BRB No. 01-0378 BLA

RICHARD W. TUCKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH ON THE GREEN, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Richard W. Tucker, Central City, Kentucky, *pro se*.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-1235) of Administrative Law Judge Robert L. Hillyard rendered 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*. (the Act).[1] The administrative law judge found fourteen

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. Theses regulations became effective

and one-half years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis, one of the elements of entitlement previously adjudicated against claimant, and thus, found that a material change in conditions was not established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.[3]

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers= Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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

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on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F..R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his first claim for benefits on January 6, 1988, which was denied on June 23, 1988, because claimant did not establish any elements of entitlement. Claimant never pursued this claim and the claim was administratively closed on September 6, 1988. Director=s Exhibit 38. Claimant filed the instant claim for benefits on April 6, 1998.

[3] The record indicates that claimant=s first claim for benefits was denied because claimant failed to establish any elements of entitlement. Director=s Exhibit 38-16. Thus, in determining whether a material change in conditions was established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge should have considered whether the newly submitted evidence established any one of the elements previously adjudicated against claimant. However, because the administrative law judge, after considering the newly submitted x-ray evidence, also considered relevant evidence submitted in the prior claim and found that it did not establish the existence of pneumoconiosis, an essential element of entitlement, the administrative law judge=s failure to determine whether any of the other elements previously adjudicated against him was established by newly submitted evidence is harmless error. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

(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. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge=s Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. The administrative law judge rationally found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge found that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis based on the negative readings by physicians with superior qualifications. This was proper. Director=s Exhibits 17-22, 38-23, 38-24; Claimant=s Exhibit 1; Employer=s Exhibits 2, 3; Decision and Order at 13; 20 C.F.R. '718.202(a)(1); *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). In addition, relevant to 20 C.F.R. '718.202(a)(2), (3), the administrative law judge properly found that the existence of pneumoconiosis was not established as there was no biopsy evidence of record, this is a living miner=s claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 13; see 20 C.F.R. ''718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Considering the medical opinion evidence of record, the administrative law judge accorded greater weight to the opinions of Drs. Fino, Selby, Lane and Broudy, finding no pneumoconiosis, than to the contrary opinions of Drs. Simpao, Anderson and Wright as he found them better reasoned and documented and because Drs. Fino and Selby were highly-qualified physicians. The administrative law judge also accorded them greater weight because he found that the opinions of Drs. Simpao and Anderson were equivocal. This was proper. *Clark supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-212, 22 BLR 2-162, 175 (4th Cir. 2000).

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 Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge=s finding that claimant failed to establish the existence of pneumoconiosis. Thus, because claimant failed to establish the existence of pneumoconiosis by the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions on that basis and denied benefits. Moreover, because the administrative law judge also considered the x-ray and medical opinion evidence submitted with the prior claim and found that they failed to establish the existence of pneumoconiosis, he also properly found that this claim must be denied because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement. *See Trent, supra*; *Perry, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge