BRB No. 99-1188 BLA

HARCE M. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BELLAIRE CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
	)	
Party-in-Interest	)	

Appeal of the Decision and Order-Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufield, Schiller & Holmes), Pittsburgh, Pennsylvania, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-BLA-1029) of Administrative Law Judge Gerald M. Tierney 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).[1] The administrative law judge found that

[1]Claimant initially filed a claim with the Social Security Administration on October 11, 1973, which was finally denied by the Department of Labor on September 4, 1980, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 29. Claimant took no further action until the filing of

the claimant established a coal mine employment history of at least thirty years, Decision and Order at 2, and that the instant claim was a duplicate claim governed by the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Decision and Order at 2. The administrative law judge further found that the newly submitted evidence, *i.e.*, that evidence submitted subsequent to the previous denial, failed to support a finding of a material change in conditions pursuant to 20 C.F.R. §7275.309, inasmuch as such evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or a totally disabling respiratory impairment arising out of pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b). Decision and Order at 2-6. Finally, the administrative law judge concluded that a review of the entirety of the record demonstrated that claimant was unable to establish entitlement to benefits inasmuch as the evidence failed to demonstrate that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment. Decision and Order at 6. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to conclude that the newly submitted biopsy evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and thus a material change in conditions pursuant to Section 725.309. Claimant further asserts that the administrative law judge also erred in failing to conclude that the newly submitted medical opinion evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and thus a material change in conditions. Finally, claimant contends that the newly submitted medical opinion evidence of record establishes the existence of a totally disabling respiratory

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the instant claim on June 6, 1997. Director's Exhibit 1.

impairment and thus a material change in conditions. Employer, in response, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not filed a brief in this appeal.[2]

In *Ross, supra*, the Sixth Circuit held that, in order to establish a material change in conditions pursuant to Section 725.309, a claimant must establish at least one of the elements of entitlement previously adjudicated against him in the prior claim. *See Ross, supra.* In the instant case, benefits were denied to claimant inasmuch as the evidence failed to establish the existence of pneumoconiosis or the presence of a totally disabling respiratory impairment. *See* Director's Exhibit 29.

Claimant asserts that the newly submitted biopsy evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as the conclusions of Dr. Klay support a finding of pneumoconiosis at that subsection. Dr. Klay, a cardiac, thoracic and vascular surgeon, removed part of claimant's lung, and concluded that "[g]iven the pathologic report, the appearance of the lungs at the time of the surgery and the fact that [claimant] has not smoked for many, many years," it was his opinion that claimant suffered from severe black lung disease. Claimant's

[2]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, his finding that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and his findings that the newly submitted pulmonary function study evidence and blood gas study failed to demonstrate a totally disabling respiratory impairment pursuant to Section 718.204(c)(1), (2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further hold that claimant is precluded, as a matter of law, from establishing the existence of pneumoconiosis at Section 718.202(a)(3), *see* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306, or the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(3), *see* 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds*, 933 F.2d 510 15 BLR 2-124 (7th Cir. 1991).

Exhibit 1. Dr. Klay, apparently, based his conclusion on a biopsy performed, by Dr. Cabotaje, who reviewed the lung specimen, and concluded that there was some evidence of "focal interstitial anthracotic deposits and fibrovascular viscreal pleural thickening." Claimant's Exhibit 3. Dr. Altmeyer, a Board-certified pulmonary specialist, reviewed the pathology report of Dr. Cabotaje and concluded that the physician's opinion did not support a pathological finding of pneumoconiosis as it failed to "describe the classic feature of simple coal workers' pneumoconiosis... the coal macule," Employer's Exhibit 1.

The administrative law judge properly concluded that the opinion of the physician who performed the lung biopsy, Dr. Cabotaje, failed to support a finding of pneumoconiosis pursuant to Section 718.202(a)(2) since that physician's diagnosis of "focal interstitial anthracotic deposits," without linking such a diagnosis to coal dust exposure, does not constitute a finding of pneumoconiosis pursuant to Section 718.202(a)(2). *See Lykins v. Director, OWCP*, 819 F.2d 146, 10 BLR 2-129 (6th Cir. 1987); *see also Dobrosky v. Director, OWCP*, 4 BLR 1-680 (1982); *cf*. *Bueno v. Director, OWCP*, 7 BLR 1-337 (1984). Further, the administrative law judge permissibly concluded that, of the two physician's reviewing the biopsy, he would accord greater weight to Dr. Altmeyer's conclusion that the biopsy did not support a finding of pneumoconiosis, based on Dr. Altmeyer's superior credentials. *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *see also Milburn Colliery Co.* v. *Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's determination that the newly submitted biopsy evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant further contends that the medical opinion evidence supports a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant specifically asserts that the administrative law judge erred in concluding that Dr. Lenkey, did not diagnose pneumoconiosis, and that the administrative law judge again erred in crediting the opinion of Dr. Altmeyer over that of Dr. Klay.

In finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge, contrary to claimant's assertion, found that Dr. Lenkey diagnosed the presence of coal workers' pneumoconiosis, Director's Exhibit 11, but the administrative law judge concluded, in a permissible exercise of his discretion, that the opinion was entitled to little weight as the physician failed to elaborate on his

diagnosis. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). The administrative law judge further found, in a permissible exercise of his discretion, that the opinion Dr. Blatt diagnosing the presence of pneumoconiosis, Director's Exhibit 9, was not well-supported by the underlying documentation of record, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985), and was a qualified opinion, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Finally, contrary to claimant's assertion, the administrative law judge, after recognizing that Dr. Klay was claimant's surgeon and "followed [claimant's] progress," Decision and Order at 5, permissibly accorded greater weight to the opinion of Dr. Altmeyer, that claimant did not suffer from pneumoconiosis, Employer's Exhibit 1, than to the opinion of Dr. Klay, that the miner suffered from the disease, Claimant's Exhibit 1, Director's Exhibit 31, based on Dr. Altmeyer's superior qualifications, *see Martinez, supra*; *Wetzel, supra*, and the fact that Dr. Altmeyer's opinion was better supported by the underlying documentation of record, *see Clark, supra*; *Peskie, supra*; *Lucostic*, *supra*. We thus reject claimant's assertion that the opinion of Dr. Klay was entitled to greater weight merely based on the physician's status as treating physician. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.,* 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Accordingly, we affirm the administrative law judge's determination that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Ondecko, supra*. We therefore affirm the administrative law judge's determination that claimant has failed to establish a material change in conditions by establishing the existence of pneumoconiosis pursuant to Section 718.202(a). *See* 20 C.F.R. §725.309; *Ross, supra*.

A review of the previously submitted evidence of record demonstrates that there was no evidence supporting a finding of the existence of penumoconiosis pursuant to Section 718.202(a)(1)-(4). Director's Exhibit 29.[3] Inasmuch as the administrative law judge has properly determined that the newly submitted evidence also fails to support a finding of the existence of pneumoconiosis, claimant is precluded from establishing entitlement to benefits since he has failed to

[3]This evidence consists of three x-ray interpretations all of which were read as negative for the existence of pneumoconiosis, and a medical opinion by examining physician, Dr. Anghie, who concluded that there was no clinical evidence of any pulmonary disease. Director's Exhibit 29.

demonstrate the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc).* We must, therefore, affirm the denial of benefits. [4]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

[4]In view of our holding that claimant's failure to establish the existence of pneumoconiosis precludes an award of benefits, we need not address claimant's assertions regarding the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c). *See Trent, supra*; *Perry, supra*; *see also Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge