BRB No. 01-0245 BLA

THEODORE B. BARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND 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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Theodore B. Barker, Pennington Gap, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (00-BLA-0604) of Administrative Law Judge Daniel F. Solomon on a

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, has requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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 instant claim constituted a duplicate claim and that the case was thus

[2] 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 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). 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).

[3] Claimant first filed a claim with Department of Labor on March 8, 1978, and an initial finding of entitlement was issued by a claims examiner on July 31, 1980. Director's Exhibit 32. Subsequently, Administrative Law Judge V.M. McElroy issued a Decision and Order denying benefits because employer established rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(2). Director's Exhibit 32. Claimant sought modification which was denied by Administrative Law Judge Robert M. Glennon in a Decision and Order issued on July 12, 1988, Director's Exhibit 32. The Board affirmed the denial of modification, *Barker v. Westmoreland Coal Co.*, BRB No. 88-2758 BLA (Apr. 25, 1990)(unpub.), and also denied claimant's request for reconsideration, *Barker v. Westmoreland Coal Co.*, BRB No. 88-2758 BLA (Aug. 13, 1990)(unpub. Order). Director's Exhibit 32. Claimant subsequently filed another request for modification on January 17, 1991, which was denied by Administrative Law Judge Julius A. Johnson in a Decision and Order issued on November 9, 1992. Director's Exhibit 32. The Board, however, vacated the denial of modification and remanded the case for further consideration pursuant to the holding in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). *Barker v. Westmoreland Coal Co.*, BRB No. 93-0679 BLA (Apr. 24, 1995)(unpub.). On remand, Administrative Law Judge Johnson found the x-ray evidence sufficient to establish invocation of the interim presumption under Section 727.203(a)(1), but found rebuttal established pursuant to Section 727.203(b)(3). Accordingly, benefits were denied. The Board affirmed the denial of benefits. *Barker v. Westmoreland Coal Co.*, BRB No. 96-0128 BLA (Aug. 20, 1996)(unpub.). Claimant took no

governed by the duplicate standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *cert. denied*, 117 S.Ct. 763 (1997). Decision and Order at 2-3. The administrative law judge proceeded to find that the newly submitted evidence, *i.e.*, that evidence submitted subsequent to the previous denial, failed to establish a totally disabling respiratory impairment. Decision and Order at 14-16. The administrative law judge further concluded that the weight of the evidence failed to establish the presence of complicated pneumoconiosis and thus claimant was not "presumptively totally disabled." Decision and Order at 6-14. Accordingly, benefits were denied.

On appeal, claimant contends that he is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (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).

After careful consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that the administrative law judge's decision denying benefits is supported by substantial evidence, contains no reversible error and, therefore, it is affirmed. In *Rutter, supra*, the Fourth Circuit held that, in order to establish a material change in conditions, claimant must establish at least one of the elements of entitlement adjudicated against him in the past. Inasmuch as the claim was previously denied because claimant failed to establish total disability, the administrative law judge properly determined that, in order to establish a material change in conditions the burden rested with claimant to affirmatively establish the existence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b); *see Rutter, supra*; *see generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 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).

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further action until the filing of the instant claim on July 15, 1999. Director's Exhibit 2.

Reviewing the relevant evidence in the instant case, the administrative law judge noted that Dr. Westerfield found that the February 20, 1999 x-ray demonstrated a large opacity, Director's Exhibit 13, but that Drs. Wheeler, Young, Kim and Scott all read the same x-ray and found absolutely no evidence of either simple or complicated pneumoconiosis, Director's Exhibit 28. The administrative law judge further noted that Dr. Paranthaman, a B-reader, read the film taken on August 19, 1999 as positive for complicated pneumoconiosis, Director's Exhibit 15, and that Dr. McCloud interpreted the same x-ray as positive for complicated pneumoconiosis, Director's Exhibit 15, but that Drs. Scott, Kim and Wheeler read this x-ray as negative for the existence of either complicated or simple pneumoconiosis, Employee's Exhibits 2, 4, and that only Dr. Sargent had found that the x-ray demonstrated the existence of simple pneumoconiosis, Director's Exhibit 16. The administrative law judge further found that, of the remaining x-rays, those of September 28, 1999, March 23, 2000 and June 13, 2000, none were interpreted as positive for the existence of complicated pneumoconiosis. Director's Exhibit 28; Employer's Exhibits 1, 3, 6, 8. Considering the biopsy evidence, the administrative law judge found that Dr. Smiddy concluded that the biopsy slides showed "marked" fibrosis and "extensive" anthracotic pigmentation, Director's Exhibit 13, but that Dr. Adelson's concluded, that while the biopsy showed a 1.5 centimeter opacity, the opacity was not complicated pneumoconiosis, Director's Exhibit 8. Further, the administrative law judge recognized the conclusions of Drs. Dahhan, Hippensteel and Fino, Employer's Exhibits 7, 11, 12, that the biopsy evidence was insufficient to support a finding of complicated pneumoconiosis. Lastly, the administrative law judge considered whether the other evidence under Section 718.304(c) tended to establish the existence of complicated pneumoconiosis. Specifically, the administrative law judge recognized that the CT scan interpretation by Dr. Wheeler did not find complicated pneumoconiosis, Employer's Exhibit 9, and that the medical opinions of Drs. Dahhan, Hippensteel and Fino all rejected the presence of complicated pneumoconiosis. Weighing all the evidence, the administrative law judge, within a proper exercise of his discretion, found that the relevant evidence was insufficient to establish the existence of complicated pneumoconiosis. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Eastern Assoc. Coal Corp. v. Director,*

[4] The administrative law judge took judicial notice of Dr. Paranthaman's qualifications. A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985)

OWCP [Scarbro], 220 F.3d 25, 22 BLR 2-93 (4th Cir. 2000); *Double B. Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge, therefore, rationally concluded that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304.

Next, the administrative law judge turned to the evidence relevant to the issue of total disability, properly finding that the newly submitted pulmonary function study evidence and blood gas study evidence failed to demonstrate the presence of a totally disabling respiratory impairment, because they produced non-qualifying values, Director's Exhibits 10, 11; Employer's Exhibit 1. Further, the administrative law judge properly concluded that the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure. *See Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991). Accordingly, the administrative law judge's findings that claimant failed to demonstrate the presence of a totally disabling respiratory impairment through pulmonary function study evidence, blood gas study evidence, or a showing of cor pulmonale with right-sided congestive heart failure is affirmed. 20 C.F.R. §718.204(b)(2)(i)-(iii). Likewise, the administrative law judge properly concluded that the medical opinion evidence of record failed to demonstrate the presence of a totally disabling respiratory impairment as none of the physicians who rendered newly submitted opinions, Drs. Dahhan, Paranthaman, Hutchins and Fino, Employer's Exhibits 1, 5, 7, 9-12, concluded that claimant was unable to return to his previous coal mine, or provided opinions sufficient to allow the administrative law judge to make such a determination. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *see also Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). Thus, because the administrative law judge addressed all the relevant medical evidence at Section 718.204(b)(2)(iv), and provided an affirmable basis for his determination, we affirm his conclusion that the medical opinion evidence failed to demonstrate the presence of a totally disabling respiratory impairment. *Ondecko*, *supra*. We thus affirm the administrative law judge's determination that the newly submitted medical evidence failed to establish a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b); *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).

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Accordingly, we affirm the administrative law judge's determination that the newly submitted medical evidence failed to establish a totally disabling respiratory impairment and, therefore, a material change in conditions. *Rutter, supra*. Because claimant has failed to establish a totally disabling respiratory impairment, a requisite element of entitlement, benefits must be denied and we need not reach the administrative law judge's finding on causation. *See 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*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge