U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 10 June 2005

Case No. 2004-BLA-5218

In the Matter of

ANGELO BOLINGER,

Claimant,

v.

CRIBB COAL COMP.,

Employer,

and

LIBERTY MUTUAL INS. CO.,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:[1]

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[1] The Director, Office of Workers' Compensation Programs, a party in this proceeding, was not present or represented by counsel at the hearing. By failing to appear at the hearing or participate in this case after referral to this office, the Director is deemed to have waived any issues which it could have raised at any stage prior to the close of this record. By referring this matter for hearing the Director is further deemed to have completed evidentiary development and adjudication as required by the regulations. 20 C.F.R. §725.421.

Monica Rice Smith, Esq., at hearing
Edmond Collett, Esq., of record
Edmond Collett, PSC.
Hyden, Kentucky
For the Claimant

Francesca Maggard, Esq.
Lewis & Lewis
Hazard, Kentucky
For the Employer

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (the "Act"), 30 U.S.C. § 901 et seq., and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On November 4, 2003, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a hearing. (DX 22).[2] A formal hearing in this matter was conducted on March 29, 2005, in Hazard, Kentucky, by the undersigned. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder. The opinion which follows is based on all relevant evidence of record.

ISSUES[3]

The issues in this case are:

[2] In this Decision and Order, "DX" refers to the Director's exhibits, "EX" refers to the Employer's exhibits, "CX" refers to the Claimant's exhibits, and "TR" refers to the transcript of the hearing.

[3] The Employer stipulated to at least ten years of coal mine employment and maintains Constitutional issues for appeal purposes. (TR 8).

1. Length of coal mine employment;

2. Whether the Claimant has pneumoconiosis as defined in the Act and regulations;

3. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether the Claimant is totally disabled; and,

5. Whether the Claimant's disability is due to pneumoconiosis.

(TR 8; DX 22).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

The Claimant, Angelo Bolinger, was born on September 14, 1945 and has a tenth grade education. (TR 10; DX 3). He served in the United States Army from December 1965 until September 1967. Id. He alleges one dependent for the purposes of augmentation, namely his daughter, Clara Paige. (TR 24; DX 3).

At the hearing, the Claimant alleged eighteen years of coal mine employment. (TR 8). The Claimant began coal mine work in 1974 for Wollum Trucking where he was a truck driver for two years. (TR 11). He stated he hauled coal from the mines to the tipple in a truck with an open cab. (TR 12). He testified that he would load the coal himself. Id. Next, the Claimant was employed by Hensley Trucking for approximately three years. (TR 13). He performed similar duties there. (TR 13-15). The Claimant's last coal mine employment was with Amy Jo Coal which later became Cribb Coal where he worked for fourteen years. (TR 15). He was employed two years at surface level and twelve years underground operating a Wilcox Miner and setting jacks. (TR 16). The Claimant's jobs included a lot of walking and heavy lifting of over fifty pounds daily. (TR 17). He stated that he was constantly exposed to significant amounts of coal dust in the above-mentioned jobs. (TR 12-17). In 1993, the Claimant ceased coal mine employment after a back injury underground. (TR 18).

He received a Workers' Compensation Award for the injury as well as state black lung benefits. Id. He also draws Social Security disability benefits. (TR 29).

The Claimant's treating physician is Dr. Shinn, and he is seen at the Veteran's Administrative Hospital in Johnson City, Tennessee for his breathing problems. (TR 19-20, 22). He is prescribed inhalers that he uses daily. (TR 20). The Claimant complains of shortness of breath, daily cough, daily sputum production, sleeping problems, and dyspnea. (TR 19). The Claimant testified that he can no longer perform yard or housework due to his breathing problems. (TR 22-23). Furthermore, he stated that he had to hire someone to help take care of his infant daughter. (TR 22). Additionally, the Claimant suffers from high blood pressure, stress disorders, skin cancer, back problems, hearing problems, and possible lung cancer. (TR 26).

The Claimant testified that he smoked from ages twenty-one to twenty-eight at a rate of one-half pack per day. (TR 25). He stated that he continues to occasionally smoke about two or three cigarettes a week. The medical reports of record included conflicting smoking histories with the current use of cigarettes. Therefore, I find that there is insufficient information at this time to make an accurate smoking history determination.

The Claimant filed his first application for benefits on December 12, 1994. (DX 1). The claim was denied by the Office of Worker's Compensation Programs on March 24, 1995, and again on August 16, 1995, after a request for reconsideration. Id. The Claimant sought a formal hearing, and on September 30, 1996, Administrative Law Judge Richard Huddleston remanded the claim for a complete pulmonary evaluation. Id. On December 16, 1996, the District Director issued a denial of benefits. Id. On October 17, 1997, the administrative law judge denied benefits. Id. The Claimant requested review by the Benefits Review Board (the "Board"), which affirmed the denial on October 27, 1998. Id.

The current application for benefits was filed on October 3, 2002. (DX 3). The District Director issued a Proposed Decision and Order denying benefits on August 19, 2003. (DX 17). This matter was transferred to this office after the Claimant submitted a request for a formal hearing conducted by an Administrative Law Judge. (DX 18, 22).

Length of Coal Mine Employment:

The Claimant alleges eighteen years of coal mine employment. (TR 8; DX 3). The Employer stipulated to at least ten years of coal mine employment. Id. The District Director made a finding of ten years. (DX 17). The documentary evidence of record includes the Claimant's Social Security earnings report from 1978 to 1993. (DX 6). Furthermore, the Claimant testified to two additional years of coal mine employment prior to 1978. (TR 11-12). In determining the length of the miner's coal mine employment, the administrative law judge may apply any reasonable method of calculation. See Clark v. Barnwell Coal Co., 22 B.L.R. 1-275, 1-280 - 1-281, BRB Nos. 01-0876 BLA and 02-0280 BLA (Apr. 30, 2003). Accordingly, I find that the Claimant was a coal miner, as that term is defined by the Act and Regulations, for twelve years. He last worked in the Nation's coal mines in 1993. (DX 6).

Dependency:

The Claimant alleges one dependent for purposes of augmentation, namely his daughter, Claire Paige, born on August 28, 2003. (TR 22; CX 2). As the issue of dependency is not contested, I find that the Claimant has one dependent for purposes of benefit augmentation.

Applicable Regulations:

Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. Amendments to the Part 718 regulations became effective on January 19, 2001. As this claim was filed on October 3, 2002, such amendments are applicable.

The 2001 amendments significantly limit the development of medical evidence in black lung claims. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in a single medical report must comply individually with the evidentiary limitations. Id. In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one

physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, biopsy or autopsy. § 725.414(a)(2)(ii). Likewise, employers and the District Director are subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i, iii).

Subsequent Claim:

In cases where a claimant files more than one claim and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial unless there has been a material change in condition or the later claim is a request for a modification. Section 725.309(d). The Claimant's previous claim was a request for benefits which was ultimately denied by the Board on October 27, 1998. (DX 1). The current claim was filed on October 3, 2002, not within one year of the prior denial, so that it cannot be construed as a modification proceeding pursuant to Section 725.310(a). Therefore, according to Section 725.309(d) this claim must be denied on the basis of the prior denial unless there has been a material change in condition.

Section 725.309(d) provides that a subsequent claim must be denied unless the Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. §725.309(d)(2). If the Claimant establishes the existence of one of these conditions, he has demonstrated, as a matter of law, a material change. If he is successful in establishing a material change, then all of the record evidence must be reviewed to determine whether he is entitled to benefits.

The previous claim was denied when it was determined that the Claimant failed to establish the existence of pneumoconiosis. (DX 1). The Administrative Law Judge did not make findings in respect to total disability or total disability arising out of pneumoconiosis, and as such, the Claimant has not met entitlement under these elements. Accordingly, the newly submitted medical evidence will be reviewed in order to determine whether there has been a material change in condition.

Pneumoconiosis:

Section 718.202(a) sets forth four alternate methods for determining the existence of pneumoconiosis. Pursuant to

Section 718.202, the Miner can demonstrate pneumoconiosis by means of 1) x-rays interpreted as positive for the disease, or 2) biopsy or autopsy evidence, or 3) the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable, or 4) a reasoned medical opinion which concludes the presence of the disease, if the opinion is based on objective medical evidence such as pulmonary function studies, arterial blood gas tests, physical examinations, and medical and work histories.

Under Section 718.202(a)(1), a finding of the presence of pneumoconiosis may be based upon a chest x-ray conducted and classified in accordance with Section 718.102. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis.

The newly submitted medical evidence consists of two x-rays. The x-ray dated January 2, 2003 was interpreted as positive for pneumoconiosis with a 1/1 profusion by Dr. Simpao, who has no radiological qualifications. (DX 8). Dr. Barrett re-read the x-ray listing emphysema with his remaining notes illegible, but he made no findings with respect to pneumoconiosis. Id. Dr. Barrett is a Board-certified radiologist and B-reader[4]. Also, the x-ray was read by the highest qualified physician, Dr. Wheeler, as negative for pneumoconiosis. (EX 1). In addition, he noted a nodule in the lateral subapical RUL compatible with granuloma or tumor, minimal obesity, and possible focal arteriosclerosis aortic arch. Dr. Wheeler is a Board-certified radiologist and B-reader. As such, I find this x-ray to be negative.

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[4] A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the United States Department of Health and Human Services. 42 C.F.R. § 37.51. The qualifications of physicians are a matter of public record at the National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. Because B-readers are deemed to have more training and greater expertise in the area of x-ray interpretation for pneumoconiosis, their findings may be given more weight than those of other physicians. Taylor v. Director, OWCP, 9 BLR 1-22 (1986).

The December 9, 2002 x-ray was interpreted as negative for pneumoconiosis by Dr. Dahhan, who is a B-reader. (DX 9). No rebuttal evidence was offered regarding this x-ray, and thus, I find it constitutes a negative reading.

Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. Dixon v. North Camp Coal Co., 8 BLR 1-344 (1985). Thus, it is within the discretion of the administrative law judge to assign weight to x-ray interpretations based on the readers' qualifications. Goss v. Eastern Associated Coal Co., 7 BLR 1-400 (1984); Aimone v. Morrison Knudson Co., 8 BLR 1-32 (1985) (granting great weight to a B-reader); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211, 1-213 n. 5 (1985) (granting even greater weight to a Board-certified radiologist). In this case, both x-rays were interpreted as negative by highly qualified physicians.

The record also contains more negative interpretations than positive. It is within the discretion of the administrative law judge to defer to the numerical superiority of the x-ray interpretations. Edmiston v. F & R Coal Co., 14 BLR 1-65 (1990). The United States Court of Appeals for the Sixth Circuit has confirmed that consideration of the numerical superiority of the x-ray interpretations, when examined in conjunction with the readers' qualifications, is a proper method of weighing x-ray evidence. Stanton v. Norfolk & Western Railway Co., 65 F.3d 55 (6th Cir. 1995) (citing Woodward v. Director, OWCP, 991 F.2d 314 (6th Cir. 1993)).

Ultimately, both x-rays were interpreted as negative. (DX 9; EX 1). Accordingly, I rely on the preponderance of negative readings by qualified physicians in finding that the Claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis.

Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

The fourth and final way to establish the existence of pneumoconiosis is set forth in Section 718.202(a)(4). This subsection provides for such a finding where a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis. Any such finding shall be based upon objective medical evidence and shall be supported by a reasoned medical opinion. A reasoned medical opinion is one which contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id.

The newly submitted medical evidence consists of two medical reports. Dr. Simpao, Board-certified in Internal Medicine and Pulmonary Disease, conducted a physical examination on January 2, 2003. (DX 8; CX 1). He also performed a chest x-ray, pulmonary function test, and arterial blood gas study. He recorded that the Claimant worked twenty-three years in coal mine employment. He also noted the Claimant smoked one-half pack per day, beginning in 1997. His report stated that the Claimant suffered from daily sputum production of one tablespoon (10-15 years), daily wheezing on exertion (10-12 years), daily productive cough (10-15 years), dyspnea at rest and exertion (10 years), chest pains (4-5 years), orthopnea with the use of three pillows (10 years), and paroxysmal nocturnal dyspnea (10 years). A chest examination revealed "crepitations [with] distant breath sounds, inspiratory and expiratory wheezes," "tactile fremitus increased right over left," and "increased resonance upper chest and axillary areas." An EKG indicated "nonspecific ST changes [and] questionable artial enlargement." A pulmonary function study showed a moderate degree of both restrictive and obstructive airways disease while arterial blood gas analysis results indicated ventilatory perfusion mismatch with mild hypoxia. Dr. Simpao diagnosed pneumoconiosis, based on a history of dust exposure, a positive x-ray finding, EKG results, an arterial blood gas analysis, a pulmonary function study, physical findings, and symptomatology. He further opined that the Claimant suffers from a severe impairment due to pneumoconiosis. He also stated that the Claimant is not able to

perform the work of a coal miner or to perform comparable work in a dust free environment.

Dr. Dahhan, certified in Internal Medicine and Pulmonary Diseases, conducted a physical examination on December 9, 2002. (DX 9). He also performed a chest x-ray, pulmonary function test, and arterial blood gas study. He recorded that the Claimant worked in the coal mine industry for twenty-three years. He indicated the Claimant started smoking at age eighteen and quit intermittently but started again in 1998 at a rate of one-half to one pack per day. His report noted that the Claimant suffered from daily cough, clear sputum production, occasional wheezing, dyspnea on exertion, and breathing problems during sleep with the use of two pillows. A chest examination and an EKG were normal. Dr. Dahhan opined that the Claimant did not have occupational pneumoconiosis or any other disease arising out of coal dust. He based his opinion on a negative x-ray, a normal chest examination, a mild reversible obstructive ventilatory defect, and non-qualifying arterial blood gas analysis. In addition, he opined that the Claimant is able to perform his previous coal mine employment and has no respiratory impairment.

The Board has held that it is proper for an administrative law judge to discredit a medical opinion based on an inaccurate length of coal mine employment. Worhach v. Director, OWCP, 17 B.L.R. 1-105 (1993)(per curiam)(discrediting a medical report where the physician relied upon an eight year coal mining employment history, but the administrative law judge found only four years). Both physicians recorded a twenty-three year coal mine employment histories for the Claimant. However, I determined the Claimant only worked in the coal mining industry for twelve years. Accordingly, I grant Dr. Simpao's medical report, which included a diagnosis of clinical pneumoconiosis, less weight. However, in his report, Dr. Dahhan determined that the Claimant did not have pneumoconiosis or any other coal dust related respiratory disease. Therefore, a decreased coal mine employment history would add support to Dr. Dahhan's findings. As such, I find his report well-reasoned and well-documented.

Pursuant to Section 718.201(a)(2), "legal pneumoconiosis" includes any chronic lung disease or impairment arising out of coal mine employment. This definition includes any chronic restrictive or obstructive pulmonary disease. Dr. Simpao diagnosed the Claimant with a moderate degree of both restrictive and obstructive airway disease as well as mild hypoxia. (DX 8). None of these determinations include a chronic

diagnosis; therefore, Dr. Simpao's findings do not constitute legal pneumoconiosis. Furthermore, Dr. Dahhan opined that the Claimant suffered from a mild reversible obstructive ventilatory defect, but he failed to opine the disease as chronic. Thus, Dr. Dahhan's diagnosis does not amount to legal pneumoconiosis.

Accordingly, I find that the Claimant has not established the existence of pneumoconiosis per Section 718.202(a)(4). I rely upon the well-reasoned and well-documented opinion of Dr. Dahhan. Thus, the Claimant has failed to prove a material change in condition as he has not shown pneumoconiosis. Because the existence of pneumoconiosis is the threshold issue in any claim for black lung benefits under the Act, entitlement to benefits under the Act is not established.

Total Disability:

Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b). Total disability can be established pursuant to one of the four standards in Section 718.204(b)(2) or the irrebuttable presumption of Section 718.304, which is incorporated into Section 718.204(b). The presumption is not invoked here because there is no x-ray evidence of large opacities classified as category A, B, or C, and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in Section 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under Section 718.204(c), the precursor to § 718.204(b)(2), that all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195, 1-198 (1986); Rafferty v. Jones & Laughlin Steel Corp., 9 BLR 1-231, 1-232 (1987). Furthermore, the Claimant must establish this element by a preponderance of the evidence. Gee v. W.G. Moore & Sons, 9 BLR 1-4, 1-6 (1986).

Subsection (b)(2)(i) of § 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV_1[5] values less than or equal to the values specified in the

[5] Forced expiratory volume in one second.

Appendix to Part 718 and such tests reveal FVC[6] or MVV[7] values equal to or less than the applicable table values. Alternatively, a qualifying FEV_1 reading together with an FEV_1/FVC ratio of 55% or less may be sufficient to prove disabling respiratory impairment under this subsection of the regulations. § 718.204(b)(2) and Appendix B. The record consists of two newly submitted pulmonary function studies. (DX 8-9). The studies produced non-qualifying results under the regulations.[8] Thus, I find the pulmonary function study evidence of record fails to establish total disability under subsection (b)(2)(i).

Section 718.204(b)(2)(ii) provides for the establishment of total disability through the results of arterial blood gas tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of pCO_2 to pO_2, which indicates the presence of a totally disabling impairment in the transfer of oxygen from the Claimant's lung alveoli to his blood. § 718.204(c)(2) and Appendix C. The test results must meet or fall below the table values set forth in Appendix C following Section 718 of the regulations. Two studies have been entered into the record. (DX 8-9). The study dated December 9, 2002 is non-qualifying pursuant to Section 718.105(c)(2). The study conducted by Dr. Simpao produced non-qualifying values under the regulatory standards for disability. Therefore, I find that the blood gas study evidence of record fails to establish total disability under subsection (b)(2)(ii).

Total disability under Section 718.204(b)(2)(iii) is inapplicable because the Claimant failed to present evidence of cor pulmonale with right-sided congestive heart failure.

Where total disability cannot be established under subparagraphs (b)(2)(i), (b)(2)(ii) or (b)(2)(iii), Section 718.204(b)(2)(iv) provides that total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or

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[6] Forced vital capacity.

[7] Maximum voluntary ventilation.

[8] The fact finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983). I find the Miner's height to be 67 inches.

pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable gainful work.

Two newly submitted medical reports have been offered into evidence. I continue to grant Dr. Simpao's medical report dated January 2, 2003 less weight due to an inaccurate length of coal mine employment. (DX 8).

Moreover, Dr. Dahhan opined that the Claimant did not have a respiratory impairment. (DX 9). He also stated that the Claimant could perform his last coal mine employment. Dr. Dahhan relied upon a normal chest examination, a negative x-ray, a non-qualifying pulmonary function study, and a non-qualifying arterial blood gas analysis. Thus, I find his opinion well-reasoned and well-documented.

Accordingly, the Claimant has not proven total disability per Section 718.204(b)(2)(iv). I rely on the well-reasoned and well-documented medical report of Dr. Dahhan along with the non-qualifying pulmonary function study and non-qualifying arterial blood gas evidence to find total disability has not been established pursuant to Section 718.204. As such, the Claimant has not shown a material change in condition.

Total Disability Due to Pneumoconiosis:

Assuming, arguendo, that the Claimant had established pneumoconiosis and total disability, the Claimant is nonetheless ineligible for benefits because he fails to show total disability due to pneumoconiosis as demonstrated by documented and reasoned medical reports. See § 718.204(c)(2). In interpreting this requirement, the Sixth Circuit has stated that pneumoconiosis must be more than a de minimus or infinitesimal contribution to the miner's total disability. Peabody Coal Co. v. Smith, 127 F.3d 504, 506-507 (6th Cir. 1997). The only well-reasoned and well-documented report of record regarding both pneumoconiosis and total disability is that of Dr. Dahhan. (DX 9). He stated the Claimant does not have pneumoconiosis and retains the pulmonary capacity to perform his previous occupational duties. Therefore, I find that the Claimant has failed to establish total disability due to pneumoconiosis, and also he has not been able to prove a material change in condition.

Entitlement:

As the Claimant has failed to establish the existence of pneumoconiosis, total disability, or total disability arising from pneumoconiosis, I find that he has not established a material change in condition since his prior denial. Accordingly, the Claimant is not entitled to benefits under the Act.

Attorney's Fees:

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any attorney's fees to the Claimant for legal services rendered in pursuit of benefits.

ORDER

It is thereby ORDERED that the claim of ANGELO BOLINGER for benefits is hereby DENIED.

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DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.