BRB No. 00-0964 BLA

BASIL E. SLAUGHTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Basil E. Slaughter, Independence, West Virginia, *pro se.*

William S. Mattingly (Jackson & Kelly PLLC), Washington, D.C., for employer.

Jeffrey S. Goldberg (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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denying Benefits (99-BLA-1359) of Administrative Law Judge Daniel L. Leland 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).[2] Initially, the administrative law judge determined that the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309(d) (1999),[3] filed on December 8, 1998.[4] Adjudicating the claim pursuant to 20 C.F.R. Part 718 (2000), the administrative law judge credited claimant with forty years and four months of coal mine employment. Addressing the merits of the duplicate claim, the administrative law judge found the newly submitted evidence of record insufficient to establish

[1] Claimant was not represented by counsel at the hearing before the administrative law judge. The administrative law judge, however, questioned claimant regarding his intention to proceed without an attorney, and afforded him the opportunity to submit evidence on his own behalf, testify, provide statements and question witnesses. Consequently, there was a valid waiver of claimant's right to representation and the hearing before the administrative law judge was properly conducted. 20 C.F.R. §725.362(b) (2000); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

[2] 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[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).

[4] Claimant filed his initial claim for benefits on April 2, 1973 with the Social Security Administration (SSA), Director's Exhibit 27-1, which denied the claim on August 24, 1973. Director's Exhibit 27-9. Claimant filed an Election Card on April 3, 1978 seeking review of his denied claim by SSA, Director's Exhibit 27-19, which again denied the claim on October 12, 1978. Director's Exhibit 27-10. The claim was thereafter transferred to the Department of Labor, Director's Exhibit 27-11, which denied the claim on April 8, 1980 and June 26, 1980, finding that claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibits 27- 17, 27-18. No appeal was taken.

the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). In addition, the administrative law judge found the newly submitted evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Therefore, the administrative law judge found the newly submitted evidence of record insufficient to establish a material change in conditions pursuant to Section 725.309(d) (1999). Accordingly, the administrative law judge denied benefits. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal.[5]

[5] The parties do not challenge the administrative law judge's decision to credit claimant with forty years and four months of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 amended 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 16, 2001, to which employer and the Director have responded.[6] The Director asserts that the amended regulations at issue in the lawsuit do not affect the outcome of this case. Employer initially asserts that the amended regulations should not be applied retroactively to cases before the Board. In addition, employer argues specifically that this case should be held in abeyance pending the outcome of the lawsuit inasmuch as the amended versions of 20 C.F.R. §§718.104, 718.201 and 718.204 could affect the outcome of this case.[7] Lastly, employer contends that if the new regulations are to be applied, the proper procedure is to remand the case to the Office of Workers' Compensation Programs for the parties to develop evidence responsive to the new regulations. Based on the briefs submitted by employer and the Director, and our review, we hold that the ultimate 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 will consider the issue raised to be whether the Decision and Order below is

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[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 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case. Claimant has not responded to this Order.

[7] We reject employer's contention that the amended version of 20 C.F.R. §718.104(d) will affect the outcome of this case inasmuch as the changes to Section 718.104(d) only apply to claims filed after January 19, 2001, *see* 20 C.F.R. §§718.101, 718.104. Moreover, we reject employer's contention that the amended version of 20 C.F.R. §718.201(c) will affect the outcome of this case inasmuch as the progressivity of pneumoconiosis is not at issue. Similarly, the amended version of 20 C.F.R. §718.204(a) does not affect the ultimate disposition of this case inasmuch as none of the parties are alleging that a nonpulmonary or nonrespiratory condition caused total respiratory disability in this case.

supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). If the findings of fact and conclusions of law of the administrative law judge 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, 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 (2000); *Hobbs v. Clinchfield Coal* Co. [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

Section 725.309 (1999) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (1999). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that in considering whether claimant has established a material change in conditions, the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has proven at least one element of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP* [*Rutter II*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). In the case at bar, the prior claim was denied by the district director, finding that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) or total respiratory disability pursuant to Section 718.204(c) (2000). Director's Exhibit 27-17.

In determining whether claimant established a material change in conditions, the administrative law judge correctly found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis inasmuch as all of the x-ray interpretations submitted with the new claim were read as negative for the existence of pneumoconiosis.[8] Decision and Order at 3, 5;

[8] The newly submitted x-ray evidence consists of six interpretations of two films dated January 21, 1999 and May 18, 1999, all of which are interpreted as negative for the existence of pneumoconiosis. Director's Exhibits 10, 11, 22, 23; Employer's Exhibits 1, 3.

Director's Exhibits 10, 11, 22, 23; Employer's Exhibits 1, 3; 20 C.F.R. §718.202(a)(1) (2000); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), *aff'd*, 806 F.2d 258 (4th Cir. 1986)(table); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Moreover, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(2) (2000) as there is no biopsy evidence of record. Decision and Order at 5; 20 C.F.R. §718.202(a)(2) (2000). Likewise, the administrative law judge properly found that claimant was not entitled to any of the presumptions set forth under Section 718.202(a)(3) (2000). Decision and Order at 5; 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306 (2000).

In addition, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). The administrative law judge correctly found that all of the newly submitted medical opinions of record opined that the evidence of record was insufficient to diagnose coal workers' pneumoconiosis or any occupationally acquired pulmonary condition. Decision and Order at 4, 5; *see* Director's Exhibits 8, 22, 23; 20 C.F.R. §§718.201, 718.202(a)(4); *Perry, supra*; *see also Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988). We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000).

Furthermore, we affirm the administrative law judge's finding that the preponderance of the newly submitted medical evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c) (2000) as supported by substantial evidence. Decision and Order at 5. The administrative law judge properly found that the pulmonary function study evidence was insufficient to demonstrate total disability inasmuch as none of the newly submitted pulmonary function studies produced qualifying values.[9] Decision and Order at 3, 5; Director's Exhibits 7, 21-23; 20 C.F.R. §718.204(c)(1) (2000). Likewise, the administrative law judge correctly found that all of the blood gas studies were non-qualifying and, thus, insufficient to demonstrate total disability.

[9] 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 (2000), Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

Decision and Order at 3, 5; Director's Exhibits 9, 23; 20 C.F.R. §718.204(c)(2) (2000). In addition, the administrative law judge correctly found that the record contains no evidence of cor pulmonale with right sided congestive heart failure and, therefore, as a matter of law, total disability was not demonstrated pursuant to Section 718.204(c)(3) (2000). Decision and Order at 5; 20 C.F.R. §718.204(c)(3) (2000); *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

Finally, the administrative law judge properly found that total disability was not demonstrated at Section 718.204(c)(4) (2000), as the newly submitted medical opinions of record were insufficient to demonstrate total respiratory or pulmonary disability. The administrative law judge properly set forth the medical opinions of record, finding that Drs. Renn and Jaworski opined that claimant was able, from a respiratory standpoint, to perform his usual coal mine employment as a dumper helper. Decision and Order at 4, 5; Director's Exhibits 8, 23. In addition, the administrative law judge properly found that Drs. Rechtenwald and Leef did not render an opinion regarding a respiratory or pulmonary impairment. Decision and Order at 3, 5; Director's Exhibit 22. Inasmuch as the administrative law judge properly considered all of the relevant evidence of record, we affirm his finding that the newly submitted medical was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000). Decision and Order at 5; 20 C.F.R. §718.204(c) (2000); *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *see also Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).

Since the administrative law judge rationally found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or establish that claimant was totally disabled, *see* discussion, *supra*, the elements of entitlement previously adjudicated against claimant, we affirm the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish a material change in conditions. 20 C.F.R. §725.309(d) (1999); *Rutter, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge