BRB No. 97-0834 BLA

RAY L. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Ray L. Hill, Coeburn, Virginia, *pro se*.[1]

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

[1]Tim White, 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. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1671) of Administrative Law Judge Edward Terhune Miller 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 adjudicated this duplicate claim[2] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.203(b), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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. 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).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that "Claimant's previous claim was denied on the grounds that he failed to show both that he suffered from coal workers' pneumoconiosis and was totally disabled as a result of the disease." Decision and Order at 7; *see* Director's Exhibit 37. The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See 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]Claimant filed his initial claim on June 20, 1973. Director's Exhibit 37. After several decisions on this claim, Administrative Law Judge Charles P. Rippey issued a Supplemental Decision and Order denying benefits on September 18, 1991. *Id*. The bases of Judge Rippey's denial were claimant's failures to establish the existence of pneumoconiosis and total disability. *Id*. The Board subsequently affirmed Judge Rippey's denial of benefits. *Hill v. Director, OWCP*, BRB No. 92-0263 BLA (May 24, 1993)(unpub.). Claimant filed his most recent claim on August 1, 1995. Director's Exhibit 1.

2-223 (4th Cir. 1995).

Initially, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) since each of the forty-one x-ray interpretations of record is negative for pneumoconiosis. Decision and Order at 7; Director's Exhibits 12-14, 22-28, 30-34; Employer's Exhibit 1. Further, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 7. Additionally, we affirm the administrative law judge's finding that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *Id.*; *see* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption of pneumoconiosis at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption of pneumoconiosis at 20 C.F.R. §718.306 is also inapplicable.

Next, in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Kanwal and Sargent.[3] The administrative law judge stated that "[o]nly Dr. Kanwal's report supports a finding of pneumoconiosis." Decision and Order at 7. The administrative law judge properly accorded determinative weight to the opinion of Dr. Sargent than to the contrary opinion of Dr. Kanwal because of Dr. Sargent's superior qualifications.[4] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody*

[3]Dr. Sargent opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibit 30. Although Dr. Kanwal opined that claimant does not suffer from pneumoconiosis, Dr. Kanwal nonetheless opined that claimant's chronic obstructive pulmonary disease is related to cigarette smoking and coal dust exposure. Director's Exhibit 10; *see Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61, 2-66 (4th Cir. 1995); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985). Conversely, while Dr. DePonte diagnosed chronic obstructive pulmonary disease, Dr. DePonte did not attribute this condition to coal mine employment. Director's Exhibit 31; *see Barber, supra*; *Biggs, supra*. The record also contains a medical report dated July 19, 1995 which lists a diagnosis of "[c]hronic obstructive pulmonary disease secondary to tobacco, plus/minus silicosis." Director's Exhibit 22. The administrative law judge stated that "this report was prepared by a physician's assistant, not a licensed medical doctor." Decision and Order at 7-8, n.5. Consequently, the administrative law judge properly excluded this report from consideration under 20 C.F.R. §718.204(c)(4).

[4]The administrative law judge stated that Dr. Sargent is "a pulmonary specialist." Decision and Order at 8. Dr. Sargent is Board-certified in Internal Medicine and Pulmonary Diseases. Director's Exhibit 30. The record does not indicate Dr. Kanwal's credentials.

Coal Co., 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge properly discounted Dr. Kanwal's opinion on the basis that it is not well reasoned.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the evidence insufficient to establish total disability. The administrative law judge properly found that none of the newly submitted pulmonary function studies or arterial blood gas studies of record yielded qualifying[6] values, and that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibits 9, 11, 22, 30. Moreover, the record does not contain any evidence of cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3).

[5]The administrative law judge stated that "Dr. Kanwal...does not explicitly state the basis for his conclusion that Claimant suffers from a respiratory impairment caused, in part, by coal dust exposure." Decision and Order at 8.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Finally, we address the administrative law judge's evaluation of the newly submitted medical reports of record. Whereas Dr. Kanwal opined that claimant suffers from a total respiratory disability, Director's Exhibit 10, Dr. Sargent opined that claimant does not suffer from a respiratory impairment, Director's Exhibit 30. The administrative law judge properly accorded determinative weight to the opinion of Dr. Sargent than to the contrary opinion of Dr. Kanwal because he found Dr. Sargent's opinion to be better supported by the objective evidence of record.[7] *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Moreover, the administrative law judge properly discounted Dr. Kanwal's opinion on the basis that it is not well reasoned.[8] *See Clark, supra*; *Fields, supra*; *Fuller, supra*. Therefore, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[7]The administrative law judge stated that "[n]ot only do the results of the pulmonary function and arterial blood gas studies fail to qualify the Claimant as totally disabled, but they have been characterized as `normal' by Dr. Sargent." Decision and Order at 9. Further, the administrative law judge stated that "Dr. Sargent's opinion that Claimant retains the respiratory capacity to perform his last coal mine employment, on the other hand, is supported by the results on pulmonary testing." *Id*.

[8]The administrative law judge stated that "Dr. Kanwal does not explain the basis for his conclusion that Claimant is totally disabled in part due to his COPD." Decision and Order at 9.

REGINA C. McGRANERY
Administrative Appeals Judge