BRB No. 02-0257 BLA-A

GARLAND STILTNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	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 - Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Garland Stiltner, Richlands, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Rejection of Claim (00-BLA-191) of Administrative Law Judge Edward Terhune Miller rendered on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal

[1] Claimant was not represented by counsel when this duplicate claim was before the administrative law judge. Because claimant was previously represented by counsel, *see* Director's Exhibits 36, 37, and was made aware of his right to counsel without cost to him, and he was given the opportunity to present evidence on his behalf, and to respond to evidence proffered by employer, the requirements enunciated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), were satisfied.

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge credited claimant with a coal mine employment history of thirty-six years and found that claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment, elements of entitlement previously adjudicated against him.[3] The administrative law judge, therefore, found that a material change in

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Claimant initially filed a claim for benefits on June 22, 1981, which was finally denied by the Department of Labor on November 26, 1982, Director's Exhibit 37. Claimant filed a second claim on February 22, 1983 which was denied by Administrative Law Judge

conditions was not established pursuant to the standard set forth in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 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), *cert denied*, 510 U.S. 1090 (1997).[4] Accordingly,

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Ben O'Brien. Director's Exhibit 36. Judge O'Brien found that claimant failed to establish the existence of pneumoconiosis or total disability and was, therefore, precluded from establishing entitlement to benefits. Director's Exhibit 36. The Board vacated Judge O'Brien's denial of benefits and remanded the case for further consideration. *Stiltner v. Island Creek Coal Co.*, BRB Nos. 91-1690 BLA and 91-1690 BLA-A (Aug. 13, 1993)(unpub.). Specifically, the Board held that the pending claim constituted a request for modification, not a duplicate claim, and remanded the case for consideration under 20 C.F.R. §718.305. *Id*. On remand, Administrative Law Judge Marvin Bober found that because claimant was unable to establish a totally disabling respiratory or pulmonary impairment, entitlement to benefits was precluded. The Board affirmed this denial of benefits. *Stiltner v. Island Creek Coal Co.*, BRB No. 94-0800 BLA (Nov. 28, 1994) (unpub.). Claimant filed the instant duplicate claim on April 15, 1999, which was denied by Administrative Law Judge Edward Terhune Miller in the Decision and Order denying benefits from which claimant now appeals.

[4] To prove a material change in conditions, a claimant must prove, under all of the favorable and unfavorable medical evidence of his condition after the previous denial, at least

benefits were denied.

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one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 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), *cert. denied*, 510 U.S. 1090 (1997).

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.[5]

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. *McFall v. Jewell Ridge Coal Corp.*, 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).

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*).

[5] Initially, the Director, Office of Workers' Compensation Programs (the Director), filed an appeal in this case. On March 1, 2002 the Board issued an Order granting the Director's motion to dismiss his appeal.

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law is supported by substantial evidence and contains no reversible error. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).[6] The administrative law judge rationally found that the newly submitted x-ray evidence of record, *i.e.*, that evidence "developed subsequent to the closing of the record on which the prior denial was based," Decision and Order at 4, was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) based on the preponderance of negative x-ray readings by physicians with superior qualifications. Decision and Order at 4; Director's Exhibits 13, 14, 25, 29, 31, 32; Employer's Exhibits 1-4, 6, 8, 9, 17; 20 C.F.R. §718.202(a)(1); *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); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *see Staton v. Norfolk v. Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) as there was no biopsy evidence of record, this was a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 14; *see* 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

[6] We affirm, as unchallenged on appeal, and not adverse to claimant, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Considering the medical opinion evidence of record, the administrative law judge rationally found that the only newly submitted medical opinion which concluded that claimant suffered from the existence of pneumoconiosis, *i.e.*, that of Dr. Forehand,[7] could not be credited because it was based solely on the length of claimant's coal mine employment history inasmuch as the positive x-ray relied on by Dr. Forehand was subsequently re-read as negative by three B-readers[8], and the qualifying blood gas test he relied on was found by all of the other physicians who reviewed the record not to indicate an actual respiratory impairment. Decision and Order at 15; Director's Exhibits 9, 10, 11, 13; 20 C.F.R. §718.202(a)(4); *Clark*, *supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). The administrative law judge rationally found that opinions of Drs. McSharry, Zaldivar, Fino, Morgan and Castle,[9] finding no evidence of coal worker's pneumoconiosis or any other dust disease of the lungs related to coal mine employment, were entitled to greater weight, than the contrary opinion of Dr. Forehand, as they were better supported by objective evidence. Employer's Exhibits 2, 5, 7, 10, 11, 13, 14, 16; *Hicks*, *supra*; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Accordingly, the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis

[7] Dr. Forehand is a board-certified pediatrician, allergist and immunologist. Director's Exhibit 10.

[8] "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A "board-certified radiologist" is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology.

[9] The administrative law judge stated the credentials of these physicians: Dr. McSharry is board-certified in internal pulmonary and critical care medicine. Employer's Exhibits 2, 11. Dr. Zaldivar is board-certified in internal and critical care medicine and in the subspeciality of pulmonary diseases. Employer's Exhibits 5, 19. Dr. Fino is board-certified in internal medicine and in the subspeciality of pulmonary diseases. Employer's Exhibit 7. Dr. Morgan received the British equivalent of board certification in internal medicine and the subspecialty of pulmonary diseases. Employer's Exhibit 7. Dr Castle is board-certified in internal medicine and the subspeciality of pulmonary diseases. Employer's Exhibit 10.

pursuant to Section 718.202(a)(4) is affirmed. 20 C.F.R. §§718.201, 718.202(a)(4). We, therefore, affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis, and thus, a material change in conditions. 20 C.F.R. §§718.202(a)(1)-(4); 725.309(d)(2000); *Rutter*, *supra*; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

In considering the evidence relevant to the issue of a totally disabling respiratory impairment, the administrative law judge correctly found that because none of the newly submitted pulmonary function studies produced qualifying[10] values they could not establish total respiratory disability. Director's Exhibit 9; Employer's Exhibits 2, 12; 20 C.F.R. §718.204(b)(2)(i). The administrative law judge correctly found that total disability could not be established by blood gas studies because none of the newly submitted blood gas studies submitted yielded qualifying values. He further found that while one exercise study produced qualifying values; that study, administered by Dr. Forehand, Director's Exhibit 11, was not credible based on the opinions of Drs. McSharry, Zaldivar and Castle, who concluded that the qualifying values were reflective of either an invalid test or a cardiac condition, rather than a respiratory impairment. Decision and Order at 17; 20 C.F.R. §718.204(b)(2)(ii); *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *see generally Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280 (7th Cir. 1988); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting). Additionally, the administrative law judge correctly found that because the record contained no evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established at Section 718.204(b)(2)(iii). Decision and Order at 17. The administrative law judge, therefore, correctly found that the weight of the evidence failed to demonstrate total disability pursuant to Section 718.204(b)(2)(i)-(iii).

In considering the newly submitted medical opinion evidence, the administrative law judge determined that Dr. Forehand did not provide an explanation for his determination that claimant suffered from a totally disabling respiratory impairment, Decision and Order at 17, that all of the other opinions found to the contrary, and that the blood gas study which Dr.

[10] 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).

Forehand had relied upon was found not to be indicative of a respiratory impairment. The administrative law judge concluded that the preponderance of evidence did not establish a totally disabling respiratory impairment at Section 718.204(b)(2)(iv). *See Hicks*, *supra*; *Akers*, *supra*; *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Clark*, *supra*; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). We affirm, therefore, the administrative law judge's determination that claimant failed to establish a totally disabling respiratory impairment pursuant to the newly submitted medical opinion evidence, *see* 20 C.F.R. §718.204(b)(2)(iv), and affirm the conclusion that claimant has failed to establish a totally disabling respiratory impairment based on the new evidence. 20 C.F.R. §718.204(b)(2); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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); *see 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).

Thus, because the administrative law judge considered all of the newly submitted evidence and has provided affirmable bases for concluding that such evidence failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment, elements of entitlement previously adjudicated against claimant, we affirm the administrative law judge's finding that claimant has failed to establish a material change in conditions. *See* 20 C.F.R. §725.309; *Rutter*, *supra*.

Accordingly, the administrative law judge's Decision and Order - Rejection of Claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge