BRB No. 97-0718 BLA

BILL HURLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
JOHNS CREEK ELKHORN COAL CORPORATION	)	
	)	
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 Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Bill Hurley, Freeburn, Kentucky, *pro se*.

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

Before: HALL, Chief Administrative Appeals Judge, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order Denying Benefits (94-BLA-1313) of Administrative Law Judge Daniel A. Sarno, Jr., with respect to 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).[1] The

[1]Claimant's Notice of Appeal regarding the denial of benefits in the present case was accompanied by a letter written by Susie Davis, a counselor employed by the Kentucky Black Lung Association. In an Order issued on February 25, 1997, the Board informed claimant that his appeal would be considered under the standard applicable to claimants who file appeals without the assistance of counsel. *Hurley v. Johns Creek Elkhorn Coal*

record in this case contains a claim filed on October 6, 1973, which was finally denied in a Decision and Order issued by Administrative Law Judge John W. Earman on September 27, 1984. Director's Exhibit 29. Judge Earman credited claimant with thirty-six years of coal mine employment and considered the claim under the regulations set forth in 20 C.F.R. Part 727. Judge Earman found that the x-ray evidence of record was insufficient to support a finding of invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Earman further determined, however, that the pulmonary function studies of record supported a finding of invocation under 20 C.F.R. §727.203(a)(2). With respect to rebuttal of the interim presumption, Judge Earman found that employer demonstrated, pursuant to 20 C.F.R. §727.203(b)(3), that claimant's disabling pulmonary impairment did not arise out of coal mine employment. Accordingly, benefits were denied. Claimant took no further action with respect to this claim, but rather filed a second application for benefits on May 5, 1993. Director's Exhibit 1.

In the present case, Judge Sarno (the administrative law judge), noted that the record contained two claims and, in accordance with the standard adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 999, 19 BLR 2-10, 2-21 (6th Cir. 1994), the administrative law judge considered whether claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309 by weighing the newly submitted evidence to determine whether claimant had established at least one of the elements of entitlement previously adjudicated against him.[2] The administrative law judge indicated that the previous Decision and Order concluded that the weight of the evidence had not shown the presence of pneumoconiosis; it had shown that smoking, rather than coal dust exposure, was the cause of claimant's impairment. The administrative law judge concluded that the newly submitted evidence did not support

---

Corp., BRB No. 97-0718 BLA (Feb. 25, 1997)(unpublished Order).

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. Director's Exhibits 2, 29; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The Board has held that a determination that the miner's physical condition has worsened is a requisite part of the duplicate claims analysis under *Sharondale Corp. v. Ross*, 42 F.3d 993, 999, 19 BLR 2-10, 2-21 (6th Cir. 1994). *See Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997).

a finding that claimant is now suffering from pneumoconiosis or that claimant is now totally disabled due to pneumoconiosis. The administrative law judge found, therefore, that claimant failed to establish a material change in conditions and denied benefits accordingly. Employer has responded to claimant's appeal and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 (1989). The Board's scope of review is defined by statute. 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).

As an initial matter, we note that the regulations applicable to the duplicate claim in this case are set forth in 20 C.F.R. Part 718, inasmuch as claimant filed his second application for benefits on May 5, 1993. 20 C.F.R. §718.2. Although the administrative law judge did not consider the newly submitted evidence under Part 718, we will review his findings in the context of the applicable regulations. With respect to the newly submitted x-ray readings, the administrative law judge acted within his discretion in finding that they did not support a finding of pneumoconiosis, inasmuch as the only positive reading, which was submitted by Dr. Sundaram, whose qualifications are not of record, was outweighed by the negative readings performed by physicians who are Board-certified radiologists and/or B readers. Decision and Order at 7; *see* 20 C.F.R. §718.202(a)(1); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Regarding the newly submitted medical opinions of record, the administrative law judge rationally determined that the opinions in which Drs. Broudy, Lane, Branscomb, Anderson, and Fino stated that claimant does not have pneumoconiosis were entitled to greater weight than the contrary opinion of Dr. Sundaram, as the record reflects that Drs. Broudy, Lane, Branscomb, Anderson, and Fino are pulmonary specialists inasmuch as they are Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 7; Employer's Exhibit 8; *see* 20 C.F.R. §718.202(a)(4); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, the administrative law judge's finding that the newly submitted evidence does not support a finding that claimant is now suffering from pneumoconiosis is appropriate under Section 718.202(a)(1) and (2). The administrative law judge's finding is, therefore, affirmed, as it is rational and supported by substantial evidence.[3]

[3]Claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) in this case, as the record does not contain any biopsy or autopsy evidence. Claimant also cannot demonstrate the presence of pneumoconiosis under 20

C.F.R. §718.202(a)(3), as the relevant claim was filed by a living miner after January 1, 1982, and there is no evidence suggesting that claimant has complicated pneumoconiosis. *See* 20 C.F.R. §§718.304-306.

Concerning the issue of whether claimant is now totally disabled due to pneumoconiosis, the administrative law judge properly found that the newly submitted evidence does not support such a determination. *See* 20 C.F.R. §718.204(b); *Adams v. Director, OWCP*, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge rationally found that Dr. Sundaram's conclusion that fifty to seventy percent of claimant's totally disabling pulmonary impairment is attributable to pneumoconiosis was outweighed by the opinions in which Drs. Broudy, Lane, Branscomb, Anderson, and Fino determined that claimant's impairment was caused solely by cigarette smoking. The administrative law judge acted within his discretion in basing his finding upon the status of these physicians as pulmonary specialists and upon the fact that Dr. Sundaram did not discuss the significance of claimant's use of cigarettes. Decision and Order at 7; Director's Exhibit 7; see 20 C.F.R. §718.204(b); *Dillon*, *supra*; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Inasmuch as the administrative law judge's determination that the newly submitted evidence does not establish that claimant is now totally disabled due to pneumoconiosis is appropriate under Section 718.204(b), is rational, and is supported by substantial evidence, it is affirmed.

In light of the foregoing, we affirm the administrative law judge's finding that claimant did not demonstrate a material change in conditions pursuant to Section 725.309 and must also, therefore, affirm the denial of benefits. *See Ross*, *supra*.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge