BRB No. 98-0481 BLA

DONALD E. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DUDE BRANCH MINING INCORPORATED	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Donald E. Brown, Beaver, Kentucky, *pro se*.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-0586) of Administrative Law Judge Daniel F. Sutton 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). Claimant's first application for benefits filed on December 12, 1975 was initially awarded but later denied because claimant did not cease his coal mine employment within one year of the date of his final determination of eligibility. *See* 20 C.F.R. §725.503A(b);

Director's Exhibits 16, 35 at 9-17. On May 20, 1996, claimant filed the present application for benefits which is a duplicate claim because it was filed more than one year after the district director's denial of the previous claim. Director's Exhibits 1, 16; 20 C.F.R. §725.309(d).

The administrative law judge noted that employer did not contest its designation as the responsible operator or claimant's allegation of thirty-seven years of coal mine employment, and found that claimant has one dependent for purposes of benefits augmentation. The administrative law judge also found that the new evidence established an element of entitlement previously decided against claimant by demonstrating that he was no longer engaged in coal mine employment, Director's Exhibit 4; Hearing Transcript at 21, and therefore found that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d). *See* 20 C.F.R. §725.503A(b); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). The administrative law judge then considered whether all of the evidence established entitlement to benefits, *Ross, supra*, and concluded that the record failed to demonstrate the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

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 Co*., 12 BLR 1-176 (1989). 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 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).

[1] We affirm the administrative law judge's findings regarding dependency and pursuant to 20 C.F.R. §725.309(d) as they are unchallenged on appeal and are not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all twenty-three readings of ten x-rays taken between 1974 and 1997. There were four positive readings and nineteen negative readings. Director's Exhibits 12, 13, 30, 31, 35; Employer's Exhibits 1-6. Of the negative readings, fifteen were rendered by physicians who are Board-certified radiologists, B-readers, or both, while one of the positive readings was rendered by a Board-certified radiologist and B-reader. The administrative law judge permissibly accorded greater weight to the readings by qualified physicians and concluded that the existence of pneumoconiosis was not established "by a preponderance of the x-ray evidence . . . ." Decision and Order at 9; *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). Substantial evidence supports the administrative law judge's finding. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 7; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge discussed the reports of eight physicians. Four of these physicians prepared reports in connection with claimant's first claim for benefits. In July of 1974, Dr. Martin examined claimant, interpreted a chest x-ray as positive for silicosis and administered a "match test"[2] that he indicated was positive. Director's Exhibit 35 at 186, 192. Based on his findings and claimant's fifteen years of coal mine employment, Dr. Martin diagnosed silicosis. *Id*. In September of 1974 Dr. Anderson examined and tested claimant and diagnosed "category 1 pneumoconiosis." Director's Exhibit 35 at 217-18. In February of 1976 Dr. Page after examination and testing indicated a diagnosis of "poss pneumoconiosis." Director's Exhibit 35 at 269. Dr. O'Neill examined and

[2] Dr. Martin testified that in the match test the patient attempts to blow out a match held six inches away from his mouth. Director's Exhibit 35 at 192-94.

tested claimant twice, in September of 1974 and in April of 1979. After the September 1994 examination, in which Dr. O'Neill interpreted claimant's chest x-ray positive for pneumoconiosis, he diagnosed simple pneumoconiosis. Director's Exhibit 35 at 178, 218, 229. After the April 1979 examination, in which Dr. O'Neill interpreted claimant's chest x-ray as "normal," he diagnosed chronic bronchitis for which he did not provide an etiology. Director's Exhibit 35 at 251-52.

In the second claim, claimant was first examined by Dr. Fritzhand, who took a chest x-ray and administered a resting blood gas study which yielded qualifying[3] values. Director's Exhibits 10, 11. Dr. Fritzhand interpreted the resting blood gas study as abnormal and reported that an exercise blood gas study and pulmonary function study were not done because of claimant's recent quadruple coronary artery bypass surgery. Director's Exhibit 10 at 3. Dr. Fritzhand diagnosed COPD due to cigarette smoking and pneumoconiosis due to coal dust exposure, noting that the diagnosis of pneumoconiosis was "made on [the] basis of abnormal ABG with a very long H/O coal dust exposure (37 yrs) despite a [negative] CXR." Director's Exhibit 10 at 4. Dr. Fritzhand's qualifications are not in the record.

Two months later, Dr. Fino, an Internal Medicine and Pulmonary Disease specialist and B-reader, examined and tested claimant and reviewed three chest x-rays and two medical reports with associated test results from the first claim. Director's Exhibit 30. Based upon his examination findings, a negative chest x-ray, non-qualifying pulmonary function and blood gas studies, and his review of the earlier evidence, Dr. Fino diagnosed mild obstructive lung disease due to smoking and opined that claimant does not have pneumoconiosis. Director's Exhibit 30 at 6-7. Dr. Fino explained his view that the negative chest x-rays, the specific pattern of claimant's mild ventilatory impairment, and claimant's normal diffusing capacity and total lung capacity values indicated that pneumoconiosis was absent. *Id*.

Subsequently, the Department of Labor asked Dr. Younes to review the medical evidence of record and determine whether claimant had pneumoconiosis and to state which blood gas study better reflected claimant's condition--the qualifying blood gas study obtained by Dr. Fritzhand in July 1996 or the non-qualifying blood gas study subsequently obtained by Dr. Fino in September 1996.

[3] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Director's Exhibit 32 at 1. Dr. Younes opined that claimant does not have "Coal Workers' Pneumoconiosis" because the "chest x-rays . . . show no evidence of [p]neumoconiosis." Director's Exhibit 32 at 2. Dr. Younes diagnosed a moderate to severe ventilatory impairment with a "primary etiology" of cigarette smoking, but added that "coal dust exposure might be a significant contributing factor . . . ." *Id*. Dr. Younes further indicated that Dr. Fino's blood gas study "done in September reflects [claimant's] respiratory status better than the ones that were done in July" because "respiratory infection or bronchospasm . . . might explain the low PO2 in July 1996." *Id*. The record indicates that Dr. Younes is Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader.

Finally, Dr. Broudy, who is Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader, examined and tested claimant on January 16, 1997. Employer's Exhibit 3. Based upon his examination findings, a negative chest x-ray, a non-qualifying blood gas study that he interpreted as showing mild resting hypoxemia, and a non-qualifying pulmonary function study that he interpreted as showing "very mild obstruction," Dr. Broudy diagnosed chronic bronchitis due to smoking and coronary atherosclerosis. Employer's Exhibit 3 at 2-3. Dr. Broudy concluded that claimant did not have coal workers' pneumoconiosis or "any significant pulmonary disease or respiratory impairment . . . aris[ing] from [his] occupation as a coal worker." Employer's Exhibit 3 at 3.

After summarizing all of the medical opinions, Decision and Order at 9-13, the administrative law judge reasonably accorded diminished weight to the eighteen- to twenty-three-year-old opinions by Drs. Martin, Anderson, O'Neill and Page because they did not reflect claimant's current condition. *See Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 1167, 21 BLR 2-73, 2-82 (6th Cir. 1997). In addition, the administrative law judge rationally questioned Dr. Martin's reliance on a match test to diagnose silicosis, and permissibly found that Dr. Page failed to explain the basis for his diagnosis. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the administrative law judge, while recognizing that a claimant "may not be denied benefits solely on the basis of negative chest x-ray evidence," Decision and Order at 9, rationally considered that the 1974 and 1979 diagnoses by Drs. Anderson and O'Neill, which were based in part upon their own positive x-ray readings, were not supported by "any positive [x-ray] interpretations of the recent x-rays by the best qualified radiologists . . . ."[4] Decision and Order at 14; *see Woodward, supra*.

[4] The record contains no radiological qualifications for Drs. Anderson and O'Neill.

Turning to the new medical reports, the administrative law judge recognized that the opinions of Drs. Fritzhand and Younes "could support a finding of pneumoconiosis" pursuant to Section 718.201, but found that they were outweighed by the opinions of Drs. Fino and Broudy. Decision and Order at at 14. Specifically, the administrative law judge found that Dr. Fritzhand's diagnosis based on the July 1996 blood gas study was "called into question by Dr. Younes who concluded that the closer-to-normal arterial blood gas results obtained by Dr. Fino in September 1996 were more representative of the [c]laimant's respiratory condition than the July 1996 study relied upon by Dr. Fritzhand." Decision and Order at 14. In so doing, the administrative law judge permissibly deferred to Dr. Younes' documented credentials in pulmonary medicine. *Clark, supra*. The administrative law judge then found that Dr. Fino's opinion, as supported by that of Dr. Broudy, was "better reasoned and better supported by the objective medical evidence" than those of Drs. Fritzhand and Younes because Dr. Fino explained in detail why he believed that the objective evidence supported his opinion that claimant does not have pneumoconiosis but does have chronic bronchitis due to smoking. *See Clark*, *supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984). The administrative law judge considered all of the relevant evidence and provided valid reasons for the weight that he accorded to the evidence, and substantial evidence supports his finding. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge