BRB No. 08-0380 BLA

C.W.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAMBERT COAL COMPANY	)	
	)	
and	)	
	)	
ARROWPOINT CAPITAL	)	DATE ISSUED: 02/19/2009
	)	
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 – Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

C.W.R., Clintwood, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (2007-BLA-5161) of Administrative Law Judge Linda S. Chapman rendered 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 the instant case to be a subsequent claim filed on

December 2, 2005.[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with ten years of coal mine employment and considered whether the evidence submitted since the prior denial was sufficient to establish one of the conditions of entitlement previously adjudicated against claimant pursuant to 20 C.F.R. §725.309. The administrative law judge found that, while the newly submitted medical evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), it is sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that the evidence submitted since the prior denial is sufficient to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. Addressing the evidence as a whole, however, the administrative law judge found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and insufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the denial of benefits. In addition, employer contends that the weight of the new evidence is insufficient to establish total disability. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response unless requested to do so by the Board.

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[1] Claimant filed his initial claim on March 18, 1988, which was denied by Administrative Law Judge Richard E. Huddleston, in a Decision and Order issued on April 22, 1991, based on his determination that the evidence failed to establish a totally disabling respiratory impairment. The Board affirmed this denial. [*C.R.*] v. *Lambert Coal Co*., BRB No. 91-1418 BLA/A (Nov. 24, 1993)(unpub.). Claimant then filed a request for modification, which was denied by Judge Huddleston in a Decision and Order issued on April 9, 1997. While finding a change in conditions, in reconsidering all of the evidence of record, Judge Huddleston found the evidence insufficient to establish the existence of pneumoconiosis and also insufficient to establish total disability. Accordingly, benefits were denied. The Board affirmed the denial of benefits, affirming the finding that the medical evidence was insufficient to establish the existence of pneumoconiosis. [*C.R.*] v. *Lambert Coal Co*., BRB No. 97-1046 BLA (Feb. 25, 1998) (unpub.). Claimant filed several requests for modification of the denial of his claim. Each was denied by the district director. Director's Exhibit 1. The last request for modification was filed on December 9, 2002, and was denied by the district director on January 23, 2003. *Id.* No further action was taken by claimant until he filed his current claim on December 2, 2005. Director's Exhibit 3.

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, 1-177 (1989). 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.[2] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that her finding, that the evidence as a whole is insufficient to establish entitlement to benefits, is supported by substantial evidence and contains no error requiring remand or reversal. Specifically, we affirm the administrative law judge's finding that, in considering the evidence as a whole, claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

In considering the new medical evidence, namely the evidence submitted in conjunction with claimant's subsequent claim, the administrative law judge rationally found the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), based on her determination that the weight of the x-ray readings by the most qualified physicians is, at best, in equipoise. Decision and Order at 12. In particular, the administrative law judge found that the July 9, 2001, November 12, 2002 and February 6, 2006 x-rays were read as only negative for pneumoconiosis, whereas the September 23, 2005, August 31, 2006, March 6, 2007 and March 21, 2007 x-rays, were read as both positive and negative for pneumoconiosis, by equally qualified physicians.[3] Decision and Order at 11-12; Director's Exhibits 15, 28, 30; Claimant's

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

[3] The x-rays dated July 9, 2001, November 12, 2002 and February 6, 2006 were read only as negative for pneumoconiosis by Dr. Scatarige, Dr. Scott and Dr. Baker respectively. Director's Exhibits 15, 30. The September 23, 2005 x-ray was read as

Exhibits 1, 2, 5a, 8; Employer's Exhibits 1, 32, 39, 42. In addition, the administrative law judge found that the narrative x-ray reports do not contain findings of pneumoconiosis and are, therefore, insufficient to establish the existence of pneumoconiosis. Decision and Order at 12. Consequently, we affirm the administrative law judge's finding that the weight of the new x-ray evidence is, at best, in equipoise and, therefore, that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 12.

Moreover, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge reasonably exercised her discretion in finding that Dr. Baker's opinion, that claimant's chronic obstructive pulmonary disease was due primarily to his cigarette smoking but that coal dust exposure may have had a minor contribution to it, is equivocal and, thus, insufficient to establish pneumoconiosis.[4] 20 C.F.R. §718.201; s*ee Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Akers*, 131 F.3d at 441 21 BLR at

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positive for pneumoconiosis by Dr. Alexander, who is a Board-certified radiologist and B reader, but as negative by Dr. Scott, who is also dually qualified as a Board-certified radiologist and B reader. Director's Exhibits 28, 30. In addition, the August 31, 2006 x-ray was read as positive for pneumoconiosis by Drs. Cappiello and Miller, both of whom are dually qualified radiologists, and as negative for pneumoconiosis by equally qualified physicians, Drs. Scatarige and Scott. Claimant's Exhibits 1, 5a; Employer's Exhibits 32, 39. Likewise, the March 6, 2007 and March 21, 2007 x-rays were read as positive for pneumoconiosis by Dr. Alexander, a dually qualified radiologist, and negative for pneumoconiosis by Dr. Wheeler, who is also a dually qualified radiologist. Claimant's Exhibits 2, 8; Employer's Exhibits 1, 42.

[4] Based on a physical examination and objective testing administered on February 6, 2006, Dr. Baker diagnosed chronic obstructive pulmonary disease (COPD), decreased PO_2 and increased PCO_2 and chronic bronchitis due to "cigarette smoking / ? coal dust exposure." Director's Exhibit 15. However, in an addendum to his report, also dated February 6, 2006, Dr. Baker opined that claimant does not have a chronic lung disease that was caused by his coal dust exposure. But rather, Dr. Baker further stated that claimant's COPD, hypoxemia, hypercarbia and chronic bronchitis have "all been caused primarily by his greater than 40+ year history of smoking" and that "his 14 years of coal dust exposure may have contributed some but not of a significant degree." Director's Exhibit 15.

2-275; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Decision and Order at 12; Director's Exhibit 15. In addition, the administrative law judge reasonably found that the remainder of the new medical opinion evidence is insufficient to establish pneumoconiosis, because none of the hospital records or treatment notes provides a diagnosis of, or evaluation for, pneumoconiosis, or a respiratory condition due to coal dust exposure, and Dr. Hippensteel opined that claimant does not suffer from pneumoconiosis or relate claimant's respiratory impairment to coal dust exposure. Decision and Order at 13; Claimant's Exhibits 5, 7; Employer's Exhibits 2, 24, 30, 31. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4), as she reasonably found that the only opinion that could support claimant's burden, namely, Dr. Baker's opinion, is equivocal and, therefore, insufficient to establish claimant's burden of proof. 20 C.F.R. §718.202(a)(4); *Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; *see Mays v. Piney Mountain Coal Co*., 21 BLR 1-59, 1-64 (1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 13.

Because the administrative law judge properly considered the relevant new evidence, we affirm her finding that the newly submitted medical evidence, taken together, is insufficient to establish the existence of pneumoconiosis.[5] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 13.

With regard to the evidence submitted in conjunction with claimant's earlier claim, the administrative law judge reasonably found that this evidence is also insufficient to establish the existence of pneumoconiosis. Reviewing the x-ray evidence, the administrative law judge found that the old evidence, like the new x-ray evidence, is at best in equipoise, because the December 9, 1998 x-ray was read only as negative for pneumoconiosis; the July 9, 2001 x-ray was read as positive by Dr. Ahmed, who is a dually qualified radiologist, but as negative by Dr. Scatarige, who is also a dually qualified radiologist; and the weight of the remaining x-ray evidence, dating back to 1988, was negative for pneumoconiosis.[6] Decision and Order at 15; Director's Exhibits

[5] The administrative law judge properly found that the record contains no biopsy or autopsy evidence and, therefore, cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 12. In addition, claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) because none of the presumptions set forth therein is applicable in this claim. *Id*.

[6] The Board, in its 1998 Decision and Order, affirmed Judge Huddleston's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, because the record contained only one positive interpretation, by Dr. Westerfield, a dually qualified radiologist, which Judge Huddleston found was outweighed by three

1, 30. Because the administrative law judge's finding that the weight of the x-ray evidence, old and new, is insufficient to establish pneumoconiosis, is supported by substantial evidence, we affirm this finding. 20 C.F.R. §718.202(a)(1); *Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; Decision and Order at 15.

Moreover, we affirm the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as substantial evidence supports her finding that the only medical opinion diagnosing pneumoconiosis, namely, the opinion of Dr. Smiddy, is not sufficient to establish pneumoconiosis. Within a reasonable exercise of her discretion, the administrative law judge found that Dr. Smiddy's opinion, that claimant has "significant and severe" pneumoconiosis, is not supported by its underlying documentation. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 15; Director's Exhibit 1. Because the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis, in conjunction with her finding that the only opinion supportive of claimant's burden in the earlier claim, Dr. Smiddy's report, is not a credible diagnosis of pneumoconiosis, is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence as a whole has not established pneumoconiosis pursuant to Section 718.202(a)(4). 20 C.F.R. §718.202(a)(4); *Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; Decision and Order at 15. Accordingly, as claimant bears the burden of proof in establishing each of the elements of entitlement, and substantial evidence supports the administrative law judge's determination that the x-ray evidence and medical opinion evidence as a whole is insufficient to establish pneumoconiosis, we affirm her finding that claimant has not carried his burden of proof in establishing the existence of pneumoconiosis pursuant to Section 718.202(a). 20 C.F.R. §718.202(a); *Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; *Compton*, 211 F.3d at 207, 22 BLR at 2-167-168.

Since claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Akers*, 131 F.3d at 440, 21 BLR at 2-272-273; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Moreover, in light of our affirmance of the administrative law judge's denial of benefits on the merits, we need not address her findings regarding a change in an applicable condition of entitlement

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negative readings of the same film by equally qualified physicians. [*C.R.*] *v. Lambert Coal Co.*, BRB No. 97-1046 BLA, slip op. at 3 (Feb. 25, 1998)(unpub.).

pursuant to Section 725.309, as error, if any, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, we affirm the administrative law judge's Decision and Order – Denying Benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge