BRB No. 99-1178 BLA

BERNARD R. REECE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION 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 - Denying Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Bernard R. Reece, Rock, West Virginia, *pro se*.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (99-BLA-0338) of Administrative Law Judge Lawrence P. Donnelly 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). The administrative law judge found that claimant established thirty-three years of coal mine employment, and based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. Claimant filed his initial claim for benefits on April 16, 1984, which was denied on November 21, 1984, as claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability at Section 718.204(c). Director's Exhibit 31. This claim was finally dismissed by the deputy commissioner on March 1, 1988. Director's Exhibit 31. Claimant filed a duplicate claim on October 30, 1997, and submitted additional evidence with his

claim. The administrative law judge considered the newly submitted evidence 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*, 117 S.Ct. 763 (1997); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). The administrative law judge determined that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Claimant appeals, generally contending 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 (the Director), has not participated in 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error. The administrative law judge initially reviewed all the newly submitted x-ray evidence of record pursuant to Section 718.202(a)(1). Of the numerous x-ray readings submitted, only the reading of Dr. Patel, a B-reader and a Board-certified radiologist,[1] of the December 10, 1997 film was positive. Director's Exhibit 8. The administrative law judge further noted that this film was reread by Drs. Ranavaya, Navani, Wiot and Spitz, dually qualified readers, as negative. Director's Exhibits 9, 10, 18. As there were no other positive readings, the administrative law judge permissibly found that the weight of the x-ray readings was negative for pneumoconiosis. Decision and Order at 12; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also 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). Further, regarding Section 718.202(a)(2) and (3), the administrative law judge properly found the existence of pneumoconiosis was not established at this Section. 20 C.F.R. §718.202(a)(2), (3).

[1] A "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 by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 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).

The administrative law judge next considered the newly submitted medical reports of Drs. Hippensteel, Fino and Zaldivar which did not find the existence of pneumoconiosis, Employer's Exhibits 1, 2, 3, 5; Director's Exhibit 26, and the reports of Drs. Rasmussen and Qazi, which found chronic obstructive pulmonary disease related to smoking and coal dust exposure pursuant to Section 718.202(a)(4). Director's Exhibits 6, 15; Employer's Exhibit 6. The administrative law judge permissibly accorded little weight to Dr. Rasmussen's opinion in light of his statement that claimant's respiratory impairment "could be due to coal mine dust exposure, previous cigarette smoking, or probable asthma .... and that asthma would be due to a 'probable non-occupational factor'," as it was "too equivocal for a finding that the COPD arose from coal mine employment." Decision and Order at 13; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Although the administrative law judge found that the opinion of Dr. Qazi, claimant's treating physician, was documented, he permissibly accorded it little weight as Dr. Qazi "stated that he was inclined to defer to board-certified pulmonologists," Decision and Order at 13, who found that claimant did not have pneumoconiosis. Accordingly, the administrative law judge permissibly found the evidence insufficient to establish the presence of pneumoconiosis at Section 718.202(a)(4). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Doss v. Director, OWCP*, 854 F.2d 1316, 19 BLR 2-181 (4th Cir. 1995); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J. concurring.); *Justice*, *supra*. We therefore affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

The administrative law judge next considered the newly submitted evidence pursuant to Section 718.204(c). The administrative law judge properly found that of the three pulmonary function studies, two were nonqualifying.[2] Director's Exhibits 5, 26. Regarding the October 16, 1997 pulmonary function study, the administrative law judge found that although the test yielded qualifying results, only one effort was obtained when the regulations require three. *See* 718.204(c)(1); Appendix B; Director's Exhibit 22. Further, the administrative law judge noted that "[n]o reason was given for the failure to obtain three efforts, and subsequent studies show that medical problems do not prevent the claimant from undergoing three efforts." Decision and Order at 14. Considering the three pulmonary function studies, the administrative law judge properly found that a totally disabling respiratory impairment was not established at Section 718.204(c)(1). *See Winchester v.*

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

Director, OWCP, 9 BLR 1-177 (1986). Additionally, the administrative law judge correctly found that as none of the blood gas studies yielded qualifying results, a totally disabling respiratory impairment could not be established at Section 718.204(c)(2). 20 C.F.R. §718.204(c)(2); Director's Exhibits 7, 22, 26. Further, as the record was devoid of any evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant could not establish a totally disabling respiratory impairment at Section 718.204(c)(3). 20 C.F.R. §718.204(c)(3).

The administrative law judge next determined that the newly submitted medical opinions failed to establish a totally disabling respiratory impairment at Section 718.204(c)(4) as none of them found "that claimant was totally disabled based on his pulmonary status alone." Decision and Order at 14. Dr. Qazi found claimant completely disabled due to his multiple medical problems, especially his chronic obstructive pulmonary disease. Employer's Exhibit 6. Drs. Hippensteel, Fino, Rasmussen and Zaldivar found that claimant was not disabled from a pulmonary standpoint. Employer's Exhibits 1, 2, 3; Director's Exhibit 6. In evaluating the opinions, the administrative law judge permissibly found that the weight of the medical opinions are insufficient to establish total disability. *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Lane*, *supra*; *Doss*, *supra*; *Seals*, *supra*; Decision and Order at 14. In addition, the administrative law judge rationally found that, in any case, Dr. Qazi's opinion of severe chronic obstructive pulmonary disease would be entitled to less weight as he relied, in part, on the discredited October 16, 1997 pulmonary function studies and because he did not address other potential causes of claimant's dyspnea. *See Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

As the newly submitted evidence failed to establish the presence of pneumoconiosis at Section 718.202(a) or total disability at Section 718.204(c), claimant has failed to establish a material change in conditions pursuant to Section 725.309(d) and the duplicate claim must be denied. *Rutter, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge