BRB No. 03-0235 BLA

JAKE NOBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED: 10/31/2003
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

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

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-1023) of Administrative Law Judge Gerald M. Tierney 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] The administrative law judge, after determining that this case involved a

[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, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

duplicate claim, found that claimant established at least twenty-nine years of coal mine employment and that employer was the properly identified responsible operator. Decision and Order at 2. Based on the date of filing, and noting the proper standard, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 2-5; Director's Exhibit 40. The administrative law judge determined that the newly submitted evidence of record was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). Decision and Order at 2-5. The administrative law judge therefore concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Decision and Order at 5. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis, the existence of a totally disabling respiratory or pulmonary impairment and disability causation established. Employer responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[4]

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

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[2]Claimant filed his initial claim for benefits with the Department of Labor on February 13, 1991. In a Decision and Order issued on December 14, 1994, the Board affirmed Administrative Law Judge Joel R. Williams's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish that he was suffering from a totally disabling respiratory or pulmonary impairment. The Board affirmed, therefore, the denial of benefits. *Noble v. BethEnergy Mines Inc.*, BRB Nos. 94-2699 BLA and 94-2699 BLA-A (Dec. 14, 1994)(unpublished); Director's Exhibit 40. Claimant took no further action thereafter until filing the instant claim on June 21, 1999, which was denied by the district director on December 30, 1999. Director's Exhibits 1, 18, 33. Claimant requested a formal hearing and the case was forwarded to the Office of Administrative Law Judges on July 11, 2001. Director's Exhibits 19, 34, 41.

[3]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

[4]The administrative law judge's responsible operator and length of coal mine employment determinations and his finding that total disability was not established pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error.[5] Considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at Section §725.309 (2000). Decision and Order at 5. The administrative law judge correctly noted that the initial claim for benefits was denied because claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment. Director=s Exhibit 40; Decision and Order at 2. The United States Court of Appeals for the Fourth Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to Section §725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *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).

Claimant contends that the administrative law judge erred in relying upon the nonqualifying blood gas study obtained by Dr. Zaldivar and Dr. Zaldivar's medical opinion, that claimant is able to perform arduous manual labor, to find that the newly submitted evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2). Claimant asserts that in so doing, the administrative law judge failed to perform an independent review of claimant's ability to perform his usual coal mine employment. Claimant's allegations of error are without merit.

In addressing the issue of total disability under Section 718.204(b)(2), an administrative law judge is required to determine whether the medical evidence, when weighed together, supports a finding that the miner is unable, from a respiratory or pulmonary standpoint, to perform his usual coal mine employment or comparable and gainful employment. 20 C.F.R. §718.204(b)(1). With respect to the medical opinion evidence, if the physician is aware of the exertional requirements of the miner's usual coal mine employment, the administrative law judge may rely upon the physician's assessment of the extent to which the miner's respiratory or pulmonary impairment prevents him from performing this

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[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See* Director=s Exhibit 2; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

employment. If the physician describes physical limitations caused by the miner's impairment, but does not offer an opinion as to the degree to which the miner is disabled, the administrative law judge may compare the physical limitations to the exertional requirements of the miner's usual coal mine work to make an inference as to whether the miner is totally disabled. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

In this case, the administrative law judge acted within his discretion in determining that Dr. Zaldivar's opinion, that claimant retains the respiratory capacity to perform arduous manual labor, outweighed the contrary opinion of Dr. Rasmussen and the qualifying blood gas study that Dr. Rasmussen obtained on October 11, 1999.[6] Decision and Order at 4-5; Director's Exhibits 11, 12, 29, 39; Employer's Exhibits 3, 5. With respect to the qualifying blood gas study, the administrative law judge acted within his discretion in according less weight to Dr. Rasmussen's interpretation of the study. Dr. Rasmussen stated that the pO2 and pCO2 values indicated that claimant suffers from minimal resting hypoxia and that the values produced on the study met the federal criteria for disability. Director's Exhibits 11, 12. The administrative law judge rationally determined that Dr. Rasmussen's view of the study was credibly challenged by Dr. Zaldivar, as Dr. Zaldivar adequately explained that the results were normal given the altitude where the study was performed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); Decision and Order at 4-5; Director's Exhibits 11, 12, 29; Employer's Exhibit 5.

The administrative law judge also acted within his discretion in concluding that Dr. Zaldivar's opinion, as a whole, was entitled to greater weight than Dr. Rasmussen's on the issue of total disability.[7] The administrative law judge rationally based his finding upon Dr. Zaldivar's status as a Board-certified pulmonary specialist and the fact that, unlike Dr. Rasmussen, Dr. Zaldivar premised his conclusions upon a review of the medical evidence of record dating back to 1991, in addition to the information and objective data obtained during an examination of claimant. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo*, 17 BLR 1-85; *Clark v. Karst-Robbins Coal Co.*, 12

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[6]The administrative law judge's credibility determinations with respect to the opinions of Drs. Dahhan and Hippensteel are unchallenged on appeal and are therefore affirmed. *See Skrack*, 6 BLR 1-710.

[7]The administrative law judge also rationally found that Dr. Zaldivar's opinion was supported by the well-reasoned and well-documented opinion of Dr. Fino, who is also a Board-certified pulmonary specialist. *Millburn Colliery Co. v. Hicks*, 138 F.2d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 5; Director's Exhibit 39; Employer's Exhibit 3.

BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also permissibly determined that Dr. Rasmussen did not adequately explain his apparent conclusion that claimant is totally disabled because he did not elaborate upon his statement that the October 1999 blood gas study met the disability criteria. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Director's Exhibit 12.

Finally, contrary to claimant's contention, the administrative law judge adequately addressed the exertional requirements of claimant's last coal mine employment. The administrative law judge determined correctly that claimant's usual coal mine employment was as a beltman and that he was required to pick up rocks, shovel coal, and lift and carry 100 pound bags of rock dust. Decision and Order at 3; Director's Exhibits 3, 11, 29, 40; Hearing Transcript at 11-13. In light of this finding and the administrative law judge's rational determination that Dr. Zaldivar's opinion, that claimant is able to perform arduous manual labor, was entitled to greatest weight, the administrative law judge reasonably found that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *Lane*, 105 F.3d 166, 21 BLR 2-34; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *McMath, v. Director, OWCP*, 12 BLR 1-6; (1988); *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Because the administrative law judge permissibly concluded that the newly submitted evidence of record, when considered together, is insufficient to establish that claimant is totally disabled by a respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant failed to establish total disability under Section 718.204(b)(2). We also affirm, therefore, the administrative law judge's finding that claimant did not prove a material change in conditions pursuant to Section 725.309 (2000), as it is supported by substantial evidence and is in accordance with law.[8] *Rutter*, 86 F.3d 1358, 20 BLR 2-227; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order denying benefits is

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[8]In light of the administrative law judge's finding that claimant failed to establish a material change in conditions, we need not address claimant's arguments concerning the existence of pneumoconiosis and total disability causation. *See* Claimant's Brief at 4-7; *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); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge