BRB No. 03-0387 BLA

ALEXANDER GAGICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNION CARBIDE CORPORATION	)	
	)	DATE ISSUED: 10/30/2003
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Alexander Gagich, Mammoth, West Virginia, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2001-BLA-0192) of Administrative Law Judge Richard A. Morgan 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] This case is before

[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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

the Board for a second time.[2] Based on the date of filing, the administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R Part 718, and credited claimant with approximately thirty-six years of coal mine employment. The administrative law judge found that the newly submitted x-ray readings of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), since claimant had previously established this element of entitlement. The administrative law judge further found the newly submitted evidence insufficient to establish the existence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Thus, claimant failed to establish a material change in conditions regarding an element of entitlement not previously established. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board

---

[2]The record indicates that claimant filed an initial application for benefits on August 29, 1977. Director's Exhibit 36. In a Decision and Order issued on April 13, 1981, Administrative Law Judge Julius A. Johnson found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) (2000), based on the uniformly positive x-ray readings of record, but also found that rebuttal of the presumption was established pursuant to Section 727.203(b)(2) (2000), as the evidence failed to indicate that claimant suffered from a totally disabling respiratory impairment. Accordingly, benefits were denied. Director's Exhibit 36. On appeal, the Board affirmed the denial of benefits. *Gagich v. Union Carbide Corporation*, BRB Nos. 81-938 BLA and 81-938 BLA-A (Dec. 13, 1983)(unpub.); Director's Exhibit 36. On July 30, 1985, claimant filed a second application for benefits which was denied on procedural grounds by Administrative Law Judge Bober in a Decision and Order issued on December 14, 1987. Director's Exhibit 37. Claimant filed the present duplicate claim on June 18, 1999. Director's Exhibit 1.

[3]We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §718.202(a)(1), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Pursuant to Section 718.202(a)(1), the administrative law judge weighed the newly submitted x-ray readings of record and rationally credited the greater number of positive readings from physicians who hold dual qualifications in the field of radiology as establishing the presence of pneumoconiosis. Decision and Order at 6-7; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3, 5, 8, 9; Director's Exhibits 14-16, 24-29, 35; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Claimant, however, had previously established invocation of the interim presumption at 20 C.F.R.§727.203(a)(1) (2000), by means of positive x-ray evidence, and the presumption was rebutted at Section 727.203(b)(2) (2000), by evidence establishing that claimant did not have a totally disabling respiratory impairment, not by evidence establishing the absence of pneumoconiosis. Director's Exhibits 36, 37. Accordingly, the administrative law judge determined that the new x-ray interpretations of record do "not represent a material change in conditions, since the earlier x-ray evidence had been overwhelmingly positive for pneumoconiosis." Decision and Order at 7. As the administrative law judge rationally determined that the newly submitted x-ray evidence did not establish an element of entitlement previously adjudicated against claimant in accordance with the holding in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), the administrative law judge properly determined that a material change in

conditions had not been established pursuant to Section 725.309(d) (2000).[4] Thus, we hold that the administrative law judge's finding is supported by substantial evidence.

We also hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence of record was insufficient to establish the presence of a totally disabling respiratory impairment due to pneumoconiosis. Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered the four newly submitted pulmonary function studies of record and found that although the pre-bronchodilator test, dated July 9, 1999, produced qualifying values,[5] the post-bronchodilator values, and the results of the studies dated October 1, 1999, April 19, 2000, and July 5, 2001, produced non-qualifying values. Decision and Order at 7-8; Claimant's Exhibit 2; Director's Exhibits 8, 11, 17, 26. The administrative law judge permissibly accorded little weight to the qualifying July 9, 1999 study, since Dr. Walker, the administering physician, indicated in his written report that claimant's performance was not satisfactory and the tracings were not reproducible, and because Drs. Gaziano and Zaldivar reviewed this study and found that it was unacceptable due to poor performance. Decision and Order at 7; Director's Exhibits 8, 10, 26; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). As the remaining pulmonary function studies of record produced non-qualifying values, the administrative law judge rationally determined that the preponderance of the evidence was insufficient to demonstrate a totally disabling respiratory impairment at Section 718.204(b)(2)(i). Decision and Order at 8; Claimant's Exhibit 2; Director's Exhibits 11, 17, 26; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trent*, 11 BLR 1-26, 28; *Revnak v. Director, OWCP*, 7 BLR 1-771 (1985); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984).

Pursuant to Section 718.204(b)(2)(ii), the administrative law judge determined that all of the newly submitted arterial blood gas studies, dated July 9, 1999, April 19, 2000, and July 5, 2001, produced non-qualifying values. Decision and Order at 8; Claimant's Exhibit 2; Director's Exhibits 13, 17, 26. Accordingly, the administrative law judge

---

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mine industry in the State of West Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

rationally found that "total disability is not established on the basis of the recent arterial blood gas evidence." Decision and Order at 8. As the administrative law judge's finding is supported by substantial evidence, it is affirmed. *Ondecko*, 512 U.S. 267, 281; *Milburn Colliery Company v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). We also affirm the administrative law judge's findings at Section 718.204(b)(2)(iii), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 16; *see generally Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991).

The administrative law judge next considered the newly submitted medical reports of record pursuant to Section 718.204(b)(2)(iv). Dr. Walker's July 9, 1999 form report listed "no evidence of Coal Workers' Pneumoconiosis, bronchitis with bronchospasm," and a non-reducible hernia, under the section for cardiopulmonary diagnoses, and indicated that these conditions were due to "dust exposure," but stated under the heading of non-pulmonary diagnoses that claimant "could not return to work due to arthritis and COPD." Director's Exhibit 12. Dr. Walker's July 9, 2001 report again found no evidence of coal workers' pneumoconiosis, and stated that claimant was not totally disabled from his regular coal mine employment, but also diagnosed an impairment due to bronchitis which was unrelated to occupational dust exposure. Employer's Exhibit 3. The administrative law judge permissibly accorded these reports little weight, as he found these reports poorly reasoned and documented since Dr. Walker failed to adequately explain the basis of his seemingly contradictory findings, or to specifically address the extent of claimant's respiratory impairment. Decision and Order at 8-9; *Hicks*, 138 F.3d 524, 531, 21 BLR 2-323; *Underwood v. Elkay Mining , Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Similarly, it was within the administrative law judge's discretion to find that Dr. Gaziano's opinion was insufficient to establish total disability since it diagnosed only a mild impairment due to coal workers' pneumoconiosis, and indicated that although claimant could not perform "heavy, or very heavy, coal mine work," that "this is largely the result of the deterioration in lung function due to age." Claimant's Exhibit 2. The administrative law judge rationally found that this opinion overstated the exertional requirements of claimant's coal mine work, and was therefore based on an inaccurate premise,[6] and was "at best, ambiguous regarding the 'total disability' and 'causation' issues." Decision and Order at 16-17; Claimant's Exhibit 2; *Clark*, 12 BLR 1-149, 155 ; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

[6] The administrative law judge found that claimant's last coal mine job was that of a cutting machine operator, which involved moderately heavy physical exertion. Decision and Order at 5-6.

The administrative law judge further found that the opinions of Drs. Zaldivar, Repsher, Rosenberg and Fino, all of whom indicated that claimant did not suffer from a totally disabling respiratory impairment, but was disabled due to various non-respiratory conditions, outweighed the opinion of Dr. Gaziano. Decision and Order at 9-17; Claimant's Exhibit 2; Employer's Exhibits 1-7; Director's Exhibit 26. Since the administrative law judge determined that the opinions of Drs. Zaldivar, Repsher, Rosenberg and Fino were well-documented and reasoned, and "most consistent with the nonqualifying, near normal results obtained on the credible, recent pulmonary function studies and arterial blood gas tests," the administrative law judge rationally accorded these opinions determinative weight. Decision and Order at 16-17; Employer's Exhibits 1-7; Director's Exhibit 26; *Underwood*, 105 F.3d 946, 951, 21 BLR 2-31; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Accordingly, we affirm the administrative law judge's finding that the medical opinions of record do not establish that claimant is totally disabled due to pneumoconiosis, thereby precluding a finding of a material change in conditions. Decision and Order at 17; *Rutter*, 86 F.3d 1358, 1362, 20 BLR 2-227; *Toler v. Eastern Associated Coal Co.*, 34 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Consequently, we must also affirm the denial of benefits.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge