BRB No. 97-1200 BLA

AUSTIN AKERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ELLA RUTH EVANS COAL COMPANY	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Austin Akers, Grethel, Kentucky, *pro se.*

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the representation of counsel,[1] appeals the Decision and Order - Denial of Benefits (94-BLA-0813) of Administrative Law Judge Daniel J. Roketenetz on a claim filed

[1]Claimant's appeal was filed by Susie Davis, a lay representative with the Kentucky Black Lung Association. By Order dated June 27, 1997, the Board advised claimant that his appeal would be reviewed under the provisions provided at 20 C.F.R. §§802.211(e), 802.220. *See generally Shelton v. Claude V. Keene Trucking Co.,*19 BLR 1-88 (1995).

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). A summary of the procedural history of this case is as follows: Claimant filed his initial claim for benefits on August 23, 1985. Director's Exhibit 117 at 92. The district director denied benefits on January 9, 1986 and April 1, 1986 because claimant established no elements of entitlement. Director's Exhibit 117 at 31, 32. Claimant did not pursue that denial of benefits. Claimant filed his second claim for benefits on May 28, 1987. The district director denied the claim on October 21, 1987 because claimant established no elements of entitlement. Director's Exhibit 27. By correspondence received on November 10, 1987, claimant advised the Department of Labor that he intended to submit additional medical evidence. Director's Exhibit 28. On June 29, 1990 the district director advised claimant that no evidence had been received. Director's Exhibit 49. Claimant indicated on July 16, 1990 that he would not be submitting new evidence. In the interim, however, claimant filed a new claim for benefits on June 19, 1990. Director's Exhibit 47. The district director denied benefits on August 30, 1990 on the grounds that there was no material change in conditions. Director's Exhibit 48. Claimant requested a new hearing indicating that he wished to submit new evidence at the hearing. Director's Exhibit 51. The case was forwarded to the Office of Administrative Law Judges on November 28, 1990. Director's Exhibit 56. Following the hearing, Administrative Law Judge J. Michael O'Neill remanded the case to the district director to allow claimant to obtain an attorney. Director's Exhibits 72, 73, 74.

While on remand and after review of new evidence, the district director denied benefits on August 13, 1992, and claimant requested a hearing. Director's Exhibits 78, 81. The district director reviewed additional evidence and again denied benefits on October 14, 1992. By letter received on October 20, 1992, claimant, represented by Susie Davis, a lay representative, sought modification, disagreed with the denial and advised that new evidence would be submitted within the year. Director's Exhibit 86. After claimant failed to submit additional medical evidence, the district director reviewed the evidence in the record and denied benefits on January 29, 1993, Director's Exhibit 92, and claimant requested a hearing. The district director denied the claim on June 4, 1993 and October 1, 1993 and claimant sought a hearing after each denial. Director's Exhibits 94, 102, 104, 108. The case was transferred to the Office of Administrative Law Judges on January 12, 1994 for a formal hearing. Director's Exhibits 109, 118.

The administrative law judge credited claimant with twelve years of coal mine employment. He found the claim to be a duplicate claim pursuant to 20 C.F.R. §725.309(d) and governed by the standard pursuant to the holding in *Sharondale v. Ross,* 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). He further found that the prior denial in 1986 had been based on claimant's failure to establish the existence of pneumoconiosis, existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. The administrative law judge then reviewed the evidence submitted after the prior denial in 1986 to determine if claimant had established a material change in conditions pursuant to the holding in *Ross.* Finding that claimant failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R.

718.202(a)(1) and 718.204(c), respectively, the administrative law judge denied benefits.

Claimant generally contends that he is entitled to benefits. Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has elected not to participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). 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).

After consideration of the administrative law judge's Decision and Order - Denial of Benefits and the relevant evidence of record, we conclude that the administrative law judge's Decision and Order contains no reversible error, and therefore, it is affirmed.

The administrative law judge properly determined that this is a 20 C.F.R. §725.309(d) duplicate claim arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit and governed by the Sixth Circuit's decision in *Ross.* The *Ross* Court held that the proper standard to determine whether a claimant has established a material change in conditions is the "one-element" standard which requires the administrative law judge to decide whether the new evidence of record establishes at least one of the elements of entitlement previously adjudicated against claimant. We note initially that claimant proved no element of entitlement pursuant to 20 C.F.R. Part 718 in the prior claim.

In making his findings at Section 718.202(a)(1) to determine whether there was a material change in conditions pursuant to Section 725.309(d), the administrative law judge found that there were "over fifty x-ray" interpretations to weigh. Decision and Order at 6. He properly considered the qualitative and quantitative factors of this new x-ray evidence which are relevant to claimant's condition at the time of the second claim. *See generally Woodward v. Director, OWCP,* 991 F.3d 314, 17 BLR 2-77 (6th Cir. 1993). He found that the four positive readings were read by physicians who were neither B-readers nor Board certified radiologists. Decision and Order at 6. Thus, the administrative law judge reasonably found the preponderance of the x-ray evidence to be negative, based on the interpretations of the readers who were B-readers and/or Board certified radiologists. *See*

[2]We affirm the administrative law judge's length of coal mine employment finding based on the Social Security Administration records which support employer's stipulation and claimant's assertion of twelve years of coal mine employment. Decision and Order at 4; Hearing Transcript at 148; Director's Exhibit 1.

Staton v. Norfolk & Western Ry. Co., 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995)*; Woodward*, *supra*. We therefore affirm the administrative law judge's determination that the x-ray evidence does not establish the existence of pneumoconiosis or a material change in conditions.

The administrative law judge also properly found that there is no biopsy evidence in the record and that Section 718.202(a)(2) is not available to claimant. He further found that the presumptions provided at Section 718.202(a)(3) are not available in this living miner's claim filed after January 1, 1982, and in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

With respect to Section 718.202(a)(4), the administrative law judge found that examining physicians, Drs. Sutherland, Dahhan, Broudy, Vuskovich, and Dineen, and non-examining physicians, Drs. Lane and Anderson, opined that claimant did not have pneumoconiosis, while examining physicians, Drs. Sundaram, Wright, Modi, and Martin opined that claimant had pneumoconiosis. *See* 20 C.F.R. §718.201. The administrative law judge properly assigned greater weight to the opinions of Drs. Broudy, Vuskovich, Dineen, Dahhan, Anderson and Lane over the opinions of Drs. Sundaram, Modi, Martin and Wright because he found the former opinions to be well-reasoned, well-documented and supported by the underlying evidence.[3] *See Worhach v. Director, OWCP,* 17 BLR 1-105 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.* 8 BLR 1-46 (1985). We thus affirm the administrative law judge's finding that claimant did not establish a material change in conditions with respect to the existence of pneumoconiosis at Section 718.202(a)(4).

[3]The administrative law judge properly discounted the opinion of Dr. Guberman on the ground that it was equivocal, unexplained and unsupported by the underlying documentation. *Worhach v. Director, OWCP,* 17 BLR 1-105 (1993); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988).

Turning to Section 718.204(c), the administrative law judge, weighing the new evidence to determine if a material change in conditions was established with respect to total respiratory disability, properly found that only one of the ten pulmonary function studies was qualifying and that it had been invalidated. *Siegel v. Director, OWCP,* 8 BLR 1-156 ((1985). Hence, the administrative law judge correctly determined that the pulmonary function study evidence did not demonstrate total respiratory disability pursuant to Section 718.204(c)(1). He further properly found that none of the blood gas studies developed in connection with the instant claim demonstrated total respiratory disability at Section 718.204(c)(2) and that the record contains no evidence of cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(c)(3). With regard to Section 718.204(c)(4), the administrative law judge, within his discretion, relied on the opinions of Drs. Broudy, Dahhan, Vuskovich, Lane, Dineen and Anderson, who opined that claimant did not experience total respiratory disability, on the grounds that they are better supported by the underlying objective evidence, *see Lucostic, supra.* Thus, within his discretion, the administrative law judge reasonably gave less weight to the opinions of Drs. Sundaram, Martin, Wright and Guberman because their opinions were neither well-reasoned, well-documented nor supported by the underlying documentation.[4] *See Clark, supra; Lucostic, supra.* We therefore affirm the administrative law judge's determination that the new evidence is insufficient to establish total respiratory disability at Section 718.204(c) and thus is insufficient to establish a material change in conditions.

Because we affirm the administrative law judge's finding that the new evidence is insufficient to establish a material change in conditions based either on a finding of the existence of pneumoconiosis or of total respiratory disability, the administrative law judge properly refrained from considering the evidence pre-dating the duplicate claim. *See generally Ross, supra.* We therefore affirm the administrative law judge's denial of benefits as based on substantial evidence and in accordance with law.

[4]The administrative law judge correctly stated that Dr. Modi made no assessment regarding total disability. Decision and Order at 12; Director's Exhibit 76. He also properly found that the recommendation in the reports of Drs. Guberman and Martin that claimant should not be exposed to coal dust is not sufficient to establish total respiratory disability under the Act. *See Zimmerman v. Director, OWCP,* 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge