BRB No. 01-0145 BLA

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| ERVIN MULLINS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| WYOMING COAL MINING | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| BUFFALO RED ASH COAL COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | |
| | ) | |
| Employers/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ervin Mullins, Iaeger, West Virginia, *pro se*.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (00-BLA-140) of Administrative Law Judge Linda S. Chapman 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 found, based on employer's stipulation and the evidence of record, that employer was the responsible operator and that the existence of pneumoconiosis, and therefore a material change in conditions, was established.[2] Further, based on employer's concession and the evidence of record, the administrative law judge credited claimant with at least fifteen years of coal mine employment, and determined that claimant's last coal mine employment as a miner helper involved very heavy manual labor. Decision and Order at 3. The administrative law judge also found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203(b). The administrative law judge, however, found the evidence of record insufficient to demonstrate the presence of a totally disabling respiratory impairment. Accordingly, benefits were denied.

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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 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 claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association 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).

[2] Claimant filed his first application for benefits on April 8, 1991 which the district director denied on September 16, 1991. *See* Director's Exhibit 36. Claimant took no further action on this claim. Claimant filed his second application for benefits on February 28, 1995 which the district director denied on July 11, 1995 and January 12, 1996. *See* Director's Exhibit 35. Claimant took no further action on this claim. Claimant filed the present duplicate claim on May 20, 1997. *Id*.; Director's Exhibit 1.

On appeal, claimant generally challenges the findings of the administrative law judge on the issue of total disability. Employer/carrier respond, 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 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*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. Initially, the administrative law judge properly found that all of the pulmonary function studies and blood gas studies of record were nonqualifying under the regulatory criteria and that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Thus, the administrative law judge properly concluded that claimant failed to demonstrate the presence

[3]As the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, on a material change in conditions, and on the existence of pneumoconiosis arising out of coal mine employment are not unfavorable to claimant and employer has not challenged these findings on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

of a totally disabling respiratory impairment based on the pulmonary function and blood gas study evidence or any evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R.§718.204(b)(2)(i)-(iii).

Regarding the medical opinion evidence, the administrative law judge acted within her discretion when she found the medical reports of Drs. Cardona and Rasmussen, which diagnose a totally disabling respiratory impairment, not well-reasoned or supported by the objective evidence of record. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In finding Dr. Cardona's report not well-reasoned or supported by the objective evidence of record, the administrative law judge rationally concluded that Dr. Cardona's opinion was not supported in light of the non-qualifying pulmonary function study and non-qualifying, though abnormal, blood gas studies, conducted by Dr. Cardona, as well as the normal results obtained on subsequent pulmonary function and blood gas studies. Further, the administrative law judge concluded that Dr. Cardona's opinion was not substantiated through treatment notes. This was rational. *Id*.; *Church v. Eastern Assoc. Coal Corp.*, 21 BLR 1-52, 1-57 (1997) *modifying on recon.*, 20 BLR 1-8 (1986); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985); *see Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984).

Likewise, the administrative law judge permissibly accorded little weight to Dr. Rasmussen's opinion diagnosing a totally disabling respiratory impairment because Dr. Rasmussen did not provide an adequate explanation for his conclusion that minimal hypoxia and increased dead space ventilation demonstrated by blood gas studies translated into his opinion of moderate loss of respiratory function which would disable claimant from usual coal mine employment, in light of the non-qualifying results of his own tests and the subsequent, essentially normal, pulmonary function and blood gas studies conducted by Drs. Zaldivar and Forehand. *Id*. The administrative law judge, therefore, properly found that claimant did not demonstrate the presence of a totally disabling respiratory impairment.[4] *See* 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); *Beatty v. Danri Corp.*, 43 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16

[4] Dr. Forehand diagnosed no respiratory impairment based on his objective tests. *See* Director's Exhibit 8. Dr. Zaldivar diagnosed a very mild respiratory impairment which did not disable claimant from performing heavy manual labor in his coal mine employment. *See* Director's Exhibit 20. In 1995, Dr. Vasudevan diagnosed only a very mild impairment which he did not define as totally disabling and in 1991, Dr. Vasudevan found no cardiopulmonary impairment despite findings of hypoxemia and moderate reduction in exercise capacity following the blood gas studies performed on claimant. *See* Director's Exhibits 35-11, 36-10.

BLR 1-11 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BR 1-195 (1986) *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986), and we must affirm the administrative law judge's denial of benefits. *See Gee, supra*.

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

REGINA C. McGRANERY
Administrative Appeals Judge