

BRB No. 93-1276 BLA

JOHN W. MULLERY )

)  
Claimant-Petitioner )

)  
v. )

)  
) DATE ISSUED:  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

)  
Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Joseph M. Cosgrove, Forty Fort, Pennsylvania, for claimant.

Sarah M. Hurley (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (91-BLA-0030) of Administrative Law Judge Frank D. Marden denying benefits 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). This case involves a duplicate claim. Claimant filed his first claim for benefits on June 29, 1973. This claim was considered by Administrative Law Judge Frank J. Marcellino, who found that

claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §410.414(a) and that claimant failed to establish total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.414(c). Accordingly, benefits were denied in a Decision and Order dated March 26, 1985. See Director's Exhibit 15. Claimant filed a second claim for benefits on October 5, 1988. The administrative law judge determined that claimant established eight years of coal mine

employment and considered the claim as a duplicate claim pursuant to 20 C.F.R. §725.309. The administrative law judge initially found that Judge Marcellino's finding of the presence of pneumoconiosis is *res judicata*. The administrative law judge then considered the newly submitted evidence and found that claimant failed to establish total disability due to pneumoconiosis and, thus, that he failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) and that the administrative law judge erred in failing to permit post-decisional admission of a physician's deposition. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order but asserts that, if the case is remanded, the administrative law judge's findings with regard to the existence of pneumoconiosis, causation of pneumoconiosis, and comparable and gainful employment must be vacated.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In making his finding pursuant to 20 C.F.R. §725.309(d), the administrative law judge found that the evidence submitted with claimant's second claim includes a pulmonary function study which yielded qualifying results. See Decision and Order at 5; Director's Exhibit 2. However, this pulmonary function study was not accompanied by tracings as required by 20 C.F.R. §718.103(b), and is, therefore, non-conforming. See Director's Exhibit 2. As this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, the quality standards are mandatory and this non-conforming pulmonary function study is not sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) or a material change in conditions pursuant to 20 C.F.R. §725.309(d). See *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Mangifest v. Director, OWCP*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). The administrative law judge properly found that none of the other evidence submitted with claimant's second claim was supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(c) or a material change in conditions pursuant to 20 C.F.R. §725.309(d). See Decision and Order at 3; Director's Exhibits 3-11, 22. As a result, the administrative law judge's finding that claimant failed to establish a material change in conditions is affirmed as it is supported by substantial evidence.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge