BRB No. 01-0861 BLA

LAWRENCE LESTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Lawrence Lester, Newtown, West Virginia, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (00-BLA-1022) of Administrative Law Judge Richard A. Morgan denying benefits 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] The administrative law judge

[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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

found that claimant's prior claim was finally denied because claimant failed to establish any element of entitlement. The administrative law judge credited claimant with forty-one years of coal mine employment and found that the evidence submitted in support of the duplicate claim also failed to establish any element of entitlement. Accordingly, benefits were denied.

On appeal, claimant generally challenges the findings of the administrative law judge. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), is not participating in 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).

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. 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*).

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc, Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997), for deciding whether claimant demonstrated a material change in conditions at Section 725.309(d). In *Rutter*, the Court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In his prior claim, claimant failed to establish any element of entitlement. Decision and Order at 2-3; Director's Exhibit 20. Thus, the administrative law judge properly reviewed only the evidence submitted following the denial of claimant's prior claim. *Rutter, supra*.

In reviewing the newly submitted evidence regarding the existence of pneumoconiosis, the administrative law judge concluded that the two x-ray films taken since

the prior denial were uniformly read negative. Director's Exhibits 11, 12; Employer's Exhibits 1-9. The administrative law judge, therefore, correctly concluded that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis is affirmed. Further, because there were no biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(3) by the use of presumptions covering complicated pneumoconiosis, claims filed prior to January 1, 1982, or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306. Turning to the newly submitted physicians' opinions, the administrative law judge accorded little weight to Dr. Younes's opinion as he found it inconsistent in its diagnosis of pneumoconiosis as defined by the Act.[2] This was rational. Director's Exhibit 9. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). The administrative law judge, therefore, credited the opinions of Drs. Zaldivar, Fino and Castle, Board-certified pulmonary specialists, that claimant showed no evidence of coal workers' pneumoconiosis or any occupationally acquired disease, as they were more consistent with the negative x-ray evidence, the essentially normal physical findings on examination and the non-qualifying results of pulmonary function studies. Director's Exhibits 4, 7, 9. This was rational. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence. *See Clark, supra*; *Anderson, supra*. Thus, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis and, therefore, a material change in conditions on that basis. *Rutter, supra*.

Turning to the issue of total disability, the administrative law judge properly found

[2] Dr. Younes found, on the one hand, a mild or moderative restrictive impairment due to coal mine employment, but on the other hand found no occupational lung disease caused by claimant's coal mine employment. Director's Exhibit 9.

that the newly submitted pulmonary function studies and blood gas studies were non-qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. § 718.204(b)(2)(i), (ii); Director's Exhibits 8, 10; Employer's Exhibit 4. Likewise, the administrative law judge properly found that because the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(2)(iii). Turning to the physicians' opinions, the administrative law judge properly found that the medical opinion evidence was insufficient to establish total disability as none of the newly submitted medical reports supported a finding of total respiratory disability. Decision and Order at 11, 12; Director's Exhibits 9, 20; Employer's Exhibits 4, 7, 9; 20 C.F.R. §718.204(b)(2)(iv); *Budash v. Bethlehem Mines Steel Corp.*, 9 BLR 1-43 and 13 BLR 1-46 (1986), *aff'd on recon*., 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). The administrative law judge's finding that claimant failed to establish a totally disabling respiratory impairment is, therefore, affirmed. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*). Based on the administrative law judge's consideration of the evidence submitted in connection with the duplicate claim, the administrative law judge, therefore, properly found that claimant failed to establish a material change in conditions. *Rutter, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge