

BRB No. 03-0726 BLA

FRANKLIN L. DAVIS)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 01/30/2004
)	
JIM WALTERS RESOURCES,)	
INCORPORATED)	
)	
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 Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Sexton, Cullen & Jones, P.C.), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5494) of Administrative Law Judge Robert J. Lesnick 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 administrative law judge credited claimant with approximately six years of qualifying coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge considered all of the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish both the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1)-(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge thus found that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act by 30 U.S.C. §932(a); *O'Keefe 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 establish 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,

¹ Claimant filed his initial claim for black lung benefits on May 24, 1995, which was denied by the district director on July 10, 1995. Decision and Order at 2; Director's Exhibit 1. Claimant filed his second application for benefits on July 7, 1997, which was denied by the district director on October 6, 1997. Decision and Order at 2; Director's Exhibit 2. The claim was denied on the basis that while the evidence was sufficient to establish total pulmonary or respiratory disability, it was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Decision and Order at 3; Director's Exhibits 1, 2. Claimant took no further action on that claim and filed the instant claim on October 24, 2001.

718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

In the present case, the administrative law judge determined that claimant's previous claim was denied on the ground that the evidence did not establish the presence of pneumoconiosis arising out of coal mine employment or that claimant was totally disabled due to pneumoconiosis. Decision and Order at 10. The administrative law judge then properly reviewed all of the evidence submitted subsequent to the date of the prior denial to determine whether claimant had proven at least one of the elements of entitlement previously adjudicated against him. Decision and Order at 5-14; *see Allen v. Mead Corp.*, 22 BLR 1-61 (2000).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence submitted since the previous denial failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In weighing the medical opinions of record on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Perry*, 9 BLR 1-1. We reject claimant's argument that the administrative law judge provided an invalid reason for discounting the opinions in which Drs. Shad and Hawkins diagnosed of pneumoconiosis at Section 718.202(a)(4). The administrative law judge permissibly found that Dr. Hawkins's diagnosis of pneumoconiosis did not constitute a reasoned medical opinion because the physician did not indicate what other evidence he relied upon in reaching his conclusion, apart from his own positive x-ray interpretation and claimant's limited coal mine employment history. Decision and Order at 6, 11-13; Claimant's Exhibit 1; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In addition, the administrative law judge permissibly accorded little weight to Dr. Shad's opinion, that claimant has chronic obstructive pulmonary disease due to smoking and coal dust exposure since the doctor failed to identify the rationale for his diagnosis. Decision and Order at 13; Director's Exhibit 10; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge then acted within his discretion in according determinative weight to the contrary opinions of Drs. Goldstein and Hasson, which he found were more persuasive as well as consistent with the credible x-ray evidence and limited history of coal

mine employment. Decision and Order at 6, 8; Director's Exhibit 13; Employer's Exhibit 1; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's finding that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) is supported by substantial evidence, and thus is affirmed.²

Because the administrative law judge properly determined that claimant failed to establish any of the elements of entitlement previously adjudicated against him, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d), and affirm the denial of benefits. *Allen*, 22 BLR 1-61.

² Because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, the administrative law judge rationally concluded that claimant could not establish total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); Decision and Order at 14.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge