BRB No. 00-0697 BLA

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| HARRY D. JEFFERY | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits Upon Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Harry D. Jeffery, Bloomsburg, Pennsylvania, *pro se.*

Jennifer U. Toth and Mary Forrest-Doyle (Judith E. Kramer, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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 Denying Benefits Upon Modification (1999-BLA-01074) of Administrative Law Judge Ainsworth H. Brown 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

[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, 722, 725 and 726). For the convenience of the parties, all citations to the

administrative law judge accepted the parties' stipulation that claimant had three-quarters of a year of qualifying coal mine employment, and determined that claimant timely sought modification within one year of the denial of his claim, filed on November 13, 1995. The administrative law judge found the evidence of record insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000), and thus insufficient to support modification pursuant to 20 C.F.R. §725.310 (1999).[2] Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

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regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

[2]The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which claimant and the Director have responded.[3] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented by an attorney, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Decision and Order at 3; Hearing Transcript at 4-6.

Turning to the merits, in order to be entitled to benefits pursuant to 20 C.F.R. Part 718 (2000), claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R.

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[3]The Director's letter, dated March 19, 2001, asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant's letter, dated April 12, 2001, generally maintains that the opinion of his treating physician, Dr. Gegwich, is entitled to great weight; that the evidence of record establishes legal pneumoconiosis and a disabling condition, and this claim should not be denied solely on the basis of negative x-rays; and that "[t]he regulatory changes amplify details of justice that should have been in place all along." While claimant also asserts that the medical evidence of record exceeds the regulatory limitations set forth at 20 C.F.R. §725.414, 65 Fed. Reg.80,074-80,076 (2000), the revisions to this regulation are prospective only, and thus not applicable to the instant claim, which was pending on January 19, 2001. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

§§718.3, 718.202, 718.203, 718.204 (2000); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).[4] Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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[4]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment occurred in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge properly conducted a *de novo* review of the evidentiary record as a whole, and determined that the weight of the new evidence submitted in support of modification, as well as the weight of the earlier evidence, was insufficient to establish any of the elements of entitlement. Turning to the issue of total respiratory disability, the administrative law judge accurately determined that none of the pulmonary function studies or blood gas studies of record produced qualifying values,[5] and that while Dr. Barrett found cor pulmonale, his diagnosis was not accompanied by a finding of right-sided congestive heart failure.[6] Decision and Order at 4, 6-7; Director's Exhibits 8, 10, 18, 23, 24, 45, 49. In evaluating the medical opinions of record, the administrative law judge acknowledged Dr. Gegwich's status as claimant's treating physician, but reasonably found that Dr. Gegwich's observation of shortness of breath on exertion was insufficient to establish total respiratory disability, *see generally Clay v. Director, OWCP*, 7 BLR 1-82 (1984); and the physician's reports did not otherwise address the severity of claimant's respiratory impairment or the extent of any physical limitations resulting therefrom which would prevent claimant from performing his usual coal mine employment or comparable work. Decision and Order at 3, 6; Director's Exhibits 9, 42; *see generally Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Hillibush v. U. S. Dept. of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). Moreover, the administrative law judge acted within his discretion as trier-of-fact in finding that the opinions of Drs. Sahillioglu and Green, that claimant has no respiratory impairment that would prevent him from performing his usual coal mine employment or similar work, were well-reasoned and entitled to great weight because they were supported by their underlying documentation and the objective evidence of record, *see Lucostic v. United States Steel Corp.*, 8 BLR 1-49 (1985); Dr. Green is Board-certified in internal and pulmonary medicine, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); and Dr. Green's assessment referenced claimant's specific job duties. Decision and Order at 6-7; Director's Exhibits 22, 49; *see generally Gonzales v. Director, OWCP*, 869 F.2d 776, 12 BLR 2-192 (3d Cir. 1989). The administrative law judge's

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[5] 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 Part 718, Appendices, B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2) (2000).

[6] Additionally, inasmuch as the record contains no evidence of complicated pneumoconiosis, the administrative law judge properly determined that the irrebuttable presumption contained in 20 C.F.R. §718.304, as referenced in 20 C.F.R. §718.202(a)(3) (2000), was inapplicable. Decision and Order at 4-5.

findings pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000) are supported by substantial evidence and thus are affirmed. Furthermore, since the administrative law judge found that the medical evidence was insufficient to establish total disability, lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2) (2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Inasmuch as claimant has failed to establish total respiratory disability, a requisite element of entitlement, we affirm the administrative law judge's denial of benefits, and need not reach the remaining issues of the existence of pneumoconiosis and its etiology. *Trent, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge