BRB No. 99-0525 BLA

GEORGE KEEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA 'B' MINING 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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

George Keen, Richlands, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order

[1] Claimant is the miner, George Keen, who initially filed for benefits on September 29, 1978. Director's Exhibit 27. This claim was denied by Administrative Law Judge Edward J. Murty in a Decision and Order issued on January 9, 1981. Director's Exhibit 27. On appeal, the Board vacated the denial of benefits and remanded the case for reconsideration of the administrative law judge's findings at 20 C.F.R. §727.203(a)(2). *Keen v. Sea "B" Mining Co.*, 6 BLR 1-454 (1983). Director's Exhibit 27. On December 12, 1983, the administrative law judge issued a Decision and Order on Remand again denying benefits. Director's Exhibit 27. Claimant filed

(97-BLA-1149) of Administrative Law Judge Stuart A. Levin, 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). In a Decision and Order issued on January 25, 1999, the administrative law judge accepted the parties stipulation that claimant established thirty-eight years of coal mine employment, and determined that this claim was subject to the duplicate claim provisions at 20 C.F.R §725.309, as it was filed more than one year after the final denial of claimant's earlier claims. The administrative law judge found that claimant had previously established the existence of simple pneumoconiosis, but that the evidence of record was insufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304, or total respiratory disability pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge further found that claimant had failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309, in accordance with the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied,* 519 U.S. 1090

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a second claim for benefits on August 24, 1984, which was denied by Administrative Law Judge Robert L. Hillyard in a Decision and Order issued on May 28, 1991, and in a Decision and Order on Reconsideration issued on September 19, 1991. Director's Exhibit 27. On appeal, the Board affirmed the administrative law judge's denial of benefits. *Keen v. Sea "B" Mining Co.*, BRB No. 92-0140 BLA (Oct. 22, 1993)(unpub.). Director's Exhibit 27. The United States Court of Appeals for the Fourth Circuit subsequently affirmed the Board's Decision and Order. *Keen v. Sea "B" Mining Co.*, *aff'd*, No. 93-2537 (4th Cir. Sept. 26, 1994)(unpub.). Director's Exhibit 27. Claimant filed the present duplicate claim on July 24, 1996. Director's Exhibit 1.

(1997).[2] Accordingly, benefits were denied.

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 (the Director), has not participated in this appeal.

[2] The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the State of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

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 are 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 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*). Failure to prove any of these elements precludes entitlement. *Trent*, *supra*; *Perry*, *supra*.

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). The United States Court of Appeals for the Fourth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against him. *Rutter*, *supra*.

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of complicated pneumoconiosis was not established by the newly submitted evidence pursuant to Section 718.304.[3] The

[3] Section 718.304 provides an irrebuttable presumption of total disability due to pneumoconiosis or death due to pneumoconiosis if the preponderance of the evidence proves the existence of complicated pneumoconiosis by the following methods: large opacities greater than one centimeter by x-ray, biopsy or autopsy evidence of massive lesions in the lung, or a diagnosis, in accordance with acceptable medical procedures, equivalent to the conditions previously described. 20 C.F.R. §718.304(a)-(c). The Board has held that Section 718.304(a)-(c) does not provide alternative means of establishing invocation of the irrebuttable presumption, but rather requires the administrative law judge to first evaluate the evidence in each category, and then weigh together all the evidence in each category prior to invocation. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

administrative law judge accurately determined that complicated pneumoconiosis was unequivocally diagnosed in only two out of nine newly submitted x-ray interpretations of record. Employer's Exhibits 1, 3, 6, 7; Director's Exhibits 12, 13, 18, 20. The administrative law judge properly considered the quantity and quality of each reading, and noted that all the readings of the most recent film were interpreted as negative for the presence of complicated pneumoconiosis by physicians who are either board-certified radiologists, or B-readers.[4] Accordingly, the administrative law judge rationally found that claimant failed to satisfy his burden of proof to establish the presence of complicated pneumoconiosis by a preponderance of the x-ray evidence of record, and we hold that substantial evidence supports this finding. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

[4] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., of Virginia v. Director, OWCP*, 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

The administrative law judge also properly found that claimant could not establish the presence of complicated pneumoconiosis by means of the CT scans of record. Drs. Fino, Scott, Wheeler, and Sargent, all of whom have special radiological qualifications, and Dr. Estes, whose qualifications are not in the record, all interpreted the scan taken on April 30, 1997,[5] and only Dr. Estes diagnosed complicated pneumoconiosis. Employer's Exhibits 2, 4, 5, 7; Claimant's Exhibit 1. The administrative law judge permissibly accorded greater weight to the contrary interpretations of Drs. Fino, Scott and Wheeler, based on their superior qualifications, and rationally determined that the presence of complicated pneumoconiosis was not established by the CT scans of record. Decision and Order at 7. *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

We further find no error in the administrative law judge's finding that the medical reports of record failed to establish the existence of complicated pneumoconiosis. The administrative law judge stated that none of claimant's recent hospitalization records noted diagnoses of complicated pneumoconiosis, and rationally accorded little weight to the report of Dr. Sargent in light of his equivocal finding that claimant "may" have complicated pneumoconiosis, or could suffer from histoplasmosis, or tuberculosis. Employer's Exhibits 7, 9; Claimant's Exhibit 1; Director's Exhibit 24. *See Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). The administrative law judge also permissibly accorded less weight to Dr. Forehand's diagnosis of complicated pneumoconiosis as not supported by the weight of the x-ray and CT scan evidence, as well as this physician's statement that claimant may have tuberculosis, which the administrative law judge interpreted as a possible alternative diagnosis. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Justice*, *supra*. The administrative law judge rationally accorded greater weight to Dr. Fino's opinion, which found no

[5] The record indicates that Dr. Sargent also interpreted the results of this CT scan although the administrative law judge did not specifically discuss this opinion at Section 718.304. This omission is not reversible error, however, since Dr. Sargent's finding that claimant "may" have complicated pneumoconiosis is too equivocal to satisfy claimant's burden of proof on this issue. Claimant's Exhibit 1; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Similarly, the administrative law judge's failure to consider the records of claimant's 1992 treatment at Holston Valley Hospital is not reversible error, since this medical report does not address the issue of complicated pneumoconiosis. Director's Exhibit 24. *Larioni*, *supra*.

evidence of complicated pneumoconiosis, as better supported by the objective evidence of record. *Trumbo*, *supra*; *Clark*, *supra*. As the administrative law judge has provided a rational basis for his decision, we affirm the finding that the existence of complicated pneumoconiosis has not been established at Section 718.304. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trumbo*, *supra*; *Clark*, *supra*; *Justice*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We also affirm the administrative law judge's finding that total respiratory disability was not established at Section 718.204(c)(1)-(3). The administrative law judge properly found that claimant failed to establish total disability under Section 718.204(c)(1), since the two newly submitted pulmonary function studies of record produced non-qualifying values.[6] Thus, the preponderance of the evidence did not establish this required element. Employer's Exhibit 7; Director's Exhibit 8. The administrative law judge also rationally found that total disability could not be established at Section 718.204(c)(2),(3), since all of the newly submitted arterial blood gas studies produced non-qualifying values, and the record contains no evidence of cor pulmonale with right sided congestive heart failure. Employer's Exhibit 7; Director's Exhibits 8, 11.[7] *See generally Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991).

We also hold that substantial evidence supports the administrative law judge's findings pursuant to Section 718.204(c)(4). The newly submitted medical reports include the opinions of Drs. Sargent and Fino, that claimant has a mild respiratory impairment which would allow him to perform his former coal mine work. Claimant's Exhibit 1; Employer's Exhibits 7-9. Dr. Forehand stated that claimant's ventilatory impairment was mild, but also indicated that "due to the degree of his lung injury," claimant should not return to coal mining, and was totally disabled. Director's Exhibits 10, 19. The administrative law judge rationally accorded little weight to Dr. Forehand's report since it was premised on this physician's belief that claimant suffered from complicated pneumoconiosis, which contradicted the administrative

[6] A "qualifying" pulmonary function or blood gas study is one that yields values equal to or less than the values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R §718.204(c)(1), (2).

[7] The record also contains an arterial blood gas study dated July 28, 1992 which the administrative law judge did not discuss at Section 718.204(c)(2). This error is harmless however, since it produced non-qualifying values, and therefore does not support claimant's burden of proving total disability. *Larioni*, *supra*.

law judge's finding that the objective evidence of record did not support such a conclusion. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The administrative law judge credited Dr. Sargent's opinion as consistent with the objective evidence, and as supported by Dr. Fino's opinion. As it is within the administrative law judge's discretion to accord greater weight to a doctor's report which he finds is better supported by the objective evidence of record, we affirm the finding that claimant failed to establish the presence of a totally disabling respiratory impairment at Section 718.204(c). *Trumbo*, *supra*; *Clark*, *supra*. Moreover, as claimant has failed to establish an element of proof previously decided against him, we affirm the administrative law judge's finding that claimant failed to establish a material change in condition pursuant to Section 718.309, and thus, is ineligible for benefits. *Ondecko*, *supra*; *Rutter*, *supra*.

Finally, we note that claimant has also requested a waiver of the repayment of the interim benefits he has received. We are not empowered to review this issue, however, as it was not addressed by the administrative law judge.[8]

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

[8] Claimant may contact the district director if he wishes to request a waiver of the obligation to repay interim benefits.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge