BRB No. 00-1160 BLA

GORDON SKAGGS	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
CENTRAL APPALACHIAN COAL COMPANY	)	
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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

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

David L. Yaussy (Robinson & McElwee, PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0027) of Administrative Law Judge John C. Holmes 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] Claimant filed his most recent application for benefits on November 19, 1998. Director's Exhibit 1.[2] In a Decision and Order issued on August 29, 2000, the administrative law judge credited claimant with thirty-nine years of coal mine employment. The

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[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 C.F.R. Parts 718, 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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]Claimant initially filed an application for benefits on March 6, 1985. Director's Exhibit 29-1. The district director acknowledged that the evidence was sufficient to establish the existence of coal workers' pneumoconiosis but denied this claim on September 25, 1985, due to claimant's failure to establish the existence of a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 29-14. Claimant subsequently requested a formal hearing, and on February 4, 1988, Administrative Law Judge Charles P. Rippey, issued an Order of Summary Judgment denying benefits due to claimant's failure to submit evidence relevant to the issue of total disability at the hearing or to respond to Judge Rippey's January 13, 1988, Order to Show Cause regarding claimant's failure to submit evidence supporting his claim. Director's Exhibits 29-15, 29-27, 29-28. The instant claim was filed on Nov. 19, 1998. Director's Exhibit 1. A hearing was held before Administrative Law Judge John C. Holmes and evidence was submitted by claimant and employer.

administrative law judge further found that the evidence of record was sufficient to establish that claimant suffers from pneumoconiosis that arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203 (2000), but insufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(2000). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred by finding that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(2000). 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 the merits of this appeal.[3]

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 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 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*).

[3]We affirm the findings of the administrative law judge on the length of coal mine employment, the existence of pneumoconiosis arising out of coal mine employment, and on the designation of employer as the responsible operator, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Where a claimant filed a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R.§725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997).[4]

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of a totally disabling respiratory impairment was not established pursuant to Section 718.204(c) (2000). The administrative law judge properly found that claimant failed to demonstrate a totally disabling respiratory impairment under Section 718.204(c)(1)(2000), as all of the pulmonary function studies of record produced non-qualifying results.[5] Director's Exhibits 12, 29-10, 29-21, 29-23; Employer's Exhibit 1; Decision and Order at 3-4; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Pursuant to Section 718.204(c)(2)(2000), the administrative law judge considered the three blood gas studies performed on April 11, 1985, January 11, 1999 and June 30, 1999. Employer's Exhibit 1, Director's Exhibits 13, 29-11, 29-23; Decision and Order at 3-4. The administrative law judge acknowledged the one qualifying result of the exercise portion of the study performed on January 11, 1999, but found the results of the remaining non-qualifying blood gas studies were normal. The administrative law judge rationally credited the preponderance of the non-qualifying studies as most probative of claimant's condition. *Ondecko, supra*; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).[6]

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

[5]A "qualifying" pulmonary function or blood gas study yields values equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C tp 20 C.F.R. Part 718(2000). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(2)(2000).

[6]Although the Decision and Order does not contain a specific finding pursuant to 20 C.F.R.§718.204(c)(3), the record contains no evidence indicating the presence of cor pulmonale with right sided congestive heart failure. Thus, claimant may not establish the existence of a totally disabling respiratory impairment pursuant to this section. *See*

Contrary to claimant's contention, the administrative law judge did not mechanically accord greater weight to the most recent non-qualifying blood gas study of record, but determined that the single qualifying study was inconsistent with the other evidence of record. *Milburn Colliery Company v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

The administrative law judge then considered the relevant medical reports of record pursuant to Section 718.204(c)(4)(2000), and rationally credited the opinion of Dr. Altmeyer, who diagnosed the presence of pneumoconiosis, but stated that claimant did not have a totally disabling respiratory impairment, as better supported by the objective evidence of record. Employer's Exhibit 2; Decision and Order at 3-4; *Minnich v. Pagnotti Enterprises Inc.,* 9 BLR 1-1-89 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, it was within the administrative law judge's discretion to find that Dr. Rasmussen's diagnosis of totally disabling pneumoconiosis, the only opinion supportive of claimant's burden of proof on the issue of total disability, was unreasoned as it was not supported by the perponderance of the objective evidence of record. Director's Exhibits 12-14; Decision and Order at 3-4; *see generally 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); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987).

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generally Budash v. Bethlehem Mines Corp., 16 BLR 1-27 (1991).

We further find no merit in claimant's contention that the administrative law judge erred by failing to consider the results of claimant's objective tests in conjunction with the requirements of his usual coal mine work as such a comparison is not required when the administrative law judge finds that the evidence fails to establish the existence of any pulmonary or respiratory impairment. *Lane, supra.* We therefore affirm the administrative law judge's finding on the merits that claimant failed to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2000) and therefore a material change in conditions as supported by substantial evidence.[7] Inasmuch has claimant has failed to establish he suffers from a totally disabling respiratory impairment pursuant to Section 718.204(c) (2000), we need not address claimant's argument regarding the cause of total disability pursuant to 20 C.F.R. §718.204(b)(2000).

[7]The Decision and Order does not contain a specific reference to 20 C.F.R. §725.309(d)(2000). This omission is harmless however, in light of the administrative law judge's affirmable finding pursuant to 20 C.F.R.§718.204(c)(2000) on the merits. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order of the administrative law judge 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