

BRB No. 04-0851 BLA

CHARLES PARSLEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DANMAR COAL COMPANY,)	DATE ISSUED: 07/22/2005
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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Charles Parsley, Mooresburg, Tennessee, *pro se*.

Tracey A. Berry (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2003-BLA-05823) of Administrative Law Judge Mollie W. Neal denying benefits on a subsequent 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 determined that claimant's previous claim had been denied because claimant failed to establish any element of entitlement, and that the present claim, filed on May 24, 2001, was subject to the provisions at 20 C.F.R. §725.309(d).¹

¹ The administrative law judge determined that claimant's original claim for benefits, filed on March 1, 1993, was denied by the district director on August 27, 1993

Based on the date of filing, the administrative law judge adjudicated this claim pursuant to the provisions at 20 C.F.R. Part 718, and found that the newly-submitted evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), thus claimant failed to demonstrate a change in one of the applicable conditions of entitlement at Section 725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.²

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 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'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 prove 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 one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

for failure to establish either the existence of pneumoconiosis or total disability. Decision and Order at 2; Director's Exhibit 1. In a letter dated November 15, 1993, claimant disagreed with the denial and indicated that he needed time to obtain an attorney and submit additional evidence. *Id.* Claimant's correspondence was treated as a request for modification, but no further evidence was submitted, and on January 28, 1994, the district director issued a Proposed Decision and Order Denying Request for Modification. *Id.* Claimant took no further action until filing the present claim on May 24, 2001. Decision and Order at 2; Director's Exhibit 3.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 3.

Initially, based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented by an attorney, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 4-6.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge accurately determined that five out of the six newly-submitted x-rays of record were interpreted as negative for pneumoconiosis, and that the sixth and most recent film, taken on June 11, 2001 was read by Dr. Verzosa, whose radiological qualifications were not contained in the record. Decision and Order at 3-4, 9. The administrative law judge found that Dr. Verzosa's diagnosis of "increased bronchovascular markings with some fine nodularities predominantly in both lower lung fields and could be due to the given history of Black Lung disease or pneumoconiosis," Claimant's Exhibit 1, was both equivocal, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988), and outweighed by the negative interpretation of the August 29, 2001 film by Dr. Dahhan, a B-reader, thus claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) by a preponderance of the evidence. Decision and Order at 9-10; *see 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). The administrative law judge properly found that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), as the record contained no biopsy evidence. Decision and Order at 10. The administrative law judge also correctly found that claimant could not establish the existence of pneumoconiosis at Section 718.202(a)(3), as the presumptions at 20 C.F.R. §§718.304, 718.305 and 718.306 were inapplicable because there was no evidence of complicated pneumoconiosis and this living miner's claim was filed after January 1, 1982. *Id.*

In evaluating the newly-submitted medical opinions at Section 718.202(a)(4), the administrative law judge considered the underlying documentation and the relative qualifications of the physicians, and permissibly accorded little weight to the 1991 opinion of Dr. Wright, that claimant had pneumoconiosis based in part on a positive x-ray, as the administrative law judge found that the weight of the x-ray evidence was negative for pneumoconiosis and that Dr. Wright relied upon an inaccurate smoking history.³ Decision and Order at 5-6, 11; Claimant's Exhibit 1; *see generally Bobick v.*

³ The administrative law judge determined that Dr. Wright recorded a smoking history of one-half pack per day for 17 years, whereas claimant testified that he smoked up to one pack per day for 27 years. Decision and Order at 11; Claimant's Exhibit 1; Hearing Transcript at 34-35.

Saginaw Mining Co., 13 BLR 1-52 (1988). The administrative law judge reasonably accorded little weight to Dr. Baker's 1992 opinion that claimant had pneumoconiosis because the physician indicated that he based his diagnosis on x-ray changes and a significant history of coal dust exposure, which the administrative law judge found was tantamount to an x-ray report rather than constituting a reasoned medical opinion sufficient to meet claimant's burden at Section 718.202(a)(4). Decision and Order at 6, 11; Claimant's Exhibit 1; *see Anderson*, 12 BLR at 1-113. The administrative law judge acted within her discretion in according greater weight to the contrary opinions of Drs. Dahhan and Castle, highly-qualified pulmonary experts, and Dr. Hudson, that claimant did not have pneumoconiosis, as she found that these 2001 and 2002 opinions were significantly more recent evaluations of claimant's pulmonary condition, and that they were well-reasoned, persuasive, and consistent with the clinical findings and x-ray evidence.⁴ Decision and Order at 6-7, 10; Director's Exhibits 14, 15; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

After finding that the weight of the newly-submitted evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4),⁵ the administrative law judge reviewed the new evidence to determine whether it was sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv). The administrative law judge averaged the different heights recorded for claimant on the four new pulmonary function studies of record at Section 718.204(b)(2)(i), and determined that none of the

⁴ The administrative law judge properly determined that Dr. Arnett's notation on a prescription pad, that a chest x-ray dated August 20, 1993 showed 1/1 p pneumoconiosis, did not constitute a reasoned medical opinion at Section 718.202(a)(4). Decision and Order at 10, n. 4; Claimant's Exhibit 1; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

⁵ On appeal, claimant asserts that he established entitlement to federal benefits by submitting evidence of his March 3, 1993 award of benefits for total disability due to pneumoconiosis from the Workers' Compensation Board of the Commonwealth of Kentucky, *see* Claimant's Exhibit 1. Contrary to claimant's arguments, however, the Kentucky Board's findings were not binding on the administrative law judge herein; rather, the administrative law judge is required to independently evaluate all of the evidence of record and autonomously resolve all relevant issues of fact and law. *See Schegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41, 1-46 (1994). Moreover, the Kentucky award was also submitted in claimant's original claim, and the medical evidence filed in support thereof was found insufficient to establish any element of entitlement. Director's Exhibit 1; Claimant's Exhibit 1.

studies produced qualifying values for claimant's height of 69.75 inches.⁶ Decision and Order at 4-5, 12; Director's Exhibits 14, 15; Employer's Exhibit 2; *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); see *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 13 BLR 2-285 (7th Cir. 1990), *cert. denied*, 498 U.S. 827 (1990). Likewise, the administrative law judge accurately found that neither of the two new blood gas studies of record produced qualifying values at Section 718.204(b)(2)(ii), and that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii). Decision and Order at 5, 11-12; Director's Exhibits 14, 15. Lastly, in finding that the newly-submitted medical opinions were insufficient to establish total disability at Section 718.204(b)(2)(iv), the administrative law judge correctly determined that Dr. Wright's 1991 opinion and Dr. Baker's 1992 opinion were both in existence at the time the original claim was denied and related to claimant's condition prior to that time. The administrative law judge thus reasonably found that the opinions of Drs. Wright and Baker were not particularly probative on the issue of whether claimant had demonstrated a change in one of the applicable conditions of entitlement pursuant to Section 725.309(d), whereas the more recent opinions by approximately ten years of Drs. Castle, Dahhan and Hudson were more probative of claimant's current respiratory condition. Decision and Order at 12-13; see *Cooley*, 845 F.2d 622, 11 BLR 2-147. The administrative law judge, within a proper exercise of her discretion, found that the opinions of Drs. Castle, Dahhan and Hudson, that claimant had the respiratory capacity to perform his usual coal mine employment and/or had no pulmonary impairment, were well-reasoned, better supported by the clinical findings and objective evidence of record, and entitled to greater weight than the contrary opinions of Drs. Wright and Baker.⁷ Decision and Order at 12-13; see *Wetzel*, 8 BLR 1-139 (1985); *Lucostic*, 8 BLR 1-46 (1985). The administrative law judge's findings pursuant to

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(b)(2)(i), (ii).

⁷ The administrative law judge additionally found that because Dr. Baker's report was not accompanied by the pulmonary function and blood gas studies which the physician administered, there was no verifying evidence to corroborate his conclusions. Decision and Order at 12; Claimant's Exhibit 1; see generally *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge found that Dr. Baker's recommendation against further coal dust exposure was not the equivalent of a finding of total respiratory disability. Decision and Order at 12; see *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

Section 718.204(b)(2)(i)-(iv) are supported by substantial evidence and are affirmed. Consequently, we affirm the administrative law judge's finding that no change in an applicable condition of entitlement was demonstrated since the prior denial pursuant to Section 725.309(d), and affirm the denial of benefits.

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

JUDITH S. BOGGS
Administrative Appeals Judge