BRB No. 97-0583 BLA

CLYDE CURE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
SUNNY RIDGE MINING COMPANY, INCORPORATED	)	
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Deron L. Johnson (Boehl, Stopher & Graves), Prestonburg, Kentucky, for the employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order -- Denying Benefits (95-BLA-1991) of Administrative Law Judge Rudolf L. Jansen rendered on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). A claimant is entitled to benefits under the Act by establishing that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by the disease. 30 U.S.C. §901; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 BLR 2-1, 2-5 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-54 (6th

Cir.1989).

I

Claimant worked in the mines for over 20 years until 1992, *see* Director's Exhibits 2, 4; Hearing Transcript (Tr.) at 10-43, and has filed three separate claims for benefits under the Act. *See* Director's Exhibits 1, 20, 21. The first two claims, filed on August 7, 1979 and December 9, 1992, were administratively denied on December 20, 1979 and May 25, 1993 and August 3, 1993 respectively. The instant claim was filed on September 15, 1994,[1] Director's Exhibit 1, and denied on February 22, 1995. Director's Exhibit 12. Upon claimant's request, this matter was referred to the Office of Administrative Law Judges for a formal hearing, which was conducted on July 23, 1996 by Administrative Law Judge Rudolf L. Jansen.

On January 7, 1997, Judge Jansen issued his Decision and Order denying the claim. The administrative law judge applied the standards for a duplicate claim, pursuant to which this claim must be denied unless it is determined that "there has been a material change in conditions" since the denial of claimant's last previous claim, *see* 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18-19 (6th Cir. 1994), and correctly applied the permanent criteria set forth at 20 C.F.R. Part 718 in light of the September 15, 1994 filing date of this claim. *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 204, 12 BLR 2-376, 2-384 (6th Cir.1989).

The administrative law judge credited claimant with 20¾ years of qualifying coal mine employment,[2] evaluated the "new" evidence submitted after the denial of claimant's second claim in 1993, and found that because it failed to establish either that claimant was afflicted with pneumoconiosis or that he was totally disabled, *see* 20 C.F.R. §§718.202(a), 718.204(c), claimant did not establish a material change in conditions. *See* Decision and Order at 6-8, 12-15. In the alternative, assuming that even if claimant's new evidence

[1]The instant claim, filed more than a year after the denial of the previous claim, constitutes a duplicate claim. 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 996, 19 BLR 2-10, 2-16 (6th Cir. 1994).

[2]This finding is affirmed as unchallenged. *See Skrack v. Island Creek Coal* Co., 6 BLR 1-710, 1-711 (1983); *see also Hix v. Director, OWCP*, 824 F.2d 526, 527, 10 BLR 2-191, 2-192-93 (6th Cir. 1987).

demonstrated a material change in conditions, the administrative law judge found that the entire record did not support a finding that claimant suffered from pneumoconiosis. Decision and Order at 16. Benefits were denied and claimant brought this appeal.

II

On appeal, claimant contests the administrative law judge's denial of benefits in general terms. Claimant also challenges the administrative law judge's findings that claimant failed to establish either the existence of pneumoconiosis under Section 718.202(a)(4) or the presence of a totally disabling pulmonary or respiratory impairment pursuant to Section 718.204(c)(4).

The Board's scope of review is defined by statute. 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).

III

We conclude that claimant has failed to demonstrate any error in the administrative law judge's consideration of the newly submitted evidence.[3] Nowhere does claimant mention the administrative law judge's evaluation of the newly submitted evidence, other than to "agree" that the pulmonary function study evidence establishes total respiratory disability. In fact, claimant incorrectly assumes that the administrative law judge found that he had demonstrated a material change in conditions on the basis of the qualifying pulmonary function study submitted with the new evidence, Director's Exhibit 6. Petition for Review and Brief at 1-2. Contrary to claimant's interpretation of the Decision and Order, the administrative law judge ruled that "[c]laimant has not proven a material change in condition, and this duplicate claim must be denied."[4] Decision and Order at 15.

[3]Claimant's general allegations, in which he avers that the Decision and Order "is not in conformity with the medical evidence and the lay evidence[,]" that it "is clearly erroneous ... [and that it] is arbitrary, capricious, or an abuse of justice," Claimant's Petition for Review and Brief at 1, do not allege any specific error made by the administrative law judge based upon the evidence of record or controlling authority, and do not "demonstrate with some degree of specificity the manner in which substantial evidence precludes the denial of benefits or why the [administrative law judge's] decision is contrary to law." *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *see* 20 C.F.R. §802.211(b).

[4]After he specifically ruled that the newly submitted medical evidence would not support a material change in conditions, Decision and Order at 15, the administrative law judge determined in the alternative that, even if claimant's newly submitted pulmonary function study evidence had demonstrated a material change in conditions, the record as a

Because claimant fails adequately to challenge the administrative law judge's evaluation of the newly submitted evidence in his determination that a material change in conditions has not been shown by this proof, and, further, because the administrative law judge's evaluation of the "new" evidence is supported by substantial evidence and contains no reversible error, we will affirm the Decision and Order denying this duplicate claim.

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whole did not establish that claimant contracted pneumoconiosis. Decision and Order at 15-16.

In order to evaluate whether a claimant has demonstrated a material change in conditions, the administrative law judge must "consider all of the new evidence, favorable and unfavorable, and determine whether [claimant] has proven at least one of the elements of entitlement previously adjudicated against him."[5] *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18-19. The administrative law judge complied with this standard by considering the evidence which was submitted subsequent to August 3, 1993, the date of the final denial of claimant's second claim.

This evidence consists of numerous interpretations of three chest x-rays. Director's Exhibits 10-11; Employer's Exhibits 1-5, the qualifying pulmonary function study administered by Dr. Fritzhand, Director's Exhibit 6, Dr. Fritzhand's non-qualifying arterial blood gas study, Director's Exhibit 9, and Dr. Fritzhand's narrative medical report. Director's Exhibits 7, 8. In addition, claimant testified about suffering from shortness of breath, the fact that he takes "liquid breathing medicine" and has a productive cough. Tr. at 44-48. Dr. Fritzhand examined claimant on September 27, 1994, reviewed a chest x-ray and administered both a pulmonary function study and arterial blood gas test. Director's Exhibits 6-11. The x-ray does not show pneumoconiosis,[6] but the pulmonary function study administered for Dr. Fritzhand "qualifies," *i.e.* meets the disability standards set forth in 20 C.F.R. Part 718, Appendix B. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n. 5, 13 BLR 2-259, 2- 262 n. 5 (3d Cir. 1990). The arterial blood gas study produced "non-qualifying" results. *Id.*

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[5]In this case, claimant's second claim was initially denied on May 25, 1993, because claimant failed to establish *any* element of entitlement. Director's Exhibit 21: 47-53. This claim was closed as abandoned on August 3, 1993. Director's Exhibit 21: 1.

[6]The chest x-ray was taken on September 27, 1994, and was interpreted as negative by Drs. Halbert, Sargent, Poulos, West, and Broudy. Director's Exhibits 10-11; Employer's Exhibits 2-5.

Dr. Fritzhand interpreted the spirometry results as reflecting "moderately severe chronic obstructive pulmonary disease with a restrictive component." Director's Exhibit 7. Dr. Fritzhand reported that claimant said that he had limited ability to walk no more than a quarter mile without shortness of breath, could not mow his lawn without dyspnea, that claimant had four-year history of a chronic productive cough, suffered from occasional chest pain, shortness of breath at night and that claimant had noticed "slight pedal edema." Director's Exhibit 7. On physical examination, Dr. Fritzhand observed that "[d]iaphragmatic excursion and chest expansion are normal[,]" and found "no rales, rhonchi or wheezes ... over the lung fields." He diagnosed pneumoconiosis based on claimant's "long [history of] exposure to coal dust particulate" and opined that claimant's pulmonary impairment would prevent him from resuming his former work in the mines. Dr. Fritzhand also reported that claimant had never smoked cigarettes.[7] *Id.*

On November 17, 1994, however, Dr. Fritzhand completed a questionnaire in which he responded "no" to a question concerning whether claimant has an occupational lung disease. Dr. Fritzhand explained that

> [b]ased on a [history of] only 6 yrs. exposure, & [pulmonary function study] which may be invalid, I cannot make a [diagnosis] of pneumoconiosis ... I find it difficult at this time with the additional history of 6 yrs. mining exposure, to assess pulmonary impairment with marginal spirometric studies.

Director's Exhibit 8.

The administrative law judge reasonably discounted Dr. Fritzhand's diagnosis of pneumoconiosis, which was based on claimant's history of coal mine dust exposure, or his assessment of impairment. On the former point, the administrative law judge reasoned that Dr. Fritzhand "made no attempt to support his diagnosis with objective studies or physical examination findings ... ," and found that Dr. Fritzhand's diagnosis was "unreasoned and

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[7]The administrative law judge does not question Dr. Fritzhand's report that claimant was a non-smoker. However, in a report dated November 2, 1979, Dr. Fritzhand had recorded a smoking history of 1 pack/day for 30 years. Director's Exhibit 20: 20-26. Although Dr. Broudy in 1993 was told that claimant had "consum[ed] only two or three packs in his lifetime," Director's Exhibit 21: 10 (Deposition) and Dr. Dahhan recorded that claimant was a "non-smoker," Director's Exhibit 21: 93, Drs. O'Neill, Anderson and Wright each reported more extensive cigarette smoking histories. *See* Director's Exhibit 20: 27-29. While this discrepancy should have been addressed, especially because Dr. Fritzhand's diagnosis of pneumoconiosis was based exclusively on the history of claimant's coal mine dust exposure without an acknowledgment of a competing etiology of any pulmonary impairment, this error is harmless in view of our decision to affirm the administrative law judge's effective finding that Dr. Fritzhand's diagnosis of pneumoconiosis is unreasoned. *See Belcher v. Director, OWCP*, 895 F.2d 244, 246, 13 BLR 2-273, 2-275 (6th Cir. 1989).

warrants little weight." Decision and Order at 13-14. The administrative law judge was also entitled to reject Dr. Fritzhand's disability conclusions, because the doctor's characterization of the ventilatory studies as "marginal" and his difficulty in making an "assess[ment of] pulmonary impairment" rendered his opinion "equivocal" and insufficient to support a finding of total disability. Decision and Order at 13-14.

The administrative law judge found that the newly submitted evidence consisted of "one qualifying pulmonary function study, one non-qualifying arterial blood gas study, and medical opinion evidence that is insufficient to support a finding of total disability." Decision and Order at 14-15. Placing "equal weight" on the clinical tests, the administrative law judge found that claimant failed to prove a material change in conditions because "the evidence does not establish total disability by a preponderance of the evidence." *Id.* As the "context of the decision makes clear," *Sykes v. Director, OWCP*, 812 F.2d 890, 893, 10 BLR 2-95, 2-98 (4th Cir. 1987), the administrative law judge evaluated the new medical evidence "of all the categories" *as a whole* as required under Section 718.204(c) to find that claimant failed to establish total respiratory disability.[8] *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036,1041-42, 17 BLR 2-16, 2-21 (6th Cir. 1993).

The administrative law judge is charged with the evaluation and weighing of the medical evidence, may draw appropriate inferences therefrom, *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-298 (6th Cir. 1994); *see also Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989), and is not required to credit the conclusions of any particular medical expert. *See generally Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Because the administrative law judge's evaluation of the newly submitted evidence on the issues of whether that proof established the existence of pneumoconiosis or total respiratory disability is effectively unchallenged, *see C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 1116, 28 BRBS 84, 87 (CRT) (11th Cir. 1994)(assuming as correct findings not contested on appeal), is not "inherently incredible or patently unreasonable," *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), and because substantial

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[8]The administrative law judge also stated that his decision accounted for testimony at the hearing. Decision and Order at 2; *see* Tr. at 44-48. Given the administrative law judge's rejection of the newly submitted medical evidence, claimant's testimony is, given this record, "mainly cumulative," because his symptoms are recorded by Dr. Fritzhand, and "is not much help," *see Fife v. Director, OWCP*, 888 F.2d 365, 370, 13 BLR 2-109, 2-116 (6th Cir. 1989).

evidence supports the administrative law judge's finding that claimant failed to demonstrate a material change in conditions, we affirm the denial of this duplicate claim. 20 C.F.R. § 725.309(d). In view of our disposition this issue, we need not reach the administrative law judge's alternative evaluation of the record as a whole. *See Hix v. Director, OWCP*, 824 F.2d at 527, 10 BLR at 2-192-93.

Accordingly, the Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge