BRB No. 98-0279 BLA

HERBERT KISER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANITA COAL COMPANY	)	DATE ISSUED:
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Hebert Kiser, Robinson Creek, Kentucky, *pro se*.

Lois A. Kitts (Baird, Baird, Baird & Jones), Pikeville, Kentucky, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (95-BLA-0291) of Administrative Law Judge Thomas F. Phalen, Jr., 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). The administrative law judge found that the instant case is a duplicate claim and determined that pursuant to the standard enunciated in *Sharondale v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the newly submitted evidence was insufficient to establish a material change in conditions, as the evidence failed to establish at least one of the elements of entitlement previously adjudicated against claimant.[1] Decision and Order at 12. The administrative law judge credited claimant with

[1] Claimant originally filed for benefits in 1989, and the claim was administratively denied on August 29, 1990 on the basis that claimant failed to

fifteen years of coal mine employment and found the new evidence submitted by claimant insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant was totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Thus, the administrative law judge declined to adjudicate the claim on the merits and denied benefits on the basis of the previous denials. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate 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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

To establish entitlement to benefits pursuant to Part 718, the miner must prove 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 one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en*

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establish the presence of pneumoconiosis and that he was thereby totally disabled. Director's Exhibit 50. The claim was not pursued further. Claimant filed the instant claim in 1993, and it too was administratively denied on the same basis. Director's Exhibits 1, 32. Subsequently, claimant filed a request for reconsideration, and it was denied by the district director on August 3, 1994. Director's Exhibits 33, 34. Thereafter, pursuant to claimant's request, the case was referred to the Office of Administrative Law Judges. Director's Exhibits 36, 51.

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 therein. The record contains sixteen newly submitted interpretations of x-rays taken between 1993 and 1997. Director's Exhibits 7, 10, 14, 17-20, 29, 30, 47-49; Employer's Exhibits 2, 5, 7, 10. The administrative law judge found that only five of these interpretations were positive for pneumoconiosis,[2] Director's Exhibits 14, 19, 20, 47, and that three of the five interpretations were rendered by Dr. Sundaram and one by Dr. Grimes, neither of whom have superior qualifications to perform radiological interpretations. Decision and Order at 7. The administrative law judge noted that while the remaining positive interpretation was rendered by a B-reader, Dr. Reddy,[3] it carried little weight in view

[2] The record reveals only three positive x-ray readings, two by Dr. Sundaram and one by Dr. Grimes. *See* Director's Exhibits 19, 20, 47. Dr. Reddy did not render an x-ray interpretation, but instead referenced in his report an interpretation rendered by Dr. Sundaram. *See* Director's Exhibit 47. A remand is not required as any error would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3] The administrative law judge made contradictory statements concerning the qualifications of Dr. Reddy, stating at one point that the physician did not "have any special qualifications for reading x-rays" and subsequently referring to him as a B-reader. Decision and Order at 7. However, inasmuch as Dr. Reddy did not actually render an x-ray interpretation, but instead relied on an interpretation rendered by Dr. Sudaram, *see* Director's Exhibit 47, the administrative law judge's misstatement is harmless. *See Larioni*, *supra*.

of the fact that overwhelmingly the x-ray evidence was read as negative by the most qualified physicians. Decision and Order at 7. The administrative law judge also held that merely in terms of the numerical weight of the evidence, the number of negative readings far exceeded those of positive interpretations. Thus, he concluded that claimant failed to carry his burden of establishing the existence of pneumoconiosis. We agree. Of the thirteen negative interpretations of record, four were rendered by physicians who are qualified B-readers as well as Board certified radiologists, and six were rendered by physicians who are B-readers. Inasmuch as the administrative law judge properly relied upon the qualifications of the physicians and the numerical superiority of the negative readings, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), we affirm his finding that the newly submitted evidence failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Next, the administrative law judge correctly held that the presence of pneumoconiosis could not be established pursuant to 20 C.F.R. §718.202(a)(2) because the record contains no biopsy evidence. He also correctly held that pneumoconiosis could not be established pursuant to 20 C.F.R. §718.202(a)(3) because none of the regulatory presumptions are applicable to claimant. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis. Because this claim was filed after January 1, 1982, the presumption at 20 C.F.R. §718.305 is unavailable to claimant. The final presumption, found at 20 C.F.R. §718.306, is inapplicable here because it pertains only to certain survivor's claims. We, therefore, affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (3).

Pursuant to Section 718.202(a)(4), the administrative law judge accorded less weight to the newly submitted medical opinions of record opining that claimant suffers from pneumoconiosis, *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983), and thus, found that pneumoconiosis had not been established under the provision. The administrative law judge stated that Dr. Grimes reported "evidence of chronic interstitial lung disease that with appropriate work history would be compatible with pneumoconiosis 1/1." Decision and Order at 9. Although the administrative law judge analyzed this statement as a medical report, it is in fact an x-ray interpretation, *see* Director's Exhibit 19, and as such is not probative under Section 718.204(a)(4). *See Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989). Thus, the only physician of record to have diagnosed the presence of pneumoconiosis in a medical report was Dr. Sundaram. *See* Director's Exhibits 14, 47. The administrative law judge commented that although he was a treating physician, to whom more probative weight may be accorded, *see Bogan v. Consolidated Coal Co.*, 6 BLR 1-1000 (1984), two other treating physicians, Drs. Broudy and Fino, opined that claimant does not suffer from pneumoconiosis. Decision and Order at 11. The administrative law judge noted that the consultative reports by Drs. Anderson, Branscomb, Broudy, Fino, Lane and

Vuskovich all also concluded that claimant does not suffer from pneumoconiosis. *Id*. The administrative law judge credited the opinions of Drs. Broudy and Fino over that of Dr. Sudaram on the basis of the physicians' greater qualifications,[4] and on the basis that their reports are "more thorough, better documented, and better reasoned than Dr. Sundaram's opinion." Decision and Order at 11. The administrative law judge also found that the finding of no pneumoconiosis was "supported by and consistent with the objective medical evidence." *Id*. The administrative law judge also credited the reports of the consulting physicians over the opinion of Dr. Sundaram because their findings of no pneumoconiosis are corroborated by the opinions of Drs. Broudy and Fino. The administrative law judge rationally rejected the opinion of Dr. Sundaram in view of the weight of the contrary opinions offered by other treating and consulting physicians. *Perry*, *supra*. Moreover, he permissibly credited those opinions stating that claimant does not suffer from pneumoconiosis on the basis of the physicians' superior qualifications and because their diagnoses are supported by patient examinations, objective test results, negative x-rays, and are consistent with each other. Inasmuch as the administrative law judge rationally credited the medical reports of the most qualified physicians, which he found to be well-documented and whose reliability was substantiated by the medical data, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-185 (1993); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), *rev'd on other grounds*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), we decline to disturb his credibility determinations. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Thus, we affirm the administrative law judge's finding that claimant failed to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4).[5]

Finally, the administrative law judge found that even had claimant established the presence of pneumoconiosis, he would still be ineligible for benefits because the record evidence fails to establish total disability due to pneumoconiosis. Pursuant to Section 718.204(c)(1) the administrative law judge correctly found that of the nine pulmonary

[4] The record does not indicate the qualifications of Dr. Sundaram, but the curricula vitae of Drs. Broudy and Fino state that both physicians are Board certified in internal medicine with a subspecialty in pulmonary diseases. *See* Employer's Exhibit 9.

[5] As the administrative law judge found that claimant failed to establish the presence of pneumoconiosis, the administrative law judge properly declined to invoke the presumption under 20 C.F.R. §718.203(b) that the disease arose out of coal mine employment. Thus, we affirm the administrative law judge's finding that this element of entitlement has not been met.

function studies of record only one yielded qualifying values. *See* Director's Exhibits at 9-11, 47, 50; Employer's Exhibit 10. He also correctly found that none of the blood gas studies of record were qualifying. Director's Exhibits at 11, 15, 16, 50. Finally, the administrative law judge noted that the only physician diagnosing claimant as totally disabled, Dr. Sundaram, was insufficient to carry claimant's burden of proof in light of the contrary probative evidence of record. Decision and Order at 12; *Fields, supra*; *Perry, supra*. 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, supra*. Consequently, we affirm the administrative law judge's weighing of the medical evidence of record as it is supported by substantial evidence and is in accordance with law.

Inasmuch as the evidence fails to establish at least one of the elements of entitlement previously adjudicated against claimant, *see Ross, supra*, we affirm the administrative law judge's finding that claimant has failed to establish a material change in conditions within the meaning of Section 725.309.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge