BRB No. 97-0679 BLA

LENVILLE FIELDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIAMOND MAY COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Richard E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Before: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0205) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge accepted the parties' stipulation to "at least" ten years of coal mine employment and that employer is the responsible operator, and found this claim to be a duplicate claim pursuant to 20 C.F.R. §725.309(d). Decision and Order at 1, 3; Director's Exhibits 1, 31. The administrative law judge found that the newly submitted medical evidence failed to establish a material change in conditions pursuant to Section 725.309(d) and, accordingly, denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the

medical evidence pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has established at least one of the elements previously decided against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). If so, claimant has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross, supra.*

The administrative law judge noted that claimant was previously denied benefits because he failed to establish any element of entitlement pursuant to Sections 718.202(a) and 718.204. Decision and Order at 3; Director's Exhibit 31. The administrative law judge then considered the newly submitted evidence to determine whether it established a material change in conditions. *See Ross, supra.*

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and responsible operator status. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all eight readings of six x-rays taken since the previous denial. Director's Exhibits 9-11, 26; Claimant's Exhibit 1; Employer's Exhibits 1, 2. There were seven negative readings and one positive reading. Of the seven negative readings, six were by physicians who are Board-certified radiologists, B-readers, or both, while the single positive reading was rendered by a physician lacking radiological credentials. Contrary to claimant's contention that the administrative law judge improperly weighed the x-ray readings, Claimant's Brief at 3-4, the administrative law judge considered both the quantity and quality of the x-ray readings and found that, "[r]elying on the opinions of the physicians with documented radiological expertise, . . . the preponderance of the new chest x-ray [evidence] does not establish the existence of pneumoconiosis." Decision and Order at 3-4; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).[2]

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in finding that pneumoconiosis was not established when Dr. Chaney's diagnosis of the disease was documented and reasoned and when Dr. Wicker diagnosed chronic bronchitis. Claimant's Brief at 5. Drs. Wicker, Broudy, and Chaney examined and tested claimant since the previous denial. Director's Exhibits 7, 27; Claimant's Exhibit 1. Drs. Wicker and Broudy concluded that claimant did not have pneumoconiosis based on their findings of a normal chest examination, negative x-rays, and their interpretations of the objective studies. Director's Exhibits 7, 27. Contrary to claimant's contention, review of the record indicates that Dr. Wicker did not diagnose chronic bronchitis or any other respiratory or pulmonary disorder tied to coal dust exposure. Director's Exhibit 7; *see* 20 C.F.R. §718.201. Dr. Chaney read an x-ray as showing "I think very early coal worker's pneumoconiosis . . . . I/O."[3] Claimant's Exhibit 1. Dr. Chaney noted "borderline obstruction" on the pulmonary function study, but did not link the impairment to coal dust

---

[2] The administrative law judge did not address Sections 718.202(a)(2) and (3). Review of the record reveals no biopsy evidence and the presumptions at Sections 718.304, 718.305, and 718.306 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, 718.305, 718.306.

[3] Presumably, by using the letters "I/O," Dr. Chaney refers to the ILO numerical classification of "1/0." *See* 20 C.F.R. §718.102.

exposure. *Id.* Dr. Chaney's concluding diagnosis was "[h]e probably does have some early coal worker's pneumoconiosis." *Id.*

In finding that "the preponderance of the new physician opinion evidence does not establish the existence of pneumoconiosis," Decision and Order at 5, the administrative law judge reasonably found Dr. Chaney's conclusion that claimant "probably" has pneumoconiosis to be equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Further, because an administrative law judge may question the basis of a medical opinion where an x-ray relied upon by the physician is subsequently read negative by more highly-qualified readers, *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985), the administrative law judge permissibly accorded less weight to Chaney's opinion because it was based, in part, on the physician's positive reading of the May 13, 1996 x-ray, which was subsequently read negative by a B-reader. Employer's Exhibit 2. Finally, the administrative law judge permissibly accorded greater weight to Dr. Broudy's opinion based on his superior credentials in internal and pulmonary medicine.[4] Director's Exhibit 27; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c), claimant contends that the evidence submitted with his previous claim establishes total respiratory disability and argues that his condition has deteriorated since the previous denial. Claimant's Brief at 6-7. The administrative law judge correctly found pursuant to Section 718.204(c)(1)-(3) that all of the new objective studies were non-qualifying[5] and that the record contains no evidence of cor pumonale with right-sided congestive heart failure. The administrative law judge also correctly found pursuant to Section 718.204(c)(4) that no physician diagnosed total respiratory disability.[6] Therefore, we affirm the administrative law judge's finding that the new evidence failed to establish total respiratory disability pursuant to Section 718.204(c), and that disability causation at Section 718.204(b) was therefore precluded.

---

[4] The administrative law judge correctly noted that Dr. Chaney is not claimant's treating physician. Hearing Transcript at 23; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

[5] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[6] Dr. Wicker opined that claimant's respiratory capacity was adequate to perform his previous coal mine employment. Director's Exhibit 7. Dr. Broudy concluded that claimant retained the respiratory capacity to perform the work of an underground coal miner or similarly arduous manual labor. Director's Exhibit 27. Dr. Chaney did not address the issue of respiratory disability, nor did he quantify his finding of ventilatory obstruction beyond describing it as "borderline." Claimant's Exhibit 1.

In light of the foregoing, we affirm the administrative law judge's finding that “[t]he preponderance of the new evidence does not establish any of the elements of entitlement previously adjudicated against” claimant, and that therefore, a material change in conditions was not established under Section 725.309(d). Decision and Order at 7; *see Ross, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge