

BRB No. 03-0275 BLA

CORNELIUS MORGAN)
)
 Claimant-Petitioner)
)
 v.)
)
 CORNELL COALS, INCORPORATED) DATE ISSUED: 11/25/2003
)
 and)
)
 KENTUCKY CENTRAL INSURANCE)
 COMPANY)
)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leroy Lewis (Law Offices of Phillip Lewis), Hyden, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (02-BLA-5043) of Administrative Law Judge Joseph E. Kane 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 judge found that claimant established 28.97 years of coal mine employment, but found that the newly submitted evidence failed to establish a material change in conditions by failing to establish total disability.² Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted evidence did not establish total disability and failed, therefore, to establish a material change in conditions. Claimant also contends that he has established the existence of pneumoconiosis and that he is entitled to the rebuttable presumption that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. 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'Keefe 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

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.

² Claimant filed two previous claims for benefits. Claimant's first claim for benefits, filed on November 18, 1985 was denied by Administrative Law Judge Richard K. Malamphy because claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 19. Claimant filed a second claim for benefits on April 22, 1994. Judge Malamphy found that claimant established the existence of pneumoconiosis and therefore a material change in conditions, but denied benefits because claimant failed to establish total disability based on the record as a whole. Director's Exhibit 20.

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 determining that the newly submitted evidence was insufficient to establish total disability and, therefore, a material change in conditions. Specifically, claimant contends that the administrative law judge should have found total disability established based on the opinion of Dr. Sullivan, claimant's treating physician. Claimant's Exhibit 1.

In finding that claimant failed to establish total disability, the administrative law judge credited the non-qualifying pulmonary function study and blood gas study along with Dr. Baker's opinion that, even though claimant had a mild respiratory impairment, he could perform his usual coal mine employment. The administrative law judge found that Dr. Baker fully understood the exertional nature of claimant's usual coal mine employment and that his opinion was well-supported by underlying objective evidence. The administrative law judge also found that Dr. Baker fully explained his conclusions. Director's Exhibit 8.

Conversely, the administrative law judge found that Dr. Sullivan's opinion that claimant was totally disabled was neither well-reasoned nor well documented because its conclusions were not sufficiently explained, it did not discuss the exertional requirements of claimant's usual coal mine employment, and it was not supported by the objective evidence of record. *See* Claimant's Exhibit 1; Employer's Exhibit 1. This was rational. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002)(credibility of medical opinion is for administrative law judge to determine); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). 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 and we need not reach claimant's other arguments on appeal. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge