BRB No. 04-0847 BLA

BOBBY G. FIELDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 08/30/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Bobby G. Fields, Dante, Virginia, *pro se*.[1]

Anne L. Musgrove and Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (02-BLA-5456) of Administrative Law Judge Mollie W. Neal denying benefits on a claim filed pursuant to

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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 case involves a subsequent claim filed on April 9, 2001.[2] After noting employer's stipulation to twenty years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on February 20, 1981. Director's Exhibit 1. The district director denied the claim on May 21, 1981. *Id.* There is no indication that claimant took any further action in regard to his 1981 claim.

Claimant filed a second claim on March 14, 1989. Director's Exhibit 2. In a Decision and Order dated May 20, 1992, Administrative Law Judge Clement J. Kichuk found, *inter alia*, that claimant had established "a material change in medical condition" due to the worsening of his rheumatoid arthritis and stroke. Director's Exhibit 2. However, Judge Kichuk found that claimant had not established "a material change in his condition due to the presence of pneumoconiosis." *Id.* Judge Kichuk found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 1. Judge Kichuk further found that claimant failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Kichuk denied benefits. *Id.* By Decision and Order dated June 29, 1994, the Board affirmed Judge Kichuk's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Fields v. Clinchfield Coal Co.*, BRB No. 92-1855 BLA (June 29, 1994) (unpublished). The Board, therefore, affirmed Judge Kichuk's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to his 1989 claim.

Claimant filed a third claim on April 7, 1997. Director's Exhibit 3. In a Proposed Decision and Order dated April 30, 1998, the district director denied benefits. *Id.* The district director found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Claimant subsequently submitted a timely request for modification. In a Proposed Decision and Order dated April 15, 1999, the district director denied claimant's request for modification. *Id.* There is no indication that claimant took any further action in regard to his 1997 claim.

Claimant filed a fourth claim on April 9, 2001. Director's Exhibit 5.

§718.202(a)(1)-(4). However, the administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1997 claim became final. Consequently, the administrative law judge considered claimant's 2001 claim on the merits. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's 2001 claim is considered a "subsequent" claim under the revised regulations because it was filed more than one year after the date that claimant's prior 1997 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[3] has changed since the date upon which the order denying the prior claim became final. *Id.*

In this case, the administrative law judge noted that claimant's most recent 1997 claim had been denied based upon claimant's failure to establish either the existence of pneumoconiosis or that he suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order at 3. The administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 12-15. Because no party challenges the administrative law judge's finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Having found that claimant demonstrated that one of the applicable conditions of entitlement had changed since the date upon which the order denying his prior claim became final, *see* 20 C.F.R. §725.309, the administrative law judge properly considered the merits of claimant's 2001 claim.

[3]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits on the miner's claim under 20 C.F.R. Part 718.

Section 718.202(a)(1)

In her consideration of the newly submitted x-ray evidence, the administrative law judge acted within her discretion in crediting Dr. Scott's negative interpretation of claimant's June 21, 2001 x-ray over Dr. Paranthaman's positive interpretation of this film based upon Dr. Scott's superior qualifications.[4] *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 7; Director's Exhibits 18, 30. The administrative law judge also properly found that Dr. Wheeler's negative interpretation of claimant's December 4, 2001 x-ray and Dr. Fino's negative interpretation of claimant's

[4]While Dr. Paranthaman is a B reader, Director's Exhibit 18, Dr. Scott is dually qualified as a B reader and Board-certified radiologist. Director's Exhibit 30.

November 22, 2002 x-ray are uncontradicted.[5] Decision and Order at 7; Director's Exhibit 32; Employer's Exhibit 5. Moreover, the administrative law judge properly found that a preponderance of the previously submitted x-ray interpretations rendered by the best qualified physicians is negative for pneumoconiosis. *See Sheckler*, *supra*; Decision and Order at 15; Director's Exhibits 1-3. Because it is based upon substantial evidence, the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Section 718.202(a)(2)

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 7.

Section 718.202(a)(3)

The administrative law judge next considered whether claimant is entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). *See* Decision and Order at 7. The administrative law judge properly found that the Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Because this claim is not a survivor's claim, the administrative law judge also properly found that the Section 718.306 presumption is

[5]Dr. Wheeler is a B reader and Board-certified radiologist. Director's Exhibit 32. Dr. Fino is a B reader. Employer's Exhibit 5.

inapplicable. *See* 20 C.F.R. §718.306.

In her consideration of whether claimant was entitled to invocation of the irrebuttable presumption set out at 20 C.F.R. §718.304,[6] the administrative law judge addressed whether the newly submitted x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis. Although Dr. Paranthaman interpreted claimant's June 21, 2001 x-ray as positive for complicated pneumoconiosis, Director's Exhibit 18, Dr. Scott interpreted this x-ray as negative for the disease. Director's Exhibit 30. The administrative law judge acted within her discretion in crediting Dr. Scott's negative interpretation of claimant's June 21, 2001 x-ray over Dr. Paranthaman's positive interpretation of this film based upon Dr. Scott's superior qualifications. *See Sheckler*, *supra*; Decision and Order at 12. The most recent x-ray interpretations of record, Dr. Wheeler's interpretation of claimant's December 4, 2001 x-ray and Dr. Fino's interpretation of claimant's November 22, 2002 x-ray, are also negative for complicated pneumoconiosis. Director's Exhibit 32; Employer's Exhibit 5. Because it is supported by substantial evidence,[7] the administrative law judge's finding that the x-ray evidence is

[6]Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

[7]The previously submitted x-ray evidence is also insufficient to establish the existence of complicated pneumoconiosis. Dr. DePonte, a B reader and Board-certified radiologist, interpreted claimant's April 10, 1989 x-ray as revealing size A large opacities. Director's Exhibit 2. However, four similarly qualified physicians, Drs. McCluney, Scott, Wheeler and Sargent, interpreted this x-ray as negative for complicated

insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) is affirmed.

Because there is no biopsy evidence, claimant is precluded from establishing invocation pursuant to 20 C.F.R. §718.304(b).

CT scan evidence falls into the "other means" category of establishing complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Although the record contains interpretations of three CT scans taken on November 13, 1998, May 16, 2001 and December 4, 2001, *see* Director's Exhibit 32; Claimant's Exhibit 4, none of these interpretations supports a finding of complicated pneumoconiosis.[8] Claimant is, therefore, precluded from establishing invocation of the irrebuttable presumption at 20 C.F.R. §718.304(c).

We, therefore, affirm the administrative law judge's finding that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Decision and Order at 12.

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pneumoconiosis. *Id.*

[8]Although Dr. Wheeler identified several masses greater than 1.0 cm. on claimant's December 4, 2001 CT scan, there is no evidence that these masses would appear as opacities greater than one centimeter in diameter on an x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); Director's Exhibit 32. Moreover, even if there was such evidence in the record, Dr. Wheeler did not find that the masses in question constitute pneumoconiosis. *Id.*

Section 718.202(a)(4)

In her consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant tom 20 C.F.R. §718.202(a)(4), the administrative law judge properly questioned Dr. Paranthaman's diagnosis of coal workers' pneumoconiosis because it was based upon a positive x-ray finding, a reading that the administrative law judge found inconsistent with the preponderance of the x-ray evidence.[9] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 11.

Drs. Byers and Fino opined that claimant suffered from Caplan's syndrome. Director's Exhibit 28; Claimant's Exhibit 3; Employers Exhibit 5. Dr. Byers defined Caplan's syndrome as "an association of progressive massive fibrosis in black lung with rheumatoid arthritis." Director's Exhibit 28. Dr. Fino, however, explained that the chest x-ray abnormalities caused by Caplan's syndrome are due to rheumatoid arthritis and are not due to coal dust inhalation. Employer's Exhibit 5. In considering the conflicting opinions of Drs. Byers and Fino, the administrative law judge permissibly credited Dr.

[9]Dr. Paranthaman's diagnosis of coal workers' pneumoconiosis was based upon his positive interpretation of a June 21, 2001 x-ray. Director's Exhibits 12, 18. Dr. Paranthaman is qualified as a B reader. *See* Director's Exhibit 18. However, Dr. Scott, a dually qualified physician, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 30. Moreover, the administrative law judge properly found that the x-ray evidence, as a whole, is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Fino's opinion over that of Dr. Byers based upon his superior qualifications.[10] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Compton*, *supra*.

[10]Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 5. Dr. Byers's qualifications are not found in the record.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge