BRB No. 06-0318 BLA

JERRY D. McMILLION	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SLAB FORK COAL COMPANY	)	DATE ISSUED: 08/31/2006
	)	
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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Jerry D. McMillion, Crab Orchard, West Virginia, *pro se*.

Natalee A. Gilmore (Jackson & Kelly, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (04-BLA-6239) of Administrative Law Judge Daniel L. Leland on a subsequent 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 the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found, therefore, that the newly submitted evidence failed to establish an element of entitlement upon which the previous denial was based. Accordingly, the administrative law

judge denied the claim.[1]

On appeal, claimant generally challenges the administrative law judge's Decision and Order denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not file a response brief.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

The administrative law judge first addressed whether the new evidence established the existence of pneumoconiosis. The administrative law judge found that the only positive x-ray interpretation was made by Dr. Patel, a B-reader and a Board-certified radiologist, of the June 3, 2003 x-ray.[2] Director's Exhibits 21, 22. The administrative law judge noted, however, that Dr. Binns, who was also both a B-reader and a Board-certified radiologist, reread the same film as being negative for the existence of pneumoconiosis. Employer's Exhibit 2. The administrative law judge further noted that the only other newly submitted x-ray, taken on March 17, 2004, was read negative for the existence of pneumoconiosis by Dr. Zalvidar, a B-reader. Employer's Exhibit 1; Decision and Order at 4. The administrative law judge properly concluded, therefore that a preponderance of the x-ray evidence was negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). We affirm, therefore, the administrative law judge's finding that the newly submitted x-ray evidence of record failed to establish the

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[1] Claimant filed his first claim with the Department of Labor (DOL) on December 13, 1989. This claim was denied by the district director because the evidence failed to establish the existence of pneumoconiosis and total respiratory disability due to pneumoconiosis. Director's Exhibit 1. Claimant did not challenge this denial and it became final. Claimant filed the instant subsequent claim with DOL on February 26, 2003. Director's Exhibit 3.

[2] Dr. Navani read the June 3, 2003 x-ray for quality purposes only. Director's Exhibit 23.

existence of pneumoconiosis at Section 718.202(a)(1). The administrative law judge also found that there was no biopsy or autopsy evidence pursuant to Section 718.202(a)(2) and that none of the applicable presumptions described under Section 718.202(a)(3) were applicable in this case. This finding is supported by the record. Decision and Order at 3-4. Accordingly, we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2) and (a)(3).

Next, the administrative law judge concluded that the newly submitted medical opinion evidence also failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge found that, although Dr. Mullins determined that claimant suffered from a condition caused by coal mine employment, his opinion was based on the single positive x-ray of record, which was outweighed by the other x-ray evidence of record. Director's Exhibit 18. Turning to the other newly submitted medical opinion, that of Dr. Zalvidar, who concluded that claimant did not suffer from coal workers' pneumoconiosis, the administrative law judge found it was consistent with the x-ray evidence and that it was well-reasoned and documented. Weighing the evidence from the subsequent claim, therefore, the administrative law judge concluded that it failed to establish clinical or legal pneumoconiosis. This was rational. Employer's Exhibit 1; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 4. We affirm, therefore, the administrative law judge's finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

With respect to the administrative law judge's finding at Section 718.204(b)(2), the administrative law judge found that the newly submitted evidence failed to establish total respiratory disability as the newly submitted pulmonary function and blood gas studies were non-qualifying, there was no evidence of cor pulmonale, and both Drs. Mullins and Zalvidar concluded that claimant did not have a pulmonary impairment. Director's Exhibits 18, 19, 20; Employer's Exhibit 1. This was proper. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Jewell Smokeless Coal Corp.*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), and, consequently, the administrative law judge's finding that claimant failed to establish a condition of entitlement previously adjudicated against him. 20 C.F.R. §718.204(b)(2)(i)-(iv); 20 C.F.R. §725.309(d).

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge