

BRB No. 02-0882 BLA

ELMSWORTH OSBORNE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CHISHOLM MINE)	DATE ISSUED: 09/12/2003
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

J. Logan Griffith (Porter, Schmitt, Jones & Banks), Paintsville, Kentucky, for claimant.

Laura M. Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-124) of Administrative Law Judge Rudolf L. Jansen denying benefits on a duplicate 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 In this duplicate claim, the administrative law judge found that the newly submitted evidence was insufficient to establish a material change in conditions because it was insufficient to establish a totally disabling respiratory impairment due to pneumoconiosis, the element of entitlement previously adjudicated against claimant. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the new medical opinion evidence sufficient to establish total disability. Employer responds, urging affirmance of the Decision and Order of the administrative law judge. The Director, Office of Workers= Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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*).

Claimant asserts that the administrative law judge erred in according greater probative weight to the opinions of Drs. Broudy, Rosenberg and Repsher than to the opinions of the treating physicians, Drs. Tidal and Younes. In finding that the new medical evidence did not establish total disability, the administrative law judge found that neither of the two, new, pulmonary function studies resulted in qualifying values and that none of the three, new, blood gas studies resulted in qualifying values. This was proper. 20 C.F.R.

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

' 718.204(b)(2)(i), (ii).

Turning to the medical opinion evidence, the administrative law judge found that Dr. Tidal, a treating physician, did not address whether claimant=s respiratory problems prevented him from performing his usual coal mine employment, Claimant=s Exhibit 1, and that Dr. Younes=s negative response to the question of whether claimant had the respiratory capacity to perform his usual coal mine employment, Director=s Exhibit 7, was insufficient to establish total disability. The administrative law judge accorded greater weight to the opinions of Drs. Broudy, Rosenberg and Repsher because their opinions that claimant had no total respiratory disability were based on all the medical information in the record. Director=s Exhibit 19; Employer=s Exhibits 1, 2. The administrative law judge also assigned probative weight to their opinions because of their expertise in the field of pulmonary medicine and because he found their opinions to be reasoned and documented. This was proper. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Contrary to claimant=s argument, the administrative law judge is not required to accord greater weight to the opinions of treating physicians if he finds their opinions unreasoned. 20 C.F.R. ' 718.104(d)(5); *see Eastover Mining Co. v. Williams*, 2003 WL 21756342 (6th Cir. July 31, 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002). Moreover, in this case, the administrative law judge found that the opinions of Drs. Tidal and Younes did not sufficiently address the question of total disability. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 24, 19 BLR 2-1 (4th Cir. 1994). The administrative law judge, therefore, properly found that the new evidence was insufficient to establish total disability due to pneumoconiosis and, therefore, a material change in conditions. 20 C.F.R. ' 718.204(b)(2); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff=d on recon. en banc* 9 BLR 1-236 (1987).

Accordingly, the Decision and Order of the administrative law judge denying benefits in this duplicate claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge