BRB No. 01-0181 BLA

JAMES CARL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KOCHER COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LACKAWANNA CASUALTY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Michelle A. Jones (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer/carrier.[1]

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

PER CURIAM:

[1] Mr. Carrozza filed a response on behalf of respondents, but has subsequently withdrawn from this case pursuant to the direction of employer. Letter to the Board dated August 23, 2001.

Claimant appeals the Decision and Order (00-BLA-00179) of Administrative Law Judge Ainsworth H. Brown denying benefits 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).[2] Based on the filing date of August 13, 1998, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with 10.5 years of coal mine employment and found employer to be the responsible operator. In this duplicate claim, the administrative law judge determined that claimant's prior claim had been finally denied and that to establish a material change in conditions, claimant must establish at least one of the elements of entitlement which defeated his previous claim.[3] After reviewing the newly submitted evidence, the administrative law judge found this evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4)(2000), and insufficient to demonstrate the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4), (b)(2000). Thus, the administrative law judge concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (1999). Accordingly, benefits were denied.

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[2] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ.No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3] Claimant filed his initial application for benefits on July 6, 1982, which the district director denied on November 10, 1982. *See* Director's Exhibit 47. Claimant took no further action until he filed the present claim on August 13, 1998. *See* Director's Exhibit 1.

On appeal, claimant challenges the findings of the administrative law judge on the existence of pneumoconiosis, the presence of a totally disabling respiratory impairment and a material change in conditions. 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), has filed a letter indicating that he will not participate in this appeal.[4]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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).

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 (2001). 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*).

[4] We affirm the findings of the administrative law judge on the length of coal mine employment, and on the designation of employer as the responsible operator, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Contrary to claimant's assertion, he does not meet his burden of proving the existence of pneumoconiosis based on the presence positive x-ray interpretations in the record. Rather, as was done in this case, the administrative law judge must properly weigh all the newly submitted x-ray evidence to determine if this evidence was sufficient to meet claimant's burden of proof. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion when he accorded greatest weight to the interpretations of the physicians who are Board-certified radiologists and B-readers. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge properly found that the weight of the newly submitted x-ray evidence was negative for pneumoconiosis. *Id*. Likewise, claimant's argument that the reports of Drs. Rashid and Dittman are not credible because the physicians did not explain the cause of claimant's symptoms, which, claimant argues, are consistent with pneumoconiosis, is without merit. When concluding that claimant failed to meet his burden of proof based on credible medical opinion evidence, the administrative law judge correctly declined to accord determinative weight to the reports of Drs. Rashid and Dittman, as neither physician diagnosed pneumoconiosis or a respiratory impairment related to coal mine employment after noting claimant's symptoms.[5] *See* 20 C.F.R. §718.202(a)(4); *Trent, supra*;

[5] Although the administrative law judge did not make any specific findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), any error is harmless as the record does not contain any biopsy reports at Section 718.202(a)(2) and claimant, a living miner, was not entitled to the presumptions at Section 718.20(a)(3) in this claim filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

see generally Clay v. Director, OWCP, 7 BLR 1-82 (1984); *Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984). We, therefore, affirm the findings of the administrative law judge that the newly submitted evidence did not establish the existence of pneumoconiosis as it is supported by substantial evidence.[6]

[6] As claimant did not establish the existence of pneumoconiosis, we need not consider claimant's argument that he is entitled to the presumption his pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203(b).

Claimant also contends that he demonstrated the presence of a totally disabling respiratory impairment based on the blood gas study performed by Dr. Rashid on October 14, 1998 as the values in this test meet the regulatory standards for disability, and based on the report of Dr. Sahillioglu validating this test. *See* 20 C.F.R.§718.204(c)(2), Appendix C; Director's Exhibits 15, 16. The administrative law judge permissibly declined to accord determinative weight to this test on the grounds that the subsequent normal blood gas study performed by Dr. Dittman on July 9, 1999 undermined the indication of total disability shown by Dr. Rashid's test results.[7] *See Bates v. Director, OWCP*, 7 BLR 1-113 (1984). Furthermore, the administrative law judge correctly found that all the newly submitted pulmonary function studies were nonqualifying under the regulatory criteria, that the record contained no evidence of cor pulmonale with right-sided congestive heart failure, and that new medical reports of Drs. Rashid and Dittman do not contain any diagnosis of a disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(i)-(iv); *see Beatty v. Danri Corporation and Triangle Enterprises*, 43 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Trent, supra*. We, therefore, affirm the findings of the administrative law judge that claimant failed to demonstrate the presence of a totally disabling respiratory impairment as it is supported by substantial evidence.[8]

As claimant has failed to prove either the existence of pneumoconiosis arising out of coal mine employment or the presence of a totally disabling respiratory impairment due to pneumoconiosis, the elements of entitlement which defeated his prior claim, we affirm the finding of the administrative law judge that claimant has not established a material change in conditions pursuant to 20 C.F.R. §725.309 (1999) and the denial of benefits as it supported by substantial evidence and is in accordance with law. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

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

SO ORDERED.

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[7] The record reflects that Dr. Rashid did not diagnose any respiratory impairment based on the results of his blood gas study. *See* Director's Exhibit 14.

[8] We need not consider claimant's argument on the cause of claimant's respiratory impairment in light of our decision to affirm the findings of the administrative law judge that claimant did not demonstrate the presence of a totally disabling respiratory impairment.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge