BRB No. 99-0691 BLA

ALVIN K. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLAMING SUN COALS, INC.	)	DATE ISSUED:
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
INDIAN RIVER COAL CO., INC.	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Alvin K. Jones, Whitley City, Kentucky, *pro se.*

H. Brett Stonecipher (Ferreri, Fogle, Pohl & Picklesimer), Lexington, Kentucky, for employer/carrier Flaming Sun Coals, Inc. and Kentucky

Coal Producers' Self-Insurance Fund.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer/carrier Indian River Coal Co., Inc. and Old Republic Insurance Company.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (97-BLA-1650) of Administrative Law Judge Thomas F. Phalen, Jr., 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). The administrative law judge determined that the claim, filed on August 8, 1996, was subject to the duplicate claim provisions at 20 C.F.R. §725.309, as it was filed more than one year after the final denial of claimant's original claim.[1] The administrative law judge found that the new evidence submitted in support of this duplicate claim was insufficient to establish any of the elements of entitlement previously adjudicated against claimant, thus claimant failed to establish a material change in conditions pursuant to Section 725.309. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employers and carriers respond, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to

[1]Claimant filed his original claim for benefits on March 26, 1985. Director's Exhibit 45 at 154. In a Decision and Order issued on January 11, 1988, Administrative Law Judge Gerald T. Hayes credited claimant with 8.5 years of qualifying coal mine employment, and found the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(c), or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Director's Exhibit 45 at 8-15.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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 in accordance with 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).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change is established pursuant to Section 725.309, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *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, as a matter of law, a material change, whereupon the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claim or claims, supports a finding of entitlement to benefits. *Id.*

In the present case, the administrative law judge determined that claimant's original claim was denied on the basis that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Section 718.202(a)(1)-(4), 718.203(c), or total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(1)-(4). Turning first to the issue of occupational pneumoconiosis, the administrative law judge accurately reviewed the newly submitted x-ray evidence of record and the qualifications of the readers, and reasonably determined that this evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on the preponderance of negative interpretations by physicians with superior qualifications.[2] Decision and

[2]The administrative law judge determined that the newly-submitted x-ray evidence consisted of twelve interpretations of two films, only one of which was positive for pneumoconiosis. Decision and Order at 7. The administrative law judge permissibly found that the positive interpretation of the film dated August 22, 1996, by Dr. Vaezy, a B-reader, was outweighed by the four negative interpretations of that film by dually-qualified Board-certified radiologists and B-readers, and by the seven negative interpretations of the film dated February 17, 1997, by six physicians with dual qualifications and by Dr. Dahhan, a pulmonary specialist and B-reader. *Id.*; *see*

Order at 7; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). The administrative law judge properly found that claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3), because the record contains no biopsy or autopsy evidence, and the presumptions contained in 20 C.F.R. §§718.304, 718.305 and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 7. The administrative law judge then reviewed the new medical opinions of record and their underlying documentation pursuant to Section 718.202(a)(4), and acted within his discretion in according little weight to the opinion of Dr. Vaezy, that claimant had coal workers' pneumoconiosis, on the ground that the physician indicated that his diagnosis was based solely on a 1/0 x-ray reading and a history of twenty-one years of coal mine employment, which was significantly greater than the length of coal mine employment credited by the administrative law judge.[3] Decision and Order at 8-9; Director's Exhibit 17; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984). The administrative law judge reasonably gave determinative weight to the contrary opinion of Dr. Dahhan, that claimant did not have pneumoconiosis, because he found that the physician possessed superior qualifications as a pulmonary specialist and based his conclusions on a more complete consideration of the occupational, clinical, radiological and physiological evidence. Decision and Order at 8-9; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's findings pursuant to Section 718.202(a)(1)-(4) are supported by substantial evidence, in accordance with applicable law, and therefore are affirmed.

Woodward v. Director, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

[3]The administrative law judge additionally noted that Dr. Vaezy diagnosed chronic bronchitis by history but reported no respiratory or pulmonary impairment. Decision and Order at 8; Director's Exhibit 17; *see* 20 C.F.R. §718.201.

Turning to the issue of total respiratory disability due to pneumoconiosis at Section 718.204(b), (c)(1)-(4), the administrative law judge again noted that the irrebuttable presumption at Section 718.304 did not apply because there was no evidence of complicated pneumoconiosis. Decision and Order at 9. As the physicians recorded different heights for claimant, the administrative law judge permissibly resolved the discrepancy and found claimant's height to be 69 inches for the purpose of evaluating the pulmonary function studies of record. Decision and Order at 10; *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). The administrative law judge accurately determined that both of the new pulmonary function studies of record as well as both of the new blood gas studies of record produced non-qualifying values,[4] and that the record contained no evidence of cor pulmonale with right sided congestive heart failure, and thus found that claimant failed to establish total disability at Section 718.204(c)(1)-(3). Decision and Order at 10-11. Lastly, the administrative law judge properly found that the two newly-submitted medical opinions of record were insufficient to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(c)(4), (b), *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), as Dr. Vaezy concluded that claimant had no impairment due to his diagnosed conditions and Dr. Dahhan affirmatively stated that claimant retains the respiratory capacity to perform his usual coal mine employment. Decision and Order at 8, 11; Director's Exhibits 17, 38; *see generally Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986). The administrative law judge's findings pursuant to Section 718.204(b), (c)(1)-(4) are supported by substantial evidence and thus are affirmed. Inasmuch as the newly submitted evidence did not establish any of the elements of entitlement previously adjudicated against claimant, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d), and affirm the denial of benefits. *Ross, supra*.

[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(c)(1), (2).

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

REGINA C. McGRANERY
Administrative Appeals Judge