BRB No. 00-0833 BLA

EVERETT WELLS	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
ISLAND CREEK COAL COMPANY	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Everett Wells, Van Lear, Kentucky, *pro se*.

Martin E. Hall (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON,

Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-1279) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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 is before the Board for the second time.[2] Claimant filed the present duplicate claim on January 8, 1998. Director's Exhibit 1. In a Decision and Order issued on April 24, 2000, the administrative law judge credited claimant with eleven years of coal mine employment, and adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge also found that the newly submitted evidence was sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000), thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309 (1999).[3] On the merits, the administrative law judge found the evidence of record insufficient to establish that claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were denied.

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine 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, 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.

[2]Claimant filed his initial application for benefits on June 11, 1979. Director's Exhibit 28. This claim was denied by the administrative law judge in a Decision and Order issued on November 6, 1985, and again on May 28, 1992, due to claimant's failure to establish the presence of a totally disabling respiratory impairment, although claimant was able to establish the presence of coal workers' pneumoconiosis. Director's Exhibit 28. The denial of benefits was affirmed by the Board on appeal. *Wells v. Island Creek Coal Co.,* BRB No. 92-2032 BLA (Feb. 24, 1994)(unpub.). Director's Exhibit 28. Claimant filed a duplicate claim on September 18, 1995, which was denied by the district director on March 27, 1996. Director's Exhibit 29. Claimant took no further action regarding this claim which was administratively closed due to abandonment. Director's Exhibit 29.

[3]The amendments to the regulation at 20 C.F.R. §725.309 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).

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in the merits of this appeal.[4]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United 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 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 Director and employer have responded.[5] Claimant has not responded to the Board's order.[6] Based on the briefs

[4]We affirm the findings of the administrative law judge on the length of coal mine employment, and at 20 C.F.R. §§718.204(c) (2000), and 725.309(d) (1999), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]The Director's brief asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a brief dated March 14, 2001, employer asserted that the regulations at issue in the lawsuit "could" affect the outcome of this case. Employer's Brief at 4-9. Employer contends that the provisions contained at 20 C.F.R. §§718.201(c) and 718.204(a), may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of

submitted by the Director and employer, 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).

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the instant appeal.

[6]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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 (2000). *Grant v. Director, OWCP,* 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988).[7] 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*).

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that total disability due to pneumoconiosis was not established pursuant to Section 718.204(b)(2000). The relevant evidence includes the newly submitted reports of Drs. Dahhan, Fino, Repsher and Younes, all of whom found that claimant suffered from a totally disabling respiratory impairment. Dr. Dahhan, a board-certified pulmonologist, found no evidence of pneumoconiosis, but diagnosed totally disabling chronic obstructive pulmonary disease due to claimant's lengthy smoking history. Employer's Exhibit 5; Director's Exhibit 16. Dr. Fino, a board-certified pulmonologist, also found no evidence of pneumoconiosis, but diagnosed a disabling respiratory impairment due to smoking. Director's Exhibit 19. Dr. Repsher, a board-certified pulmonologist, did not diagnose the presence of pneumoconiosis, but diagnosed totally disabling chronic obstructive pulmonary disease due to smoking, hypertension, and heart disease, and possible cor pulmonale. Employer's Exhibits 3, 9. Dr. Younes, whose qualifications are not contained in the record, diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis. This physician indicated that claimant was totally disabled by a respiratory impairment, but that it was caused primarily by tobacco abuse, and that claimant's coal dust exposure "may be a significant contributing factor." Director's Exhibit 20.

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[7]The instant case arises within the jurisdiction of the United States of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP.* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

The administrative law judge weighed the aforementioned evidence, and rationally credited the opinions of Drs. Dahhan, Fino and Repsher as well reasoned and explained, as well as based on these physicians' superior qualifications.[8] Decision and Order at 10; *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Lucostic v. United States Steel Corp.* 8 BLR 1-46 (1985). As the administrative law judge's finding is supported by substantial evidence, it is affirmed, and precludes an award of benefits. *See Cross Mountain Coal Inc. v. Ward,* 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Adams v. Director, OWCP,* 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *see Maypray v. Island Creek Coal Co.,* 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its inferences on appeal. *See Clark, supra; Anderson, supra.* Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

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[8]The administrative law judge noted the record contained previously submitted medical reports, but rationally determined that they were of little probative value since they were significantly older than the newly submitted medical reports. *See Crace v. Kentland-Elkhorn Coal Corp.,* 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Wilt v. Wolverine Mining Co.,* 14 BLR 1-70 (1990).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge