BRB No. 97-0248 BLA

CLIFFORD COTTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
STONEY RIDGE COAL 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 of Christine McKenna, Administrative Law Judge, United States Department of Labor.

Clifford Cotton, Oliver Springs, Tennessee, *pro se*.

J. William Coley (Hodges, Doughty & Carson, PLLC), Knoxville, Tennessee, for employer.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order (95-BLA-2382) of Administrative Law Judge Christine McKenna 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*. Claimant filed his duplicate claim on October 7, 1991.[1] The administrative law judge considered the case pursuant to 20 C.F.R. §725.309(d). Because the administrative law judge found the newly submitted evidence insufficient to establish either the existence of coal workers' pneumoconiosis or total

[1] Claimant first filed a claim on October 19, 1970 with the Social Security Administration (SSA). Director's Exhibit (DX) 32. The SSA denied benefits on June 13, 1973, Director's Exhibit 64, and the claim was subsequently referred to the Department of Labor, which also denied benefits on March 28, 1979. DX 64. Claimant took no further action with regard to the denial until he filed the present claim on October 7, 1991. DX 1.

disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), she concluded that claimant failed to establish a material change in conditions. Accordingly, benefits were denied. On appeal, claimant contests the denial of benefits. Employer, responds, urging affirmance of the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has declined to participate in 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law. 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).

[2] Employer contends that claimant's appeal should be denied because claimant did not personally serve employer with a copy of his notice of appeal under 20 C.F.R. §802.204. Contrary to employer's contention, since claimant appealed without the benefit of legal counsel, the Board notified employer of claimant's appeal by Order dated November 27, 1996. *Cotton v. Stoney Ridge Coal Co.*, BRB No. 97-0248 BLA (Nov. 27, 1996) (unpub. Order). Furthermore, we reject employer's argument that claimant's appeal must be dismissed because he did not file a petition for review and supporting brief. The Board has determined that in cases where a petitioner is not represented by counsel, the Board will not require that the petitioner file a statement before the appeal can be reviewed. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). In accordance with that policy, the Board in the instant case merely advised claimant that he may file a petition for review and brief, but did not require him to do so. *See Cotton, supra*.

Because this case involves a duplicate claim, claimant must establish a material change in conditions since the denial of his initial claim pursuant to 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, wherein jurisdiction for this claim arises, has held that in order to determine whether a material change in conditions is established, the administrative law judge must consider all the new evidence, and determine whether the miner has proven one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). If the miner establishes the existence of that element he has demonstrated a material change in conditions as a matter of law.[3] *Id*. Then the administrative law judge must consider whether all of the record evidence, including that submitted with any previous claims, supports a finding of entitlement to benefits. *Id*.

In weighing the new x-ray evidence for pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge properly found that the record includes twenty readings of six films taken in conjunction with claimant's duplicate claim. Decision and Order (D&O) at 5-6. Of those twenty readings, there are only two which are positive for pneumoconiosis. *Id*. In weighing the conflicting x-ray evidence, the administrative law judge properly considered the qualifications of the readers. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). As noted by the administrative law judge, the positive readings of the films dated October 28, 1992 and May 3, 1995 were made by a single physician, Dr. Baker, who is a B-reader, but not a Board-certified radiologist. D&O at 6. We hold that the administrative law judge permissibly found Dr. Baker's two positive x-ray readings outweighed by the eighteen negative readings for pneumoconiosis made by physicians who were equally or better qualified than Dr. Baker.[4] *Id*. The administrative law judge also acted within her discretion by specifically crediting the negative readings by Drs. Wiot and Spitz because they are Professors of Radiology, as well as Board-certified radiologists and B-readers. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); D&O at 6. Thus, we affirm the administrative law judge's finding that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

We note that there is no autopsy or biopsy evidence for pneumoconiosis; therefore, claimant is unable to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Additionally, claimant is not eligible to establish pneumoconiosis based on the presumptions identified at 20 C.F.R. §718.202(a)(3).

In considering whether claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the newly submitted

[3] The prior claim was denied based on claimant's failure to demonstrate the existence of pneumoconiosis. DX 64.

[4] The October 28, 1992 x-ray that Dr. Baker read as positive, was reread as negative by Drs. Sargent, Cole, and Wiot, all of whom are Board-certified radiologists and B-readers. DXs 43, 45, 48, 67.

reports of Drs. Baker, Bruton, and Hudson.[5] Dr. Baker examined claimant twice, and opined that he has pneumoconiosis. DX 43; Claimant's Exhibit (CX) 1. In contrast, Drs. Bruton and Hudson specifically opined that there is no evidence of pneumoconiosis. DXs 10, 46, 83.

With respect to Dr. Baker's October 28, 1992 examination report, we hold that the administrative law judge permissibly rejected the doctor's diagnosis of pneumoconiosis because he based his opinion in part on a positive x-ray which was reread as negative by better qualified readers. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984). In weighing Dr. Baker's May 3, 1995 examination report, we affirm the administrative law judge's finding that the doctor's opinion is not well-reasoned because Dr. Baker does not offer any discussion of the evidence, or any rationale to support his conclusions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); D&O at 9. Moreover, the administrative law judge reasonably found Dr. Baker's opinions outweighed by the opinions of Drs. Bruton and Hudson, whose diagnoses of no pneumoconiosis are better supported by the record as a whole. D&O at 9. Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[5] The newly submitted evidence also includes the report of Dr. Hellman. However, the administrative law judge permissibly rejected Dr. Hellman diagnosis of "possible pneumoconiosis" as too equivocal to support claimant's burden of proof under Section 718.202(a)(4). *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order (D&O) at 9; DX 17.

On the issue of total disability, the administrative law judge properly noted that the new pulmonary function study and arterial blood gas study evidence is non-qualifying for total disability under 20 C.F.R. §718.204(c)(1) and (c)(2). D&O at 10. We note that there is no evidence of cor pulmonale whereby claimant could establish total disability pursuant to 20 C.F.R. §718.204(c)(3). Additionally, we affirm the administrative law judge's finding that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(c)(4). In weighing the conflicting medical opinion evidence, the administrative law judge properly found that only Dr. Baker opined that claimant is totally disabled. *Id*.; DX 43; CX 1. The administrative law judge, however, permissibly rejected Dr. Baker's opinion under Section 718.204(c)(4) because the doctor did not discuss how the non-qualifying objective tests supported his diagnosis of total disability, or otherwise provide a rationale for his conclusions. *See Clark, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); D&O at 10. Insofar as the administrative law judge acted within her discretion in weighing the new medical opinion evidence at Section 718.204(c)(4), her finding that claimant failed to establish total disability is affirmed.[6] Consequently, we affirm the administrative law judge's determination that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[6] The administrative law judge also properly found that the new evidence, namely Dr. Baker's report, fails to address causation pursuant to 20 C.F.R. §718.204(b). D&O at 11.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge