BRB No. 99-0780 BLA

GARMON C. LESTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERRY BRANCH COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer-Carrier/ Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert J. Hillyard, Administrative Law Judge, United States Department of Labor.

Philip A. Lacaria, Welch, West Virginia, for claimant.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (98-BLA-0230) of Administrative Law Judge Robert L. Hillyard 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.* (the Act). The administrative law judge found that claimant established twenty-nine years of coal mine employment, and based on the filing date of the claim applied the regulations found at 20 C.F.R. Part 718. Claimant filed his initial claim for benefits on November 13, 1984, which was denied May 13, 1985. Director's Exhibit 33. No

appeal of this claim was taken. Claimant filed a duplicate claim on March 10, 1997. The administrative law judge reviewed all the evidence submitted with the duplicate claim pursuant to 20 C.F.R. §725.309, *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), and found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), elements previously decided against claimant, and therefore found that claimant failed to establish a material change in conditions. Accordingly, benefits were denied. Claimant appeals, contending that the evidence is sufficient to establish the existence of pneumoconiosis and total disability at Sections 718.202(a)(1), (4) and 718.204(c). Neither employer nor the Director, Office of Workers' Compensation Programs, is participating in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant appeals, contending that the great weight of the newly submitted x-ray evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1). We disagree.

The administrative law judge found that the x-ray evidence consisted of the following readings: The December 10, 1997 film was read negative for pneumoconiosis by Dr. Zaldivar, a B-reader. Employer's Exhibit 2. The April 11, 1997 film was read positive by Dr. Jabour, Director's Exhibit 7, who has no special radiological qualifications, and positive by Drs. Pathak and Gaziano, Director's Exhibits 11, 12, who are B readers only. This film was read negative by Drs. Spitz, Wiot and Shipley, who are all B readers and Board certified radiologists. Employer's Exhibits 3, 4; Director's Exhibit 32. Thus, the administrative law judge permissibly accorded greater weight to the better qualified readers and found that this film was negative. The December 10, 1996 film was read as positive by Drs. Subramaniam and Jones, neither of whom possess any special radiological qualifications. In weighing the x-ray evidence the administrative law judge properly determined that "Due to the negative readings by the more highly qualified physicians, I find that the Claimant has failed to prove pneumoconiosis through a preponderance of x-ray evidence." Decision and Order at 13. Accordingly, the administrative law judge's finding that the new evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) is affirmed. Moreover, claimant fails to adequately allege any error on the administrative law judge's part. *See Barnes v. Director, OWCP*, 19 BLR 1-71 (1995); *Fish v. Director, OWCP*, 6 BLR 1-10 (1983). In any case, the administrative law judge committed no error in finding that the better qualified readers establish by a preponderance of evidence that claimant failed to establish the

existence of pneumoconiosis by x-ray. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Consequently, we affirm the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1).[1]

Claimant next contends that the administrative law judge erred in failing to find that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). The evidence of record contains the opinions of three physicians. Dr. Zaldivar found no coal workers' pneumoconiosis, and attributed claimant's mild pulmonary impairment to his asthma. Employer's Exhibit 3. Dr. Jabour diagnosed coal workers' pneumoconiosis based on his reading of an x-ray, and the functional impairment on the MVV results. Director's Exhibit 7. Dr. Jones, claimant's treating physician, diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease, based on x-ray evidence. Claimant's Exhibit 1.

The administrative law judge permissibly found that the opinion of Dr. Zaldivar was well reasoned and supported by the objective medical evidence, and gave it substantial weight. Regarding the other opinions of record, the administrative law judge noted that the x-ray relied upon by Dr. Jabour was reread as negative by Drs. Spitz, Wiot and Shipley, and that although the MVV results of his pulmonary function study were qualifying, the pulmonary function study as a whole failed to qualify. Director's Exhibit 6. The administrative law judge stated that "Dr. Jabour also failed to explain why the low MVV value was evidence of pneumoconiosis rather than asthma, the other condition diagnosed." Decision and Order at 13. The administrative law judge determined that Dr. Jones did not identify the x-ray upon which she relied and found her opinion outweighed by the opinion of Dr. Zaldivar, as the x-ray evidence was negative for the existence of pneumoconiosis, her examinations of claimant were "essentially normal" and the pulmonary function studies she performed failed to qualify. Thus, the administrative law judge properly found that the opinions of Drs. Jones and Jabour fail to explain adequately their diagnoses and are

[1] The administrative law judge did not make any findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). Since the evidence of record is devoid of any biopsy or autopsy evidence, and none of the presumptions at 20 C.F.R. §§718.304, 718.305 or 718.306 are applicable, entitlement pursuant to these Sections is unavailable. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

unsupported by objective evidence. *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order at 13-14. We reject claimant's contention that the administrative law judge erred in his analysis of the opinions because Dr. Zaldivar found occupational pneumoconiosis, as a review of the record indicates that he did not. Claimant is merely asking for a reweighing of the evidence in the instant case, which the Board is not entitled to do. *Jewell Smokeless Coal Co. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We, therefore, affirm the administrative law judge's finding that the evidence fails to establish pneumoconiosis at Section 718.202(a)(4).

Turning to Section 718.204(c), claimant contends that the evidence is sufficient to establish total disability, and that the administrative law judge erred in failing to credit the opinion of Dr. Jones, the treating physician. The administrative law judge properly found that none of the pulmonary function studies yielded qualifying values pursuant to Section 718.204(c)(1). 20 C.F.R. §718.204(c)(1); Employer's Exhibit 2; Claimant's Exhibit 1; Director's Exhibit 6. Additionally, although two of the three blood gas studies yielded qualifying values, the administrative law judge permissibly determined that as the results of the most recent blood gas study were nonqualifying, total disability was not established pursuant to Section 718.204(c)(2). 20 C.F.R. §718.202(c)(2); Decision and Order at 14; Employer's Exhibit 2; Director's Exhibit 8; Claimant's Exhibit 1; *Hicks*, *supra*. Although the administrative law judge made no findings at Section 718.204(c)(3), total disability cannot be established at that Section as the record is devoid of any evidence of cor pulmonale with right sided congestive heart failure.

Pursuant to Section 718.204(c)(4), Dr. Zaldivar found no total disability, noting that claimant's mild pulmonary impairment would not interfere with his ability to perform his usual coal mine employment or arduous manual labor. The administrative law judge permissibly found that Dr. Zaldivar's opinion was supported by objective medical evidence and was therefore well-reasoned, and entitled to substantial weight. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). Drs. Jones and Jabour state that claimant is unable to do his last coal mine employment or a job of comparable physical demand. However, the administrative law judge properly found that the pulmonary function study administered by Dr. Jabour was nonqualifying, and that Dr. Jabour failed to explain his rationale as to why he believed that claimant was totally disabled. Additionally, the administrative law judge found that as Dr. Jones relied on a nonqualifying pulmonary function study, and failed to explain why she felt that claimant's respiratory condition was the major contributing cause of his disability, *see Carson*, *supra*; Decision and Order at 13, her opinion was poorly explained and entitled to little weight. *See Hicks*, *supra*; *Hobbs*, *supra*; *Church*, *supra*. Accordingly, the administrative law judge's weighing of the medical opinions at Section 718.204(c)(4) and his finding that total disability was not established

thereunder is affirmed as rational and based on substantial evidence. Moreover, claimant is merely asking for a reweighing of the evidence at 718.204(c), which the Board may not do. *See Street*, *supra*; *Anderson*, *supra*. Additionally, we reject claimant's contention that Dr. Jones' opinion is entitled to greater weight as the treating physician. *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). As the administrative law judge properly weighed all evidence together at Section 718.204(c), and permissibly found that it is insufficient to establish total disability, we affirm his finding that the evidence is insufficient to establish total disability. *See Woody v. Valley Camp Coal Co.*, 73 F.3d 360, 20 BLR 2-113 (4th Cir. 1995); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). As claimant failed to establish any element of entitlement previously found against him, the administrative law judge properly found that he failed to establish a material change in conditions pursuant to Section 725.309, and properly denied benefits. *See Rutter*, *supra*.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge