BRB No. 01-0428 BLA

BOYD STACY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BROYLES & DOTSON COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	)
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Boyd Stacy, Grundy, Virginia, *pro se*.[1]

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification Denying Benefits (1999-BLA-1266) of Administrative Law Judge Pamela Lakes Wood 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).[2] This case involves a duplicate claim and is before the Board for the third time.[3] The administrative law judge accepted the parties' stipulation that claimant established seventeen years of coal mine employment. The administrative law judge next considered

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, 726 (2001).

[3]The initial claim was filed on November 3, 1976. Director's Exhibit 31, Administrative Law Judge Henry W. Sayrs found that claimant established seventeen years of coal mine employment and found that claimant failed to established invocation of the interim presumption at 20 C.F.R. §727.203(a), or invocation at 20 C.F.R. §410.490. Accordingly, benefits were denied on April 27, 1988. *Id*.

Claimant filed a duplicate claim on September 15, 1993, and submitted new evidence. Director's Exhibit 1. Administrative Law Judge Vivian Schreter-Murray (the administrative law judge) determined that even if claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and *Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992), claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 718 (2000). Benefits were therefore denied. Director's Exhibit 40. Claimant appealed and in *Stacy v. Broyles & Dotson Coal Co.*, BRB No. 96-1164 BLA (Feb. 25, 1997)(unpub.), the Board vacated the administrative law judge's Decision and Order and remanded the case for further consideration consistent with the decision of the United States Court of Appeals for the Fourth Circuit in *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). Director's Exhibit 46. On remand, the administrative law judge considered the newly submitted evidence and found it insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c)(2000). Benefits were again denied. Director's Exhibit 47. Claimant appealed the denial to the Board and in *Stacy v. Broyles & Dotson Coal Co*., BRB No. 98-0140 BLA (Oct. 14, 1998)(unpub.), the Board affirmed the denial of benefits based upon the administrative law judge's proper consideration of the evidence. Director's Exhibit 52. On November 23, 1998, claimant requested modification of the decision. Director's Exhibit 53.

the medical evidence submitted with claimant's modification request and determined that claimant established total disability and therefore a change in conditions pursuant to 20 C.F.R. §§718.204(c) and 725.310 (2000). Decision and Order on Modification Denying Benefits at 10. The administrative law judge then considered the merits of the claim and found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000). Accordingly, benefits were denied.

Claimant appeals, generally contending that the administrative law judge erred in her denial of benefits. Employer responds urging affirmance of the decision.[4] The Director, Office of Workers' Compensation Programs, has indicated 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. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *see 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 pursuant to 20 C.F.R. Part 718, claimant 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 (2001). Failure to establish any one of these elements precludes entitlement. *Roberts v. West Virginia C.W.P Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal, and the evidence of record, we hold that the administrative law judge's findings are rational and in accordance with law. In considering the merits of the claim, the administrative law judge considered the newly submitted evidence in conjunction with the previously submitted evidence pursuant to Sections 725.309 and

[4]The administrative law judge's finding that claimant established a change in conditions pursuant to 20 C.F.R. §725.310 is affirmed as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

725.310. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997); *Hess v. Director, OWCP*, 21 BLR 1-142 (1998).

At Section 718.202(a)(1), the administrative law judge found that the new x-ray evidence, submitted with claimant's request for modification and duplicate claim, was negative for the existence of pneumoconiosis, except for the single positive interpretation of an April 4, 2000 x-ray by Dr. Alexander, a B reader and Board-certified radiologist. Claimant's Exhibit 1; Decision and Order at 5. The administrative law judge further found, however, that the April 4, 2000 x-ray was also read as negative by Drs. Wheeler and Scott, also B readers and Board-certified radiologists, who additionally read a later x-ray, dated May 8, 2000, as negative for pneumoconiosis. Decision and Order at 5; Employer's Exhibits 21- 24. Thus, the administrative law judge rationally found Dr. Alexander's positive reading to be outweighed by the negative readings by Drs. Wheeler and Scott. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge found that the prior x-ray evidence is conflicting, but that there are more negative readings than positive readings. Decision and Order at 11; Director's Exhibit 31. Relying on the numerical weight of the negative readings, the administrative law judge permissibly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)(2000). *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston*, *supra*.

Relevant to Section 718.202(a)(2), the administrative law judge properly determined that claimant could not establish the existence of pneumoconiosis as the record did not contain biopsy evidence. *See* 20 C.F.R. § 718.202(a)(2)(2000); Decision and Order at 11. The administrative law judge also properly found that claimant did not establish pneumoconiosis pursuant to Section 718.202(a)(3) as the presumptions set forth in 20 C.F.R. §§718.304, 718.305 and 718.306 (2000) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§ 718.304-306 (2000); Decision and Order at 11.

Lastly, at Section 718.202(a)(4), the administrative law judge found that the previously submitted medical evidence was conflicting, but did not find a reason to "disagree with Judge Schreter-Murray's analysis."[5] Decision and Order at 11. The

[5]With respect to the evidence submitted with the initial claim, Administrative Law Judge Schreter-Murray found that the evidence was insufficient to establish that claimant was suffering from a chronic respiratory or pulmonary impairment within the legal definition of pneumoconiosis. 1996 Decision and Order at 6; 1997 Decision and Order at 3.

administrative law judge further found that the most recent opinion of record, by Dr. Hippensteel, outweighed the other medical opinions as the physician examined claimant most recently and based his opinion on a comprehensive review of the evidence, including evidence which was unavailable to other physicians.[6] Noting the physician's qualifications as a board-certified pulmonologist, and finding that Dr. Hippensteel's opinion is well-reasoned and documented, the administrative law judge acted within her discretion in according determinative weight to the opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins, supra*; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Therefore, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000).

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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988) *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). Inasmuch as claimant has failed to establish a requisite element of entitlement, we affirm the denial of benefits. *Trent, supra*; *Perry, supra.*

[6]On May 17, 2000, Dr. Hippensteel submitted a report based on his May 8, 2000 physical examination of claimant, as well as a review of the medical evidence in the record. Based on this review, the physician opined that claimant does not suffer from coal workers' pneumoconiosis or any coal dust related disease of the lungs. Employer's Exhibit 19.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge