

BRB No. 95-0481 BLA

BEN WATKINS, JR.)
)
) Claimant-Petitioner)
)
v.)
)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
) Respondent) DECISION and ORDER

Appeal of the Decision and Order of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Ben Watkins, Jr., Tazewell, Virginia, *pro se*.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order (93-BLA-0888) of Administrative Law Judge Lawrence E. Gray denying benefits on a

¹Claimant is Ben Watkins, Jr., the miner, who filed three prior claims for benefits, the last of which was denied on September 20, 1990. Director's Exhibits 20-22. The present claim was filed on April 21, 1992. Director's Exhibit 1.

²Tim White, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, filed an appeal on behalf of claimant but is not representing him on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, BRB No. 94-3940 BLA (May 19, 1995) (Order).

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). This case involves a duplicate claim. The administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

Claimant generally contests the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not responded to 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held in *Lisa Lee Mines v. Director, OWCP [Rutter]*, F.3d , No. 94-2523 (4th Cir. June 16, 1995), that to satisfy the "material change in conditions" requirement of Section 725.309(d), claimant must establish either that he did not have pneumoconiosis at the time of the first application but has since contracted it and become totally disabled by it, or that the pneumoconiosis has progressed to the point of becoming totally disabling although it was not at the time of the first application. *Rutter*, slip op. at 5-7; see *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).

In this case, the administrative law judge considered all of the evidence submitted since the denial of the miner's most recent claim in September, 1990. See n.1. This evidence consists of two negative interpretations of an x-ray dated June 4, 1992, two qualifying pulmonary function studies, a letter from a consulting physician invalidating the June 4, 1992 pulmonary function study, a non-qualifying arterial blood gas study, and the medical opinions of Drs. Forehand and Spagnolo.³

³Dr. Forehand examined claimant and diagnosed chronic obstructive pulmonary disease, the etiology of which he opined was "?" history of smoking, "?" history of asthma, and "doubt significant coal dust exposure." Director's Exhibit 8. He further opined that claimant was totally impaired by his chronic obstructive pulmonary

Director's Exhibits 6-11, 24.

Pursuant to Section 725.309, the administrative law judge noted that, while the two pulmonary function studies produced qualifying results, the administering physician questioned claimant's cooperation on the June 1992 studies and found that claimant did not understand the directions on the September 1992 study. Decision and Order at 2; Director's Exhibits 6, 7. The administrative law judge also noted that the June 1992 study was invalidated by a consulting physician. Decision and Order at 2; Director's Exhibit 6. Based on these findings, the administrative law judge concluded that claimant had not demonstrated a material change in conditions. Decision and Order at 2.

Inasmuch as an administrative law judge may assign a qualifying pulmonary function study little or no weight, see *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984); cf. *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991), and may accord greater weight to the opinion of a consulting physician regarding the validity of a pulmonary function study, see *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984), we affirm the administrative law judge's treatment of the pulmonary function study evidence.

Similarly, the administrative law judge permissibly found Dr. Forehand's opinion insufficient to establish the existence of a totally disabling respiratory impairment because it was based on pulmonary function studies which the physician himself questioned and which were found to be invalid. See *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). As none of the remaining evidence supports either a finding of the existence of pneumoconiosis or a totally disabling respiratory impairment, we affirm the administrative law judge's finding pursuant to Section 725.309 and the denial of benefits. See *Rutter, supra*.

disease but stated that this diagnosis "must be tempered by poor oral history and variable effort on pulmonary function study." Director's Exhibit 8. Dr. Spagnolo reviewed the medical evidence and opined that claimant does not have pneumoconiosis or a totally disabling breathing disorder. Director's Exhibit 24.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge