BRB No. 02-0416 BLA

WILLIAM B. LANE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNION CARBIDE CORPORATION	)	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 on Remand-Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman, (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (98-BLA-1315) of Administrative Law Judge Gerald M. Tierney 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 has a lengthy history.[2] When this case was most

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

recently before the Board, the Board vacated the administrative law judge's finding that claimant was entitled to modification of the prior denial of benefits, and remanded the case for the administrative law judge to set forth the specific basis for his finding that claimant had established a mistake of fact in the prior determination that claimant did not suffer from a totally disabling respiratory impairment due to pneumoconiosis. *See Lane v. Union Carbide Coal Corp.*, BRB No. 00-0430 BLA (Apr. 24, 2001)(unpub.). The Board also vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.204(b), (c) and instructed the administrative law judge to reconsider whether the evidence established the existence of pneumoconiosis and total disability due to pneumoconiosis. Lastly, the Board vacated the administrative law judge's award of attorney's fees as the administrative law judge failed to address employer's arguments concerning excessive fees and remanded the case for the administrative law judge to address those contentions. On remand, the administrative law judge found, considering all the relevant evidence of record, that there was no mistake of fact in the prior determination that claimant did not suffer from a totally disabling respiratory impairment and also concluded that claimant was not entitled to modification of the prior

---

[2] Claimant initially filed a claim for benefits on June 3, 1972 which was finally denied on November 30, 1980. Director's Exhibit 20. The instant, duplicate, claim was filed on March 26, 1984. Director's Exhibit 2. On March 11, 1988, Administrative Law Judge Ben H. Walley issued a Decision and Order awarding benefits. Director's Exhibit 51. The Board held that Judge Walley erred in finding total disability established and remanded the case for reconsideration. *Lane v. Union Carbide Corp.*, BRB No. 88-1280 BLA (Feb. 22, 1990)(unpub.). On remand, Judge Walley found total disability established and awarded benefits. Director's Exhibit 66. The Board vacated Judge Walley's finding that the medical opinion evidence established total disability and again remanded the case for further consideration. *Lane v. Union Carbide Corp.*, BRB No. 91-1544 BLA (Apr. 8, 1992)(unpub.)-Director's Exhibit 76. On remand, Administrative Law Judge George P. Morin found that claimant failed to establish a totally disabling respiratory impairment and thus denied benefits. Director's Exhibit 79. The Board affirmed the denial of benefits, *Lane v. Union Carbide Corp.*, BRB No. 93-1215 BLA (Apr. 19, 1994)(unpub.)-Director's Exhibit 93 and subsequently, granted claimant's Motion for Reconsideration *en banc*, but denied the relief requested. Director's Exhibit 95-*Lane v. Union Carbide Corp.*, BRB No. 93-1215 BLA (Order on Motion for Reconsideration *En Banc*)(Nov. 20, 1995)(unpub.). The United States Court of Appeals affirmed the denial of benefits. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997)-Director's Exhibit 98. Subsequently, claimant sought modification, Director's Exhibit 110. On December 10, 1999, Administrative Law Judge Gerald M. Tierney issued a Decision and Order granting modification and awarding benefits. The Board vacated the award of benefits and remanded the case for the administrative law judge to explain the basis of his modification finding. *Lane v. Union Carbide Coal Corp.*, BRB No. 00-0430 BLA (Apr. 24, 2001)(unpub.).

denial of benefits. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in concluding that the medical opinion evidence of record failed to establish a totally disabling respiratory impairment due to pneumoconiosis. Claimant asserts that the administrative law judge should have found that a mistake in the prior determination of fact was established and awarded benefits. Employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief 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 into the Act 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 establish 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 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, the evidence of record, and the arguments of the parties, we conclude that the Decision and Order on Remand-Denying Benefits of the administrative law is supported by substantial evidence and contains no reversible error. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In finding that claimant failed to establish a basis for modification by establishing total disability, the administrative law judge found that there were no qualifying pulmonary function studies of record[3] and that, while Dr. Rasmussen provided qualifying blood gas studies, the weight of the blood gas study evidence, including the most recent studies, was not qualifying. The administrative law judge further found that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. The administrative law judge, therefore, properly found that total disability was not established based on pulmonary function studies, blood gas studies, or evidence of cor pulmonale with right- sided congestive

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

heart failure, 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). In finding that the medical opinion evidence failed to establish total disability, the administrative law judge properly found that the opinions of Drs. Renn, Zaldivar, Fino and Crisalli were entitled to the greatest weight because they were most consistent with the underlying documentation of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark*, *supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge permissibly credited the preponderance of the evidence which questioned the reliability of qualifying 1974 and 1984 blood gas studies, which Drs. Rasmussen, Lee, and Cohen relied on to find total disability, and, therefore, the administrative law judge permissibly accorded less weight to the opinions of Drs. Rasmussen, Lee, and Cohen. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877 (1984); *see also Rafferty, supra*; *Shedlock, supra*. Likewise, the administrative law judge permissibly discounted the opinion of Dr. Mirza, claimant's treating physician, that claimant was totally disabled, because it was not as well-reasoned as the opinions of Drs. Renn, Zaldivar, Fino and Crisalli. *See Hicks*, *supra*; *Grizzle*, *supra*; *Clark, supra*.

Claimant's argument that the opinions of Drs. Renn, Zaldivar, Fino and Crisalli should be accorded little weight because they failed to diagnose the existence of pneumoconiosis is rejected because it addresses the issue of causation, and is not a valid reason to reject an opinion on total disability. *See* 20 C.F.R. §718.204(b), (c). Additionally, claimant's assertions that the opinions of Drs. Cohen and Rasmussen are entitled to superior weight because they are well-reasoned opinions is rejected as it is tantamount to a request that the Board reweigh the evidence, a function outside its scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge's determination that claimant failed to establish a totally disabling respiratory impairment, a requisite element of entitlement, and, therefore, failed to establish entitlement at Part 718 is affirmed. *Trent*, *supra*; *Perry*, *supra*; *Gee*, *supra*; *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (1993). We realize that the administrative law judge did not reconsider the other issues set forth by the Board in its remand instructions. However, because the administrative law judge found that claimant failed to establish total disability, an essential element of entitlement, based on his consideration of all the relevant evidence of record, the resolution of those issues was not required. *See Trent, supra*; *Perry, supra*; *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge