BRB No. 01-0955 BLA

JAMES L. BEALMEAR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employers/Carrier-Respondents	)	
	)	
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 L. Hillyard, Administrative Law Judge, United States Department of Labor.

James L. Bealmear, Sturgis, Kentucky, *pro se*.

Ashley M. Harman (Jackson & Kelly, PLLC), Morgantown, West Virginia.

Jennifer U. Toth (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (00-BLA-0586) of Administrative Law Judge Robert L. Hillyard rendered on a duplicate 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 administrative law judge found eleven years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 3. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence of record failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis, elements of entitlement previously adjudicated against claimant, and thus, found that a material change in conditions was not established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Benefits were, accordingly, denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers= Compensation Programs, contends that the administrative law judge erred in defining the elements which must be established in order to establish a material change in conditions, but nonetheless argues that the administrative law judge=s decision may be affirmed on the merits. The Director also contends that the revised regulations will not affect the outcome of this case.

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. *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 by 30 U.S.C. '932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

---

[1] 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, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed previous claims for benefits on September 9, 1980 and January 8, 1986, which were denied by the district director on October 26, 1983 and April 20, 1987. Director=s Exhibit 45 (121-123). Claimant filed a third claim on January 4, 1989, which was denied by the administrative law judge on April 29, 1993. The denial of benefits was affirmed by the Board and the United States Court of Appeals for the Sixth Circuit. Director=s Exhibit 41. The claim currently before the Board was filed on July 21, 1999. Director=s Exhibit 1.

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, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *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 arguments on appeal, and the evidence of record, we conclude that the Decision and Order of administrative law is supported by substantial evidence and contains no reversible error. The administrative law judge reasonably determined that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) since only one out of the fourteen new x-rays was read as positive for the existence of pneumoconiosis and that x-ray was subsequently re-read as negative by one B reader and by two dually qualified physicians. Decision and Order at 10; Director=s Exhibits 14, 16, 17, 19, 28-30, 32, 36; Employer=s Exhibits 1, 7, 8; *see* 20 C.F.R. 718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. '718.202(a)(2) and (a)(3) as there was no biopsy evidence of record, this is a living miner=s claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 10; *see* 20 C.F.R. ''718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Finally, the administrative law judge considered the newly submitted medical opinion evidence of record and rationally found that it failed to establish the existence of pneumoconiosis by according greater weight to the opinions of Drs. Jarboe, Branscomb, Morgan and Lombard, finding no pneumoconiosis, than to the opinion of Dr. Simpao, diagnosing pneumoconiosis, as the former were better supported by objective evidence. *Clark v. Island Creek Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). The administrative law judge also rationally found their opinions entitled to greater weight based on their superior qualifications. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, the administrative law judge permissibly accorded little weight to the opinion of Dr. Simpao because of several discrepancies and weaknesses contained in it, *i.e.*, it was based on Dr. Simpao=s positive reading of an x-ray which was subsequently

reread as negative by more highly qualified physicians; claimant=s blood gas studies were non-qualifying; claimant failed to exert maximal effort on his pulmonary function study, and Dr. Simpao, himself, reported that claimant=s symptoms did not support a finding of pneumoconiosis, although the doctor had cited Asymptomotology@ as a basis for his diagnosis. Decision and Order at 11; Director=s Exhibit 14; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Thus, the administrative law judge properly found that the medical evidence did not support a finding of pneumoconiosis as defined by the Act.

The administrative law judge is empowered to weigh the medical evidence and 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 if the administrative law judge=s findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). Consequently, we affirm the administrative law judge=s findings that the evidence failed to establish the existence of pneumoconiosis and, therefore, a material change in conditions pursuant to Section 725.309(d)(2000), as they are supported by substantial evidence and in accordance with law. *See Ross*, *supra*; *Trent*, *supra*; *Perry*, *supra*. Further, because the administrative law judge properly found that the existence of pneumoconiosis was not established based on the evidence submitted since the denial of claimant=s previous claim, the denial of which was affirmed by the Board and the Sixth Circuit, in part, because the evidence did not establish the existence of pneumoconiosis, we will not consider whether the other elements of entitlement were established in this case. *See Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge