BRB No. 97-1289 BLA

| | | |
|---|---|---|
| KERMIT E. CHARLES | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| YOGI MINING COMPANY | ) | |
| | ) | |
| Employer-Respondent | ) | DATE ISSUED: |
| | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Kermit E. Charles, Vansant, Virginia, *pro se.*

Ramesh Murthy (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant[1], without the assistance of counsel[2], appeals the Decision and Order on Remand (95-BLA-341) of Administrative Law Judge Clement J. Kichuk, denying benefits 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). This claim involves a

[1]Claimant is Kermit E. Charles, the miner, who filed three claims for benefits. The first and second claims filed on February 15, 1980 and August 8, 1990 were finally denied on December 15, 1980 and January 17, 1991, respectively. Director's Exhibit 21. Claimant filed the instant claim for benefits on May 10, 1994. Director's Exhibit 1.

[2]Tim White, a benefits counselor with Stone Mountain Health Services, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See* 20 C.F.R. §§802-211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

duplicate claim. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis and total respiratory disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 2-223 (4th Cir. 1995). Claimant's previous claims were denied because claimant failed to establish the existence of pneumoconiosis and total respiratory disability pursuant to Sections 718.202(a) and 718.204(c). Director's Exhibit 21.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. The newly submitted x-ray evidence of record consists of twenty-five interpretations of eight x-rays, two of which were positive for the existence of pneumoconiosis. Director's Exhibits 7, 20. 21; Employer's Exhibits 1, 2, 4, 5, 8-13, 15-20; Claimant's Exhibit 1. The administrative law judge rationally found that the preponderance

of the x-ray evidence interpreted by physicians with superior qualifications is negative for the existence of pneumoconiosis. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989)*; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)*(en banc); Perry, supra.* Thus, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3) inasmuch as the record contains no autopsy or biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306; Decision and Order at 6; Director's Exhibit 1. Further, the record contains the newly submitted opinions of Drs. Forehand, Abernathy, and Sargent, none of whom diagnosed pneumoconiosis. Director's Exhibits 10, 21; Employer's Exhibit 8. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Regarding the existence of total respiratory disability, the record contains three newly submitted pulmonary function studies and three newly submitted arterial blood gas studies, none of which yielded qualifying results. Director's Exhibits 8, 9, 21; Employer's Exhibit 8. Also, the record contains no evidence of cor pulmonale with right sided congestive heart failure and none of the three newly submitted medical opinions diagnosed total respiratory disability. Director's Exhibits 10, 21; Employer's Exhibit 8. Thus, the administrative law judge properly found that the newly submitted evidence does not support a finding of total respiratory disability pursuant to Section 718.204(c)(1)-(4).

The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson, supra.* Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis and total respiratory disability pursuant to Sections 718.202(a) and 718.204(c). Further, because we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis and total respiratory disability, we also affirm the administrative law judge's findings that claimant failed to establish a material change in conditions pursuant to Section 725.309 and his denial of benefits. *Rutter, supra.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge