BRB No. 01-0329 BLA

MARIO W. LEOMBRUNI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
JEDDO-HIGHLAND COAL COMPANY	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Robert A. Mazzoni, Scranton, Pennsylvania, for claimant.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-BLA-00480) of Administrative Law Judge Robert D. Kaplan 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).[1] Based on a stipulation by the parties, the administrative law judge credited

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

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

claimant with twenty-nine years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 (2000).[2] The administrative law judge found that the

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relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in 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). 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 147 (D.D.C. 2001).

[2] Claimant filed his initial claim for black lung benefits on May 10, 1973, which was denied by the district director on May 24, 1979. Claimant filed his second claim for benefits on December 3, 1986, which was denied by Administrative Law Judge Ainsworth H. Brown on February 21, 1989. Claimant filed his third claim for benefits on May 31, 1994, which was dismissed, at claimant's request, by Administrative Law Judge Ralph A. Romano on March 1, 1996. Claimant filed his fourth claim for benefits on June 4, 1997, which was dismissed, at claimant's request, by Administrative Law Judge Robert D. Kaplan on August

evidence submitted since the prior denial was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000) and thus, that a material change in conditions was not established pursuant to 20 C.F.R. §725.309(d) (2000). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) (2000) and that total disability was not established pursuant to 20 C.F.R. §718.204(c)(4) (2000). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief on the merits in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

10, 1998. The instant claim was filed on October 19, 1999. Director's Exhibit 1.

[3]We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(c)(1)-(3) (2000), that the newly submitted evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6, 10.

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Third Circuit has held that in determining whether a material change in conditions has been established, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Labelle Processing Co. v. Swarrow,* 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).[4]

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[4] The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibits 2, 13; *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge considered the newly submitted medical opinion evidence and rationally found that it was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000).[5] The administrative law judge permissibly accorded greater weight to the opinion of Dr. Dittman, who is Board-certified in internal medicine and pulmonary disease, finding no pneumoconiosis, than to the contrary opinion of Dr. Aquilina, who is Board-certified in anesthesiology, because he found that the former was reasoned and documented as it was supported by the objective evidence of record and that the latter was not. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 147 n.2 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1994); Decision and Order at 8-9. Accordingly, 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) (2000) and, therefore, a material change in conditions on that ground. We also hold that in considering the newly submitted x-ray and medical opinion evidence together, the administrative law judge rationally found that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 10.

With respect to Section 718.204(c)(4) (2000), the administrative law judge also rationally determined that the newly submitted evidence was insufficient to establish that claimant suffered from a totally disabling respiratory or pulmonary impairment. The administrative law judge permissibly concluded that the newly submitted medical opinion evidence was insufficient to establish total disability since Dr. Aquilina's diagnosis of total disability was questionable in light of the objective studies administered by Drs. Dittman and Levinson. Decision and Order at 11. In addition, the administrative law judge rationally found that the contrary opinions of Drs. Dittman and Levinson, stating that claimant was not suffering from a disabling respiratory or pulmonary impairment, were supported by the

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[5] The newly submitted medical opinions of record consist of the reports and depositions of Dr. Levinson, finding claimant had legal pneumoconiosis in 1997, but that he did not have pneumoconiosis in 1999, Director's Exhibits 5, 20-4; Employer's Exhibit 3; Dr. Dittman, finding no pneumoconiosis in 2000, Employer's Exhibits 1, 9; and Dr. Aquilina diagnosing pneumoconiosis due to prolonged exposure to coal dust in 2000. Claimant's Exhibits 1, 2.

objective data and, thus, were well-reasoned.[6] *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields*, *supra*; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry*, *supra*; Decision and Order at 10.

[6] As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

Furthermore, contrary to claimant's contention, the administrative law judge acted within his discretion in crediting Dr. Dittman's opinion regarding whether claimant has a totally disabling respiratory or pulmonary impairment. Dr. Dittman premised his opinion, that claimant is not totally disabled, upon the assumption, which claimant does not challenge, that his usual coal mine employment required heavy exertion.[7] Since Dr. Dittman found no impairment, it was reasonable for him to opine that claimant was not totally disabled even from performing heavy manual labor. Employer's Exhibit 9 at 12, 22-23, 26. Finally, claimant's argument, that Dr. Dittman erred in his discussion of the source of claimant's symptoms, is irrelevant because the doctor found no impairment and the cause of claimant's symptoms has no bearing on the issues in this case.

The administrative law judge is empowered to weigh the medical 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 Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.,* 12 BLR 1-77 (1988), *aff'd,* 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.,* 10 BLR 1-127 (1987). Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) (2000). Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) or total respiratory disability pursuant to Section 718.204(c) (2000), we affirm the administrative law judge's finding that the evidence was insufficient to establish a material change in conditions pursuant to Section 725.309 (2000) and we affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law. *Swarrow*, *supra*.

[7]The administrative law judge stated that claimant's "last several years of coal mine employment involved drilling with a jackhammer, and operating a bulldozer." Decision and Order at 3.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge