

BRB No. 03-0157 BLA

ESTATE OF JOEL S. STENSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CRESENT HILLS COAL COMPANY)	DATE ISSUED: 09/29/2003
)	
and)	
)	
OLD REPUBLIC 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 on Remand B Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James F. Rohaley, lay representative, Daisytown, Pennsylvania.

George H. Thompson (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand-Denying Benefits (98-BLA-0392) of Administrative Law Judge Michael P. Lesniak rendered 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).¹ The miner filed the current application for benefits on June 14, 1984. Director=s Exhibit 1. That claim, now being considered pursuant to claimant=s request for modification, has been before the Board numerous times. Previously, the Board discussed fully the claim=s procedural history. *Stenson v. Crescent Hills Coal Co.*, BRB Nos. 98-1204 BLA, 97-0711 BLA (Dec. 13, 1999)(unpub.). When this claim was last before the Board, the Board held that that the disposition of the case was not impacted by the challenge to the revised regulations, but nonetheless vacated the administrative law judge=s Decision and Order and remanded the case in order that a hearing could be held. *Stenson v. Crescent Hills Coal Co.*, BRB No. 00-0653 BLA (Apr. 10, 2001)(unpub.). Pursuant to a hearing held March 27, 2002, on claimant=s request for modification on a duplicate claim, the administrative law judge found that claimant failed to establish total respiratory disability and failed, therefore, to establish a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers= Compensation Programs (the Director), has not responded to 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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. '921(b)(3), as incorporated into the Act 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 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

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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 first challenges the retroactive application of the new, revised regulations to this claim, arguing that this was an *ex-post facto* application of law. The Board previously held, however, that the disposition of this case was not impacted by the new regulations. Moreover, the administrative law judge did not apply the new regulations when he considered this claim. We will not, therefore, address this issue again. See [2001] *Stenson*, slip op. at 3; *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Claimant also raises the issue of bias by the administrative law judge in this case based on the fact that claimant witnessed counsel for the insurance company conferring with the administrative law judge post hearing. Claimant's contention is rejected, however, as claimant has failed to provide any specific example of bias on the part of the administrative law judge in deciding this case. See *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986)(Adverse rulings in the proceedings are not by themselves sufficient to show bias); see generally *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*).

Claimant also asserts that the administrative law judge erred in according little weight to Dr. Bhatt's opinion because Dr. Bhatt did not definitely state that the miner had coal workers' pneumoconiosis when, in fact, Dr. Bhatt consistently reported the existence of coal workers' pneumoconiosis. Director's Exhibit 47. Claimant is correct that Dr. Bhatt diagnosed the existence of coal workers' pneumoconiosis, the existence of which was established in the prior claim. See Decision and Order on Remand at 3. In the instant duplicate claim, however, claimant must establish that the miner was totally disabled, the element of entitlement previously adjudicated against him, in order to establish a material change in conditions. See *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); see also *Hess v. Director*,

OWCP, 21 BLR 1-141 (1998). Accordingly, claimant=s contention that Dr. Bhatt diagnosed the existence of pneumoconiosis is irrelevant to the issue to be decided in this duplicate claim. *See* 725.309(d)(2000); *Swarrow*, 72 F.3d 308, 20 BLR 2-76; *Hess*, 21 BLR 1-141.

Finally, claimant argues that the administrative law judge should have credited the opinion of Dr. Levine, a pulmonary specialist, who conducted the miner=s most recent examination, the reading of Dr. Fisher, a Board-certified radiologist and B-reader, and the miner=s death certificate showing that the miner had respiratory distress syndrome. Claimant=s Brief at 3. Contrary to claimant=s assertion, however Dr. Levine denied that he was a pulmonary specialist on deposition; instead stating that he was Board-certified in internal medicine with a subspecialty in allergies. Director=s Exhibit 68, pp. 3-4. Further, although the death certificate stated that the miner died from hypoxemia, adult respiratory distress syndrome and widely metastatic prostate carcinoma, Unnumbered Exhibit, the administrative law judge rationally found that because there was no indication that the physician signing the death certificate possessed any relevant qualifications or personal knowledge of the miner from which to assess the cause of death, he considered it unreliable. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Additionally, the administrative law judge correctly found that the death certificate, the only new evidence submitted pursuant to the request for modification, did not address whether the miner was totally disabled by a respiratory impairment before his death. Nor, contrary to claimant=s argument, is an x-ray reading sufficient to establish total disability. *See* 20 C.F.R. ' ' 718.202, 718.204. Claimant=s arguments are, therefore, rejected. Further, on reviewing the evidence, we conclude that the administrative law judge permissibly accorded more weight to the more expert opinions of Drs. Scott, Fino, Renn, Strother and Anderson than to the opinions of Drs. Tarwater and Levine, which he found were not supported by the objective evidence, *see 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 (1984), and properly found that the medical opinion evidence, along with the pulmonary function studies and blood gas studies of record, did not establish total disability and a material change in conditions. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff=d on recon. en banc* 9 BLR 1-236 (1987).

Accordingly, the administrative law judge=s Decision and Order on Remand B Denying Benefits is affirmed.

SO ORDERED.

DOLDER, Chief
Appeals Judge

NANCY S.
Administrative

Appeals Judge

ROY P. SMITH
Administrative

HALL
Appeals Judge

BETTY JEAN
Administrative