(2)(i). Decision and Order at 6. Additionally, the administrative law judge properly found that claimant is unable to establish total respiratory disability under 20 C.F.R. §718.204(b)(2)(ii) since the arterial blood gas studies dated July 6, 2001, August 20, 2001 or February 11, 2003 were non-qualifying for total disability. Decision and Order at 9; Director's Exhibits 13, 20, 27. Likewise, the administrative law judge properly found that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2)(iii) because the record contained no evidence of cor pulmonale with right-sided congestive heart failure.

Lastly, in weighing the medical opinion evidence for total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge correctly determined that the medical opinion evidence failed to establish that claimant had a totally disabling respiratory or pulmonary impairment. Dr. Blumstein stated in his February 11, 2003 report that claimant was under treatment for allergies, but he did not offer an opinion as to whether claimant had a respiratory impairment. Director's Exhibit 11; Claimant's Exhibit 1. Dr.

[3] There was only one pulmonary function study and arterial blood gas study dated October 14, 1994, both of which were non-qualifying for total disability. There is no medical opinion evidence in conjunction with the prior claim addressing the issue of total disability. Director's Exhibits 1, 2.

Barnett diagnosed mild obstructive and restrictive respiratory impairment based on the pulmonary function and arterial blood gas studies of July 6, 2001; but later noted that claimant had normal lung function based on February 24, 2003 test results. Director's Exhibits 12, 35, 40, and Dr. Barnett did not specifically address whether claimant was disabled. Because none of the physicians' opinions found that claimant was disabled, or otherwise addressed claimant's capacity for work, the administrative law judge found that claimant failed to satisfy his burden of establishing a totally disabling respiratory impairment at Section 718.204(b)(iv). *See Boyd v. Freeman United Coal Mining Co.*, 6 BLR 1-159 (1983)(physician's diagnosis of "mild hypoxemia" and "mild obstruction" establishes the existence of a respiratory impairment, but does not establish to what extent, if any, the impairment is disabling); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). The administrative law judge's finding that claimant failed to establish a totally disabling respiratory impairment is, therefore, supported by substantial evidence.

Because the administrative law judge properly found that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b), we decline to address his findings relevant to the existence of pneumoconiosis or claimant's contention that he established the existence of legal pneumoconiosis. Decision and Order at 8-10; *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. Because claimant failed to establish total respiratory disability, a requisite element of entitlement, claimant is precluded from entitlement to benefits. *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is hereby affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge