BRB No. 97-0715 BLA

DARL BUBBY SARRETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PINEY CREEK COAL COMPANY	)	DATE ISSUED:
	)	
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--Benefits Denied of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Ray E. Ratliff, Jr., Charleston, West Virginia, for claimant.

John P. Sherer (File, Payne, Sherer & File), Beckley, West Virginia, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order--Benefits Denied (96-BLA-0515) of Administrative Law Judge Frederick D. Neusner, 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). This claim, filed on December 16, 1994, is a duplicate claim.[1] After

[1]The relevant procedural history of this case is as follows: Claimant filed his initial claim for Black Lung benefits with the Department of Labor on October 30, 1978. Director's Exhibit 37. That claim was finally denied by the district director by reason of abandonment on July 9, 1991. *Id.* On December 6, 1994, claimant filed his present claim, a duplicate claim under 20 C.F.R. §725.309. Director's Exhibit 1. The claim was initially denied by the district director on April 13, 1995, Director's Exhibit 25, and again on September 13, 1995, following an informal conference. Director's Exhibit 34. On October 10, 1995, claimant requested a hearing before the Office Administrative Law Judges (OALJ). Director's

crediting claimant with seven and one-half years of coal mine employment, the administrative law judge found the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge also found the evidence of record insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c), and accordingly, denied benefits. Claimant appeals, arguing that the administrative law judge erred in his weighing of the evidence regarding the issues of both pneumoconiosis at 20 C.F.R. §718.202(a)(2) and total disability at 20 C.F.R. §718.204(c)(2) and (c)(4). Employer responds, contending that the administrative law judge's decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers Compensation Programs, has not filed a brief in this appeal.[2]

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 under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director,*

Exhibit 36. The case was transferred to the OALJ for a hearing on December 28, 1995. Director's Exhibit 38. Administrative Law Judge Frederick D. Neusner conducted a hearing on the claim in Beckley, West Virginia, on August 7, 1996. Decision and Order at 1; Hearing Transcript at 1. Subsequent to the hearing, the miner died on August 26, 1996. Decision and Order at 6, n.4; Unmarked Exhibit. Judge Neusner issued his decision on January 24, 1997. Decision and Order at 1.

[2]Inasmuch as the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1), (a)(3), (a)(4) and 718.204(c)(1), (c)(3), are unchallenged on appeal, they are hereby affirmed. See *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

OWCP, 9 BLR 1-1 (1986)(*en banc*).

Initially, although the administrative law judge noted that the claim was a duplicate claim under 20 C.F.R. §725.309, he failed to make a threshold determination as to whether the newly submitted evidence established a material change in conditions pursuant to the decision of the United States Court of Appeals for the Fourth Circuit, under whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*). Nevertheless, because the administrative law judge properly reviewed the entire record in rendering a decision, we hold that his failure to consider *Rutter* is harmless, and we review his decision on the merits under Part 718. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Turning to claimant's specific arguments, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis based on the autopsy evidence in this case. We disagree. The administrative law judge found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) by means of the medical opinion evidence in the record, *see* Decision and Order at 4-5, a finding which we have affirmed on appeal as unchallenged. *See supra*, n.2. As Section 718.202(a) provides for alternative methods of establishing the existence of pneumoconiosis, the administrative law judge was not obligated to consider whether the autopsy evidence established the existence of pneumoconiosis under subsection (a)(2). *See Dixon v. North Camp Coal Co.,* 8 BLR 1-344 (1985). Moreover, although the administrative law judge did not specifically consider the autopsy evidence under subsection (a)(2), he did note that the autopsy evidence corroborated his findings under subsection (a)(4). *See* Decision and Order at 5. Consequently, claimant's first assignment of error is rejected.

Next, claimant contends that in finding that the evidence of record failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c), the administrative law judge erred in weighing the blood gas study evidence under Section 718.204(c)(2). Specifically, claimant argues that the administrative law judge erred in failing to consider Dr. Gaziano's validation reports, and contends that the administrative law judge's analysis of the blood gas study evidence violates both the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 33 U.S.C. §919(d), 30 U.S.C. §932(a) and 5 U.S.C. §554(c)(2), and the prohibition against a mechanical application of the later evidence rule set forth in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We disagree with each of claimant's contentions. Initially, the administrative law judge neglected to consider specifically Dr. Gaziano's validation of the November 1978 and September 1980 blood gas studies, Director's Exhibit 37. In weighing the evidence as a whole, he did consider those two blood gas studies to be "qualifying."[3] However, he properly found the two qualifying blood gas

[3]A "qualifying" pulmonary function study or blood gas study yields values equal to or less than the applicable values delineated in the tables at 20 C.F.R. Part 718, Appendix B, C, respectively. A "nonqualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

studies outweighed by the results of the other nonqualifying objective studies in the record. *See Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986); Decision and Order at 5. Consequently, the administrative law judge's failure to consider specifically Dr. Gaziano's validation reports did not prejudice claimant in this case.

Claimant also contends that the administrative law judge's simple weighing of the evidence, and subsequent reliance on the preponderance of the nonqualifying objective studies, without further explanation, is violative of the Administrative Procedure Act. We disagree. The administrative law judge is charged with determining whether a party has met its burden of proof. *See Kuchwara v. Director, OWCP,* 7 BLR 1-167 (1984). In relying on the preponderance of the evidence, the administrative law judge acted within the bounds of his discretion in determining that the objective studies, on the whole, did not support a finding of total disability. *See Director, OWCP v. Greenwich Collieries [Ondecko],* 117 S.Ct. 2251, 18 BLR 2A-1 (1994); *cf. Edmiston v. F&R Coal Co.,* 14 BLR 1-65 (1990); *see also, Shedlock, supra*. Lastly, claimant's argument that the administrative law judge violated the court's holding in *Adkins* is rejected, as the administrative law judge did not employ the "later evidence rule" in his weighing of the objective studies. *See* Decision and Order at 5.

Finally, claimant argues that the administrative law judge erred in weighing Dr. Rasmussen's opinion under Section 718.204(c)(4). Claimant contends that Dr. Rasmussen altered his opinion that claimant suffered from no pulmonary or respiratory impairment at his deposition, and that the administrative law judge failed to consider this fact. We reject this argument. In considering the medical opinion evidence under Section 718.204(c)(4), the administrative law judge noted that Dr. Rasmussen opined that claimant had the "pulmonary capacity to perform his last regular coal mine employment," Decision and Order at 5, and that Dr. Rasmussen "reiterated his opinion in his deposition." *Id.* It is true, as claimant contends, that upon being shown the results of a blood gas study from 1978 at his deposition, Dr. Rasmussen noted that it showed significant impairment of gas exchange and was qualifying under the Department of Labor standards. *See* Employer's Exhibit 12 at 13. Contrary to claimant's contention, however, the doctor did not change his opinion regarding claimant's pulmonary condition. Dr. Rasmussen noted that the blood gas study being shown to him was a resting study, and noted that its results were not as relevant as an exercise study, which he characterized as "[t]he crucial test." *Id*. Additionally, Dr. Rasmussen explained that the discrepancy between the 1978 study and the results obtained in 1995 could be related to the miner's weight loss. *Id.* at 15-16. On re-direct examination, Dr. Rasmussen re-affirmed his opinion that the miner had the respiratory capacity to perform heavy manual labor. *Id.* at 18. Contrary to claimant's contention, we cannot say, on the record before us, that the administrative law judge abused his discretion in finding Dr. Rasmussen's opinion not supportive of a finding of total disability under Section 718.204(c)(4), and we consequently affirm his findings thereunder. *See O'Keeffe, supra; Peabody Coal Co. v. Benefits Review Board [Wells],* 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977). We therefore affirm the administrative law judge's finding that the evidence of record fails to establish the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c), and consequently affirm his denial of benefits under Part 718. *See Trent, supra; Perry, supra.*

Accordingly, the administrative law judge's Decision and Order--Benefits Denied is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge