BRB No. 01-0293 BLA

ROSCOE C. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
PEABODY COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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.

Roscoe C. Brown, Lester, West Virginia, *pro se*.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (1997-BLA-1834) 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).[1] This case is before the Board for

[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, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive

the second time.[2] After determining that the instant case involved a duplicate claim, the

---

relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CVO3086 (D.D.C. Feb. 9, 2001)(order granting preliminary inunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

[2]The record indicates that claimant filed his initial claim for benefits on July 18, 1988, Director's Exhibit 24, which was denied by the district director on October 27, 1988, due to claimant's failure to establish total disability due to pneumoconiosis. Director's Exhibit 24. Claimant did not appeal the denial of this claim. On December 4, 1990, claimant filed a second application for benefits which was denied by Administrative Law Judge Chao, in a Decision and Order issued on November 24, 1992, again due to claimant's failure to establish total disability due to pneumoconiosis or a material change in conditions. Director's Exhibit

administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 (2000) based on the date of filing, and accepted the parties' stipulation that claimant established at least twenty-nine years of coal mine employment. Decision and Order at 4-5; Hearing Transcript at 12-13. The administrative law judge further found the newly submitted evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), since the evidence of record failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the

---

24. On appeal, the Board affirmed the denial of benefits in a Decision and Order issued on September 16, 1994. *Brown v. Peabody Coal Co.*, BRB No. 93-0729 BLA (Sept. 16, 1994)(unpub.). Claimant took no further action until filing the third claim on February 18, 1997. Director's Exhibit 1. Consequently, the present claim constitutes a duplicate claim pursuant to 20 C.F.R. §725.309 (2000). *See 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).

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 (2000). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Where a claimant files 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) (2000). The United States Court of Appeals for the Fourth Circuit has held that in determining whether a material change in conditions has been established, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *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).[3]

[3]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. Director's Exhibits 2, 24, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge considered the three pulmonary function studies of record at Section 718.204(c)(1) (2000), and rationally found that although the March 28, 1997 study produced qualifying results,[4] the study was invalid due to poor effort, based on the weight of the opinions of the reviewing physicians, Drs. Ranavaya, Renn, and Zaldivar. Decision and Order at 7-9; Employer's Exhibits 2, 7; Director's Exhibits 9, 12; *Trent, supra*; *Revnak v. Director, OWCP*, 7 BLR 1-771 (1985); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984). As the preponderance of the results of the remaining valid studies, performed on July 6, 1998, and August 26, 1998, produced non-qualifying results, the administrative law judge rationally determined that claimant failed to demonstrate a totally disabling respiratory impairment pursuant to this section. Decision and Order at 7-9; Claimant's Exhibit 1; Employer's Exhibit 3; *Director OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Pursuant to Section 718.204(c)(2) (2000), the administrative law judge acknowledged the single qualifying arterial blood gas study performed on March 28, 1997, Director's Exhibit 11, but determined that the results of the remaining studies performed on July 6, 1998, and August 26, 1998, were normal. Claimant's Exhibit 1; Employer's Exhibit 3; Decision and Order at 9-10. Accordingly, the administrative law judge rationally credited the preponderance of the non-qualifying studies, particularly the exercise portion of the July 6, 1998 study, as most probative of claimant's condition. *Ondecko, supra; Milburn Colliery Company v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). We also affirm the administrative law judge's findings at Section 718.204(c)(3) (2000), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 7; *see generally Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991).

[4]A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718 (2000). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(2) (2000).

The administrative law judge then considered the relevant medical reports of record pursuant to Section 718.204(c)(4) (2000), and properly accorded no weight to the opinions of Drs. Lirio and Karam as they failed to address the issue of total respiratory disability. Decision and Order at 19; Employer's Exhibit 1. Moreover, the administrative law judge rationally credited the opinions of Drs. Ranavaya, Renn and Zaldivar, that claimant did not have a totally disabling respiratory impairment, as well reasoned opinions since they were based on their review of claimant's medical records over a period of several years, and the results of the examinations of Drs. Ranavaya and Zaldivar. Decision and Order at 15-20; Claimant's Exhibit 1; Employer's Exhibits 2, 3, 7; Director's Exhibit 7; *Hicks, supra; Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge acted within his discretion in according Dr. Jabour's diagnosis of totally disabling pneumoconiosis little weight, as it was based on a pulmonary function study which was invalidated by the reviewing physicians, and because this physician did not have the advantage of reviewing additional, subsequent pulmonary function studies as did Drs. Ranavaya, Renn and Zaldivar. Decision and Order at 15-20; Director's Exhibits 10, 11; *see Hicks, supra*; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Trumbo, supra; Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, the administrative law judge rationally found that claimant failed to satisfy his affirmative burden of establishing that he suffered from a totally disabling respiratory impairment.[5] *See Ondecko, supra.*

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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish a totally disabling respiratory impairment, as it is supported by substantial evidence. We also affirm the administrative law judge's finding that claimant failed to establish a material change in conditions, which precluded an award of benefits. 20 C.F.R. §725.309 (2000); *Rutter, supra.*

[5]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) (2001).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge