BRB No. 01-0270 BLA

EUELL S. HANSHAW	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 and Decision and Order on Reconsideration of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Euell S. Hanshaw, Pineville, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order and Decision and Order on Reconsideration (99 -BLA-0833) 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). In this duplicate claim, 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

claimant's prior claim was finally denied on December 16,1993, for failure to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. After accepting the parties' stipulation to thirty-one years of coal mine employment, the administrative law judge found the newly submitted medical evidence insufficient to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment, elements previously adjudicated against claimant, and, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *See* 20 C.F.R. §§718.202(a)(1)-(4); 718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. 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 pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally

---

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*, 160 F. Supp. 2d 47 (D.D.C. 2001).

disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc, Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997), for deciding whether claimant demonstrated a material change in conditions at Section 725.309 (2000). In *Rutter*, the Court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309 (2000), the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In his prior claim, claimant failed to establish any element of entitlement, including the existence of pneumoconiosis, 20 C.F.R. §718.202(a), or total disability, 20 C.F.R. §718.204(b). *See* Decision and Order of Administrative Law Judge Victor J. Chao, Case No. 92 BLA 0722 (December 16, 1993). The administrative law judge, therefore, properly reviewed only the evidence submitted following the denial of claimant's prior claim to determine whether claimant established any element of entitlement, noting that because establishing the cause of pneumoconiosis and total disability were contingent on first establishing the existence of pneumoconiosis and total disability, they must necessarily be demonstrated in order to establish a material change in conditions. Decision and Order at 5. *See Rutter, supra*.

In reviewing the newly submitted evidence regarding the existence of pneumoconiosis, the administrative law judge concluded that four of the five x-ray films had been read as negative by all the readers. The remaining x-ray, dated August 28, 1998, was read as positive by Dr. Patel, a dually qualified reader, but was read as negative by four similarly qualified readers and one B reader. Director's Exhibits 10, 11, 12; Employer's Exhibits 2, 5. The administrative law judge permissibly found Dr. Patel's positive reading overwhelmed by the negative interpretations, and, therefore, found the x-ray evidence insufficient to establish the existence of pneumoconiosis. This was rational. 20 C.F.R. §718.202(a)(1); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis is affirmed. Likewise, the administrative law judge properly found that the

[2] These x-rays are dated March 28, 1996, January 23, 1997, May 6, 1997 and May 12, 1999.

existence of pneumoconiosis was not established at Section 718.202(a)(2), (3)(2000), as there was no evidence in the record sufficient to establish the existence of pneumoconiosis under those subsections. 20 C.F.R. §718.202(a)(2), (3).

Turning to the newly submitted physicians' opinions relevant to the existence of pneumoconiosis, 20 C.F.R. §718.202(a)(4), the administrative law judge accorded little weight to the opinion of Dr. Lao, claimant's treating physician, as he found that it did not indicate the documentation or objective evidence upon which it relied. Decision and Order at 12. This was rational. Director's Exhibit 1; Claimant's Exhibit 19. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 147 n.2 (1984); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 686 (1985). Similarly, the administrative law judge accorded less weight to the opinion of Dr. Rasmussen than to the contrary opinions of Drs. Zaldivar, Fino, Renn and Crisalli because he found them better documented and reasoned. This was rational. *Id.*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Director's Exhibits 7, 8; Employer's Exhibits 1, 3, 4, 8, 9. Additionally, the administrative law judge properly accorded little weight to the opinion of Dr. Mann because Dr. Mann did not express an opinion concerning the cause of the chronic obstructive pulmonary disease he diagnosed. *See* 20 C.F.R. §718.201(a)(2); *Anderson*, *supra*. Accordingly, the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis is affirmed.

Turning to the issue of total disability, the administrative law judge correctly found that both the newly submitted pulmonary function studies and the blood gas studies were non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibit 6; Employer's Exhibits 1, 2, 9. Likewise, the administrative law judge correctly found that inasmuch as the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(2)(iii).

Turning to the physicians' opinions, the administrative law judge correctly found that none of the medical opinions supported a finding of total disability because none of them diagnosed a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir 1994). Accordingly, the administrative law judge's finding that the medical opinion evidence of record was insufficient to establish a totally disabling respiratory impairment is affirmed. Further, because claimant failed to establish the existence of pneumoconiosis and total disability, the administrative law judge properly found that a material change in conditions was not established. *See Rutter*, *supra*.

Accordingly, the Decision and Order and Decision and Order on Reconsideration of the administrative law judge denying benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge