BRB No. 01 - 0310 BLA

BOBBY MAYNARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
KENTUCKY CARBON CORPORATION	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Bobby Maynard, Steele, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (99-BLA-1197) of Administrative Law Judge Daniel J. Roketenetz on a duplicate 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.*[2] The administrative

[1]Claimant is Bobby Maynard, the miner, who filed three applications for benefits. The first claim was filed on June 27, 1970, with the Social Security Administration (SSA), which denied the claim. Director's Exhibit 25. Claimant then filed a second claim, with the Department of Labor (DOL) on June 9, 1987. Director's Exhibit 25. Following the denial of that claim, claimant filed his third claim with DOL on June 11, 1998. Director's Exhibit 1.

[2]Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending

law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2000), and thus, was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(2000). Accordingly, the administrative law judge denied the claim. Claimant then filed the instant appeal with the Board. In response to claimant's appeal, employer asserts that the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000) is supported by substantial evidence. Employer therefore urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.[3]

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on appeal before the Board under the Act, except for those which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3]We affirm, as unchallenged on appeal, and not adverse to claimant, the administrative law judge's findings that claimant has established 26 years of qualifying coal mine employment, and that employer is the responsible operator. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

The relevant procedural history of this case is as follows: Claimant filed his initial claim for benefits with the Social Security Administration on June 27, 1970. Director's Exhibit 25. Following SSA review, this claim was dismissed by SSA at claimant's request. *Id.* The miner took no further action on the claim. The miner filed a second claim with the Department of Labor (DOL) on June 9, 1987. Director's Exhibit 25. Following a hearing, Administrative Law Judge Samuel J. Smith issued a Decision and Order dated June 24, 1992, wherein he found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2000), but found that claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(c)(2000). Accordingly, Judge Smith denied the claim. Claimant requested modification of Judge Smith's decision on July 24, 1992. Director's Exhibit 25-477. Following another hearing, Administrative Law Judge Edward J. Murty, Jr., issued a Decision and Order dated June 13, 1994, wherein he denied the claim because he found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2000). *Id.* Claimant then filed an appeal with the Board. The Board affirmed Judge Murty's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2000), and thus affirmed his denial of benefits. *Maynard v. Kentucky Carbon Corp.*, BRB No. 94-2845 BLA (Dec. 21, 1994)(unpub.). Director's Exhibit 25-266. Claimant then filed another request for modification with Judge Murty on December 19, 1995. Director's Exhibit 25-265. Judge Murty issued a Decision and Order dated June 5, 1997 denying claimant's request for modification on the basis that claimant failed to establish the existence of pneumoconiosis. Claimant took no further action on this claim. Director's Exhibit 25. Claimant then filed a third claim for benefits on June 11, 1998. Director's Exhibit 1. Following a hearing, Administrative Law Judge Daniel J. Roketenetz denied the claim in a Decision and Order dated November 15, 2000, wherein he found that the evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(2000), and thereby failed to establish a material change in conditions in this duplicate claim.

In an appeal filed by a claimant 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 Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986)*; Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). The Board's scope of review is defined by statute. 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 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 to benefits in a living miner's claim under the 20 C.F.R. Part 718 regulations, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis

is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Section 725.309(c) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in the conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's 1987 claim was ultimately denied because claimant failed to establish the existence of pneumoconiosis. Decision and Order at 6. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), the newly submitted evidence must support a finding of pneumoconiosis.

With respect to the administrative law judge's finding at Section 718.202(a)(1)(2000), the administrative law judge correctly found that the record contained ten newly submitted x-ray interpretations of three different films. Decision and Order at 6. He correctly found that all of the newly submitted x-ray evidence was negative for pneumoconiosis. Director's Exhibits 9, 10, 22, 23, 24; Employer's Exhibits 2, 7, 11; Decision and Order at 6. Negative x-ray interpretations are insufficient to support a finding of the existence of pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1- 85 (1993); *Sakach v. Director, OWCP*, 8 BLR 1- 237 (1985). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence of record fails to establish the existence of pneumoconiosis at Section 718.202(a)(1)(2000). 20 C.F.R. §718.202(a)(1).

The administrative law judge did not render findings with respect to 20 C.F.R. §§ 718.202(a)(2) and (a)(3)(2000). A review of the record indicates that it does not contain any autopsy or biopsy evidence, and therefore Section 718.202(a)(2) cannot be established. Moreover, none of the presumptions contained in Section 718.202(a)(3) is applicable. *See* 20 C.F.R. §§718.304; 718.305, 718.306. Accordingly, we hold that a material change in conditions is precluded at 20 C.F.R. §718.202(a)(2) and (a)(3). 20 C.F.R. §718.202(a)(2), (a)(3).

With respect to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), the administrative law judge correctly found that the record contains six newly submitted reports relevant to the issue of the existence of pneumoconiosis. He correctly found that

Dr. Younes opined that claimant suffered from chronic obstructive pulmonary disease and he found that Dr. Younes opined that the etiology of claimant's chronic obstructive pulmonary impairment was unclear. Director's Exhibit 9.[4] The administrative law judge correctly concluded that in January 1999, Dr. Dahhan found insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 22; Decision and Order at 7. As the administrative law judge also found, Dr. Dahhan examined claimant again in December 1999 and again stated that claimant did not have coal workers' pneumoconiosis. Employer's Exhibit 7; Decision and Order at 8. The administrative law judge also correctly noted that Drs. Broudy, Repsher and Iosif all opined that claimant did not have pneumoconiosis. Employer's Exhibits 3, 4, 6, 8, 13; Decision and Order at 7-8. The administrative law judge, therefore, correctly concluded that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis, as they all concluded that claimant does not suffer from pneumoconiosis. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence of record fails to establish the existence of pneumoconiosis at Section 718.202(a)(4)(2000). 20 C.F.R. §718.202(a)(4).

Inasmuch as the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), it is thereby insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Ross, supra*. Inasmuch as claimant has failed to establish a material change in conditions in this duplicate claim, we must affirm the administrative law judge's denial of benefits. *Id.*

[4]The administrative law judge correctly found that Dr. Younes' only statement relevant to etiology was "r/o occupational dust exposure." Director's Exhibit 9; Decision and Order at 6-7.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge