BRB No. 99-0545 BLA

RICHARD D. LAWSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND 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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Richard D. Lawson, Dryden, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (97-BLA-1903) of Administrative Law Judge Jeffrey Tureck 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). This case is before the Board for the second time. The initial claim for benefits was filed on April 14, 1977. Director's Exhibit 26. Administrative Law Judge Giles J. McCarthy applied the regulations found at 20 C.F.R. Part 727 and found that claimant was entitled to invocation of the interim presumption at 20 C.F.R. §727.203(a)(2), but that the presumption was rebutted at 20 C.F.R. §727.203(b)(2) and (4). Benefits were, accordingly, denied. Director's Exhibit 26. Claimant appealed, and employer cross-appealed to the Board. In *Lawson v. Westmoreland Coal Corp.*, BRB Nos.

92-0276 BLA and 92-0276 BLA-A (Feb. 23, 1994)(unpub.), the Board vacated the administrative law judge's Decision and Order denying benefits and remanded the case for reconsideration at 20 C.F.R. §727.203(a)(2), (4) and (b)(2)-(4).[1] Pursuant to a Decision and Order on remand dated April 10, 1995, Administrative Law Judge Robert D. Kaplan found that invocation of the interim presumption was not established pursuant to Section 727.203(a)(2) or (4), and consequently denied benefits under Part 727. Judge Kaplan also found that claimant failed to establish the existence of pneumoconiosis and was not therefore entitled to benefits under 20 C.F.R. Part 410, Subpart D. Director's Exhibit 26. Claimant did not appeal this denial. On March 24, 1997, claimant filed a duplicate claim and Administrative Law Judge Jeffrey Tureck (the administrative law judge) found, based on the filing date of the duplicate claim, that the regulations at 20 C.F.R. Part 718 were applicable. Director's Exhibit 1. In addition, the administrative law judge reviewed all the evidence submitted with the duplicate claim and determined that as claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), one of the elements of entitlement he had previously failed to establish, claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); cert. denied, 117 S.Ct. 763 (1997); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). Accordingly, benefits were denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not participated 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 Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

[1] Claimant appealed this decision to the United States Court of Appeals for the Fourth Circuit on May 16, 1994, but subsequently filed a motion to dismiss which was granted. Director's Exhibit 26.

At the outset, we note, contrary to claimant's contention, the administrative law judge reviewed the newly submitted x-ray readings and properly determined that none of them were read positive for the existence of pneumoconiosis. Decision and Order at 3; Employer's Exhibits 1-4, 6-8; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). In addition, the administrative law judge properly found that as the newly submitted evidence does not contain any evidence of a biopsy or autopsy, that evidence cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2).[2]

Pursuant to Section 718.202(a)(4), the administrative law judge properly determined that only the report and office notes of Dr. Sy contains "anything approaching a diagnosis of coal workers' pneumoconiosis." Claimant's Exhibit 3. Dr. Sy, as the last of four "Impressions," lists coal workers' pneumoconiosis. The administrative law judge found that:

> "It is unclear whether Dr. Sy meant these "Impressions" to be diagnoses or merely hypotheses, but since at the time he listed his impressions he had not yet had a chest x-ray taken or performed any relevant tests it is doubtful that he could have made a diagnosis of pneumoconiosis at that point. Moreover, in light of the lack of relevant data available to him at that point, any such diagnosis would not have been meaningful or probative."

[2] The existence of pneumoconiosis cannot be established at Section 718.202(a)(3) as the presumptions contained at Section 718.202(a)(3) are not available in this claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306.

Decision and Order at 3. The administrative law judge therefore permissibly found Dr. Sy's opinion unsupported by objective data and therefore insufficient to support a diagnosis of pneumoconiosis. *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. U.S. Steel Corp.*, 8 BLR 1-126 (1985). Moreover, the administrative law judge properly found that the opinions of Drs. Paranthaman, Lee and Varandani,[3] Director's Exhibit 9; Employer's Exhibit 1, failed to diagnose pneumoconiosis, while Drs. Castle, Endres-Bercher, Dahhan[4] and Fino affirmatively found no coal workers' pneumoconiosis. Employer's Exhibits 1, 8. We, therefore, affirm the administrative law judge's weighing of the newly submitted medical opinions and his finding that they are insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) as rational, *see* 20 C.F.R. §718.201. The administrative law judge, therefore, properly found that the newly submitted evidence failed to establish the existence of pneumoconiosis.

However, in *Rutter*, the Fourth Circuit adopted the Director's "one-element" standard for establishing a material change in conditions. Under this standard, the claimant must prove, under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. *Rutter*, *supra* at 2-235.

A review of the record indicates that Judge Kaplan denied the original claim on the

[3] The administrative law judge refers to Drs. Lee and Varandani as two doctors at the Lee County Community Hospital without identifying them by name. Decision and Order at 3; Employer's Exhibits 1, 5.

[4] Dr. Dahhan diagnosed an obstructive airways disease, but noted that claimant's pulmonary disease did not result from coal dust exposure. However, as Dr. Dahhan did not diagnose chronic obstructive pulmonary disease significantly related to or aggravated by coal dust exposure, his opinion is insufficient to constitute pneumoconiosis as defined by the Act. 20 C.F.R. §718.201.

grounds that the existence of pneumoconiosis, and consequently entitlement to benefits had not been established pursuant to 20 C.F.R. Part 410, Subpart D, as well as because invocation of the interim presumption had not been established pursuant to 20 C.F.R. Part 727. Nevertheless, in the instant case, the administrative law judge limited his consideration of a material change in conditions to whether the newly submitted evidence established the existence of pneumoconiosis. Therefore, while we affirm the administrative law judge's determination that the newly submitted evidence fails to establish the existence of pneumoconiosis, we vacate the finding that claimant failed to establish a material change in conditions and we remand this case for further findings consistent with *Rutter*.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge