

BRB No. 03-0282 BLA

NORMAN R. BROWN)

Claimant-Petitioner)

v.)

CIRCLE R TRANSPORT,)
INCORPORATED)

Employer-Respondent)

DIRECTOR, OFFICE OF WORKERS=)
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 09/29/2003

DECISION and ORDER

Appeal of the Decision and Order B Denial of Benefits of Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for
claimant.

Bonnie Hoskins (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order B Denial of Benefits (00-BLA-1081) of
Administrative Law Judge Robert L. Hillyard rendered 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 In this duplicate claim, the administrative law

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

judge found the newly submitted evidence insufficient to establish a material change in conditions because it failed to establish the existence of pneumoconiosis or total disability, elements previously adjudicated against claimant, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted evidence did not establish total disability, and thereby, a material change in conditions. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, (the Director) is not participating in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance 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).

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*).

Claimant contends that the administrative law judge erred in finding no total disability by rejecting the opinion of Dr. Traughber that claimant was totally disabled solely because it was based on an invalid pulmonary function study. Claimant further contends that Dr. Selby's contrary opinion cannot overcome Dr. Traughber's opinion because it did not contain sufficient explanation or rationale for its conclusion and because it was unclear as to whether it was addressing total disability or disability causation.

In according less weight to Dr. Traughber's opinion, the administrative law judge permissibly rejected Dr. Traughber's opinion because it was based on the results of a pulmonary function study which were subsequently invalidated as unreliable by Dr. Burki, a Board-certified Internist and Pulmonologist. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984), *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

Likewise, the administrative law judge permissibly found that the opinion of Dr. Selby, a Board-certified Internist and Pulmonologist, established that claimant did not have a totally disabling respiratory impairment, *i.e.*, Dr. Selby stated that Aclaimant is not totally or permanently disabled or impaired from any respiratory defect, disease or condition,@ and that

A[claimant] has the respiratory and pulmonary capacity to perform any and all previous coal mine employment duties.@ Director=s Exhibit 29; see 20 C.F.R. ' 718.204(b)(2)(iv); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff=g* 16 BLR 1-11 (1991). The administrative law judge also permissibly found that Dr. Selby=s opinion was better supported by objective evidence. See *Clark*, 12 BLR 1-149. Thus, we affirm the administrative law judge=s finding that the newly submitted evidence failed to establish total disability, and therefore, a material change in conditions. See *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Further, because claimant has not challenged the administrative law judge=s finding that claimant failed to establish the existence of pneumoconiosis and a material change in conditions on that basis, that finding is likewise affirmed. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); see also *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge=s Decision and Order B Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge