BRB No. 00-0822 BLA

VERLIN E. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES STEEL MINING	)	DATE ISSUED:
COMPANY, LLC	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Verlin E. Morgan, Oceana, Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-1213) of Administrative Law Judge Richard T. Stansell-Gamm 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] Claimant initially filed for benefits on

[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

December 12, 1972, which were denied by the district director because claimant failed to establish any element of entitlement on April 3, 1981. Director's Exhibit 30. Pursuant to a duplicate claim filed on June 6, 1985, Administrative Law Judge Nicodemo De Gregorio found that claimant established in excess of twenty years of coal mine employment, but failed to establish the existence of pneumoconiosis or total disability at 20 C.F.R. §718.202(a). Judge DeGregorio further found that because claimant failed to establish these two elements, it followed that he could not establish the elements of causation. Accordingly, benefits were denied. Claimant appealed, and in *Morgan v. United States Steel Corp.*, BRB No. 91-0533 BLA (Oct. 2, 1992)(unpub.), the Board affirmed the denial of benefits, although the administrative law judge failed to make a threshold finding regarding whether a material change in conditions had been established, because the administrative law judge weighed all the evidence of record and found that the existence of pneumoconiosis, an essential element of entitlement, was not established. Director's Exhibit 29. Claimant filed a third claim for benefits on June 23, 1994 which was denied by the district director. Claimant filed the present claim on May 22, 1997. Director's Exhibit 28. Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge), after reviewing all the newly submitted evidence, found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *Lisa Lee Mines v. Director, OWCP, rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *cert. denied*, 117 S.Ct. 763 (1997); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

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

appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, 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 9, 2001, to which the employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the responses of the employer and the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable 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).

In order to establish a material change in conditions pursuant to *Rutter*, claimant must establish one of the elements of entitlement previously adjudicated against him. In this case, as the previous administrative law judge found that claimant failed to establish the existence of pneumoconiosis, the newly submitted evidence must establish that element in order to establish a material change in conditions. The administrative law judge, considering the four x-ray readings that claimant submitted with his most recent claim, properly found none of the four readings were positive for the existence of pneumoconiosis at Section 718.202(a)(1). Director's Exhibits 22, 13, 12, 11; *Napier v. Director, OWCP*, 17 BLR 1-111 (1993).[2]

The administrative law judge further found that claimant submitted medical opinions from four physicians, Drs. Narasimham, Wahi, Glassburn and Jabour. Of the four, only Drs.

[2] We note that the newly submitted evidence contains no evidence of an autopsy or biopsy, and therefore claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Likewise, none of the presumptions found at 20 C.F.R. §§718.304, 718.305, or 718.306 are applicable in this living miner's claim, thus claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) either.

Wahi and Jabour diagnosed the presence of pneumoconiosis. Director's Exhibits 22, 9. The administrative law judge properly found that because Dr. Wahi, who diagnosed the existence of pneumoconiosis, failed to indicate the objective evidence he relied upon as support for his conclusion, his opinion was unreasoned and, therefore, not supportive of a finding of pneumoconiosis. Director's Exhibit 22; Decision and Order at 10; *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984). Additionally, the administrative law judge properly found that Dr. Jabour's opinion was not supportive of a finding of pneumoconiosis because Dr. Jabour, who diagnosed pneumoconiosis, based his conclusion on the 0/1 p x-ray reading of Dr. Aycoth, which, under the regulations, constitutes a negative reading, 20 C.F.R. §718.102; Director's Exhibits 13, 9; Decision and Order at 10, and his opinion was not supported by any other objective medical data. *See Hobbs*, *supra*; *Fields*, *supra*; *Fuller*, *supra*. The administrative law judge, therefore, properly found that claimant failed to establish the presence of pneumoconiosis at Section 718.202(a)(4).

Turning to the issue of total disability, the administrative law judge properly found that claimant failed to establish total disability based on the newly submitted evidence because the sole pulmonary function study and the sole blood gas study resulted in nonqualifying values and there was no evidence of complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §§718.204(c)(1), (2), (3); 718.304. Additionally, the administrative law judge found that claimant failed to establish total disability by medical opinion evidence at 718.204(c)(4) as the sole, relevant opinion of record attributed claimant's total disability to a multiple number of health problems, not a totally disabling respiratory or pulmonary impairment. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994).

Therefore, as none of the newly submitted evidence established the presence of pneumoconiosis or a totally disabling respiratory impairment at Section 718.202(a)(1)-(4) and 718.204(c)(1)-(4), the administrative law judge properly found that claimant failed to establish a material change in conditions at Section 725.309. *Rutter*, *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