BRB No. 05-0316 BLA

DONNIE JOE LEWIS	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
MYSTIC ENERGY, INCORPORATED	)	DATE ISSUED: 11/09/2005
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund, Workers' Compensation Defense Division), Charleston, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2004-BLA-5386) of Administrative Law Judge Daniel L. Leland on a subsequent 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). The administrative law judge found that the newly

submitted evidence of record failed to establish total respiratory disability, the element of entitlement previously adjudicated against claimant, and therefore, found that claimant failed to establish a change in a condition of entitlement. 20 C.F.R. §§718.204(b)(2), 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied the claim.[1]

On appeal, claimant asserts that the administrative law judge erred in crediting the opinions of Drs. Ranavaya and Zaldivar in finding that claimant failed to establish a total respiratory disability. Instead, claimant contends that the administrative law judge should have credited the opinion of Dr. Gaziano, who found that claimant's moderate degree of pulmonary impairment would prevent him from performing his usual coal mine employment. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not file a response brief.[2]

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 under 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes

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[1] Claimant filed his first claim with the Department of Labor (DOL) on April 23, 1999. Director's Exhibit 1. That claim was denied by the district director on June 24, 1999. *Id.* Claimant took no further action on that claim and the denial became final. Claimant filed a second claim with DOL on September 20, 2000. Director's Exhibit 2. That claim was denied by the district director on February 8, 2001 because, even though the existence of pneumoconiosis was established, total respiratory disability was not. Claimant took no further action on that claim and that denial became final. Claimant filed a third claim with DOL on November 13, 2002, Director's Exhibit 3, the denial of which is presently on appeal.

[2] As no party challenges the administrative law judge's findings that the evidence fails to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), those findings are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons, Inc.*, 9 BLR 1-4 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc*).

In finding that claimant failed to establish a totally disabling respiratory impairment, the administrative law judge credited the opinion of Dr. Ranavaya that claimant had a mild impairment and was able to perform his last coal mining job, Director's Exhibit 12; Decision and Order at 6, and the opinion of Dr. Zalvidar, that claimant had a minimal pulmonary impairment, which would not prevent him from performing his last coal mine employment because he found the opinions well-reasoned, well-documented, and supported by the non-qualifying pulmonary function studies and blood gas studies. Decision and Order at 6; Employer's Exhibit 1. The administrative law judge rejected the opinion of Dr. Gaziano that claimant suffered from a moderate pulmonary impairment which rendered him forty to fifty per cent impaired when compared to the heavy labor required of claimant's usual coal mine employment, Claimant's Exhibit 1, concluding that it was not well-documented because Dr. Gaziano failed to provide any rationale to support his disability findings based solely upon the FEV_1/FVC ratio when the miner's FVC results and FEV_1 results were normal and above normal. Decision and Order at 6.

Claimant first contends that that the administrative law judge erred in crediting Dr. Ranavaya's opinion of a mild respiratory impairment because his opinion was based on the results of a pulmonary function study on which claimant did not provide his best effort. Claimant contends, therefore, that the study was flawed and the administrative law judge erred therefore in relying on Dr. Ranavaya's opinion.

We reject claimant's argument that the non-qualifying pulmonary function study results relied on by Dr. Ranavaya should not be relied on because claimant did not put forth his best effort. Better effort on claimant's part would, however, have resulted in higher values. *See Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983). This argument does not, therefore, support claimant's argument that the test results do not support the doctor's finding that claimant could perform his usual coal mine employment.

Next, claimant contends that Dr. Zaldivar's opinion is also flawed and that the administrative law judge erred, therefore, in finding it well-reasoned and relying on it. Claimant argues that it is flawed because Dr. Zaldivar was the only physician who examined claimant's x-rays and opined that claimant did not suffer from occupational pneumoconiosis. Claimant also argues that it is flawed because the doctor found that claimant had a "mild" pulmonary impairment even though he found the pulmonary function studies to show a moderate irreversible airway obstruction. Claimant contends that these findings are inconsistent with the record as a whole and render Dr. Zalvidar's finding unacceptable and entitled to little weight. Claimant's arguments are rejected. The administrative law judge

noted that the existence of pneumoconiosis was previously established. Decision and Order at 2. Moreover, the fact that Dr. Zaldivar did not find the existence of occupational pneumoconiosis does not make his opinion concerning total disability flawed. 20 C.F.R. §718.204(a); *Gee*, 9 BLR at 1-5. Also, the fact that he concluded that claimant had a mild pulmonary impairment despite having found that claimant's pulmonary function study showed a moderate irreversible airway obstruction is not inconsistent as his finding of a mild pulmonary impairment is based on his consideration of all the data before him, not just the pulmonary function study. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993).

Finally, claimant contends that the administrative law judge should have credited the opinion of Dr. Gaziano that claimant's moderate degree of pulmonary impairment is sufficient to prevent him from performing his usual coal mine employment which was "heavy." The administrative law judge, however, found that Dr. Gaziano's report was not well-reasoned or well-documented because Dr. Gaziano failed to provide any rationale to support his opinion other than the FEV_1/FVC ratio on claimant's pulmonary function study when both the FVC and FEV_1 results were above normal. This was rational. 20 C.F.R. §718.204(b)(2)(i); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge also concluded that, in addition to the three doctors' opinions, the new evidence contained three non-qualifying pulmonary function studies and one blood gas study which was non-qualifying. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987), *aff'g on recon.*, 9 BLR 1-195 (1986).

Accordingly, we affirm the administrative law judge's finding that the new evidence failed to establish total respiratory disability, and thereby, a change in an applicable condition of entitlement. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because claimant failed to establish total respiratory disability, a necessary element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-29; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge