BRB No. 01-0186 BLA

ADAM J. HOLBROOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENTERPRISE COAL COMPANY	)	DATE ISSUED:
	)	
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-Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (00-BLA-0035) of Administrative Law Judge Thomas F. Phalen, Jr. 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). The administrative law judge found that

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20

claimant established a coal mine employment history of sixteen years, Decision and Order at 6, and that the instant claim which was a duplicate claim, was governed by the duplicate claim standard set forth by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993. 998, 19 BLR 2-10, 2-20 (6th Cir. 1994). Decision and Order at 3-4. Because claimant failed to establish the existence of pneumoconiosis or total disability in his previous claim, the administrative law judge found that he must first determine whether the newly submitted evidence established either the existence of pneumoconiosis or total disability. In considering the newly submitted evidence, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis through newly submitted x-ray evidence and biopsy evidence, Decision and Order at 12, and that, while the medical opinion evidence, "tend[ed] to establish the existence of

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C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 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. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot any arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant filed a claim for benefits on September 17, 1985, which was denied by a Department of Labor claims examiner on February 4, 1986, Director's Exhibit 40. Claimant took no further action until the filing of a second claim on January 30, 1990. Director's Exhibit 41. This second claim was denied inasmuch as it was deemed abandoned based on claimant's failure to respond to a show cause order. Director's Exhibit 41. Claimant filed a third claim on October 28, 1994 which was denied by a claims examiner on March 24, 1995. Director's Exhibit 42. No further action was taken until the filing of the instant claim on January 21, 1999. Director's Exhibit 1. On April 20, 2000 a hearing was conducted on this claim and on September 29, 2000, the administrative law judge issued the Decision and Order denying benefits from which claimant now appeals.

pneumoconiosis, the relevant evidence considered as a whole failed to support the existence of the disease, Decision and Order at 13-14. The administrative law judge also concluded that claimant was unable to establish the presence of a totally disabling respiratory impairment based on the newly submitted evidence and was thus unable to establish a material change in conditions. Decision and Order at 14-16. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established by the x-ray evidence of record. Claimant further asserts that the administrative law judge erred in his analysis of Dr. Broudy's opinion regarding the existence of pneumoconiosis inasmuch as the physician's opinions were hostile to the Act. Lastly, claimant contends that the administrative law judge erred in failing to find the presence of a totally disabling respiratory impairment established inasmuch as the administrative law judge erred in his weighing of the pulmonary function study evidence and medical opinion evidence. Employer responds and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate 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 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 of claimant to establish any of the foregoing elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's denial of employer's Motion to Recuse himself, his length of coal mine employment determination, and his finding that claimant was unable to demonstrate the existence of a totally disabling respiratory impairment through blood gas study evidence or a finding of cor pulmonale with right-sided congestive heart failure. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §718.204(b)(2)(ii), (iii).

Claimant asserts that the administrative law judge committed reversible error in averaging the heights of the miner recorded on various pulmonary function studies. Claimant further asserts that the administrative law judge erred in discrediting pulmonary function studies merely because the post-bronchodilator values were non-qualifying. Claimant also argues that the administrative law judge's reliance on consultative opinions to discredit otherwise qualifying pulmonary function studies was error and that the administrative law judge erred in excluding the April 13, 1999 qualifying pulmonary function study. We reject claimant's assertions and affirm the administrative law judge's determination that the pulmonary function study evidence did not demonstrate the presence of a totally disabling respiratory impairment.

Contrary to claimant's argument, the administrative law judge properly determined an actual height for claimant based on the evidence before him and used this height when he considered the results of the pulmonary function studies. *See Protoppapas v. Director, OWCP*, 6 BLR 1-221 (1983); *see also Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 13 BLR 2-285 (7th Cir. 1990) *cert. denied*, 498 U.S. 827 (1990); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Further, the administrative law judge reviewed the four pulmonary function studies submitted since the prior denial of benefits and found that two of the studies produced qualifying values supportive of a finding of total disability, Director's Exhibits 12, 28. The administrative law judge found that the post-bronchodilator study of the February 9, 1999 test, was invalidated by the administering physician and the entire study of April 13, 1999, was determined to be invalid based on a lack of cooperation from claimant. The administrative law judge found that the physicians invalidating the studies, Drs. Younes, Broudy and Burki, were well-qualified physicians. Contrary to claimant's assertion, consultative opinions by well-qualified physicians which call into question the validity of pulmonary function studies constitute relevant evidence and may be used, if credible, to discredit otherwise qualifying studies. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *see generally Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280 (7th Cir. 1988); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting). Thus, we affirm the administrative law judge's determination that claimant failed to produce credible evidence sufficient to carry his burden of demonstrating a totally disabling respiratory impairment by pulmonary function study evidence. *See* 20 C.F.R. §718.204(b)(2)(i); *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 generally Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378

(1983).

Claimant further asserts that the administrative law judge erred in failing to find total disability demonstrated through medical opinion evidence inasmuch as the administrative law judge improperly accorded less weight to the medical report of the treating physician, Dr. Alam, who opined that claimant was totally disabled as a result of a coal-mine dust related disease. Claimant's Exhibit 5. Claimant argues that the administrative law judge improperly concluded that Dr. Alam did not rely on objective bases for reaching his medical determination. We reject claimant's assertion and affirm the administrative law judge's determination that claimant is unable to demonstrate the presence of a totally disabling respiratory impairment by medical opinion evidence.

In considering the medical opinion evidence, the administrative law judge found that the opinion of Dr. Alam and the opinion of Dr. Younes, which also found claimant totally disabled, Director's Exhibit 12, were outweighed by the medical opinions of Drs. Broudy and Fino, which concluded that claimant suffered from no totally disabling respiratory impairment and from a respiratory standpoint, could return to coal mine employment, Director's Exhibits 27, 38; Employer's Exhibit 2. The administrative law judge permissibly accorded greater weight to the opinions of Drs. Fino and Broudy, because of their superior qualifications, *see Gray v. SLC Coal Co.*, 126 F.3d 382, 387, 21 BLR 2-615, 2-625-26 (6th Cir. 1999); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986), and because he concluded that they provided the best reasoned and documented opinions of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, contrary to claimant's contention, the opinion of a treating physician is not always entitled to greater weight. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). The administrative law judge's determination that claimant is unable to demonstrate the presence of a totally disabling respiratory impairment by the medical opinion evidence is therefore affirmed. *See* 20 C.F.R. §718.204(b)(2)(iv); *Ondecko*, *supra*. Accordingly, the administrative law judge's determination that the newly submitted medical evidence failed to establish the existence of a totally disabling respiratory impairment and, therefore, a material change in conditions is affirmed. *See* 20 C.F.R. §718.204(b); *Ross*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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). Further, we

[4] We need not consider claimant's argument that Dr. Broudy was hostile to the Act because it goes to the credibility of Dr. Broudy's opinion on causation not total disability. Claimant's Brief at 9-10.

recognize that while the administrative law judge failed to address specifically previously submitted evidence, Director's Exhibits 40-42, because that evidence failed to demonstrate the presence of a totally disabling respiratory impairment, claimant has failed to establish a totally disabling respiratory impairment in the instant case, and we need not address claimant's argument concerning the existence of pneumoconiosis. *See Trent, supra*; *Perry, supra*; *see also Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge