BRB No. 02-0219 BLA

HAROLD E. HAWK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Harold E. Hawk, Kitzmiller, Maryland, *pro se*.

William S. Mattingly (Jackson & Kelly, PLLC) Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-BLA-00968) of Administrative Law Judge Mollie W. Neal 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] The administrative law judge found at least twenty-seven and one-half years of coal mine employment established and, based on the date of filing,

[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence failed to establish total disability due to pneumoconiosis, the element of entitlement previously adjudicated against claimant, and thus, found that a material change in conditions was not established pursuant to *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*, 510 U.S. 1090 (1997). Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, 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. *McFall v. Jewell Ridge Coal Corp.*, 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); *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 establish 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry*

[2] Claimant filed his initial claim for benefits on April 27, 1973, which was denied on June 3, 1981. Director's Exhibit 30. Claimant filed a second claim in December 13, 1989, which was denied on June 13, 1990 . Director's Exhibit 30. Claimant filed a third claim on July 6, 1994, which was denied by Administrative Law Judge John C. Holmes on August 7, 1996. Director's Exhibits 30-39. Claimant filed the instant duplicate claim on October 7, 1999, the denial of which is now before us on appeal.

v. Director, OWCP, 9 BLR 1-1 (1986)(*en banc*).

In weighing all the new evidence relevant to total disability, the administrative law judge rationally found that it failed to establish total disability as the five pulmonary function studies conducted in 1999 and 2000 did not produce qualifying values and the four qualifying blood gas studies, out of the five blood gas studies performed, were performed while claimant was hospitalized for heart problems and surgery and did not therefore "weigh either for or against a finding of total disability," Decision and Order at 11. The administrative law judge found that the new opinions of Drs. Renn, Fino, Crouch and Naeye, finding that claimant did not suffer from any disabling respiratory impairment and that pneumoconiosis did not contribute to any disability, were entitled to greater weight as they were the best reasoned opinions of record, the physicians' qualifications were superior in the areas of pulmonary medicine and pathology, and Dr. Renn performed one of the most recent examinations of record. Director's Exhibits 13, 25, 31, 33; Employer's Exhibits 5, 6; Decision and Order at 12. This was rational. *Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1988); *Grizzle v. Pickands Mather Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d241, 19 BLR 2-1 (4th Cir. 1994); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) and 13 BLR 1-46 (1986), *aff'd on recon.* 9 BLR 1-104 (1986)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Gee W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).[3] Thus, we affirm the administrative law judge's finding that the new medical evidence of record failed to establish total disability and therefore, a material change in

[3] The new medical opinions of record consist of the opinions of: Drs. Pillai, Gupta, Poonai, Matyasik, Mir and Orlini, diagnosing chronic obstructive lung disease and noting treatment for cardiac problems, Director's Exhibit 24; Employer's Exhibits 2-5, 7-11, 13, 16, 17, 21; Dr. Sagin, finding claimant moderately impaired by silicosis due to coal mine employment and mildly impaired by chronic bronchitis due to cigarette smoking, Director's Exhibit 10; Dr. Renn, diagnosing no pneumoconiosis, chronic bronchitis, pulmonary emphysema, but finding respiratory bronchiolitis due to smoking, and that claimant was not totally disabled and was able to perform his usual coal mine employment, Director's Exhibit 22; Employer's Exhibit 15; Dr. Fino, diagnosing respiratory bronchiolitis due to smoking, a very mild respiratory impairment that would not prevent claimant from performing his usual coal mine employment, and no lung disease related to coal dust exposure, Employer's Exhibits 6, 14; Dr. Crouch, finding no evidence of dust related lung disease or any evidence indicating that dust exposure contributed in any way to any impairment, Employer's Exhibits 7, 8; and Dr. Naeye, not diagnosing pneumoconiosis and opining that pneumoconiosis could not be the cause of any disability, Employer's Exhibits 10, 13.

conditions. 20 C.F.R. §§718.204(b); 725.309(d)(2000); *Rutter*, *supra*.[4]

[4] Although the administrative law judge erred in finding that Dr. Sagin's opinion of a "moderate respiratory impairment" could not establish total disability without considering the exertional requirements of claimant's usual coal mine employment, *see Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991), we nonetheless affirm the administrative law judge's finding of total disability inasmuch as she permissibly found that the opinions of Drs. Renn, Fino, Crouch, and Naeye were entitled to greater weight and the laboratory tests of record did not support a finding of total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Likewise, although the administrative law judge erred in her outright rejection of the qualifying blood gas studies because they "were performed during periods where Claimant was being hospitalized for other conditions, primarily heart problems and surgery," without determining whether a physician had concluded that the results of these tests were affected by these other conditions, Decision and Order at 11; *see Hess v. Director, OWCP*, 21 BLR 1-

141 (1998); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984), inasmuch as the administrative law judge concluded that these tests were not dispositive and concluded that total disability was not established based on her consideration of all the relevant evidence, this error is also harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge