

BRB No. 05-0225 BLA

JAMES P. ROBERTS)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 07/19/2005
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James P. Rogers, Winfield, Alabama, *pro se*.

Rita Roppolo (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2003-BLA-5120) of Administrative Law Judge Gerald M. Tierney rendered 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). Claimant filed his initial claim for black lung benefits on January 1, 1970, and additional claims in 1982, 1985, 1988 and 1995, which were denied. Director's Exhibit 1. Claimant filed the present claim, his sixth, on March 29, 2002. Decision and Order at 1; Director's Exhibit 3. The administrative law judge decided the claim based on the record since claimant waived his right to a hearing. In his Decision and Order issued on October 26, 2004, the administrative law judge noted that claimant had previously failed to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a),

718.204(b)(2). The administrative law judge considered only the later medical evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish 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). The administrative law judge thus found that the evidence was insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs, urging affirmance of the denial of benefits.

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. *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, are supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that substantial evidence supports the denial of benefits under 20 C.F.R. Part 718. The administrative law judge properly found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a). The administrative law judge listed the new x-ray evidence and correctly concluded that the x-ray evidence did not prove the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 2; Director's Exhibits 8, 10. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Additionally, as the record contains no biopsy or autopsy evidence, and as none of the presumptions found at 20 C.F.R. §§718.304, 718.305 and 718.306 are applicable,¹

¹ The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305

claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (a)(3). See 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

In weighing the new medical opinions of record pursuant to Section 718.202(a)(4), the administrative law judge found that the reports of Drs. Stephen, Moss, Westerman and Sehgal, along with the documents submitted with Dr. Sehgal's letter, failed to meet claimant's burden of proof to establish the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order at 2-4. The administrative law judge concluded that Drs. Stephen and Moss did not provide a definitive diagnosis of pneumoconiosis and that both physicians did not specifically identify the dates of tests referred to in their reports or attach documentation regarding the x-rays and tests they conducted. Decision and Order at 3; Director's Exhibit 1. In addition, the administrative law judge found that Dr. Westerman did not affirmatively relate claimant's lung condition to his coal dust exposure. Decision and Order at 3; Directors Exhibit 8. Furthermore, the administrative law judge found that Dr. Sehgal's brief statement diagnosing chronic obstructive pulmonary disease with emphysema due to a twenty year coal mine employment history, as well as a brief note and copies of an x-ray reading and results of a pulmonary function study, were not sufficient to establish the existence of pneumoconiosis since there was no credible underlying documentation or rationale submitted with the report. Decision and Order at 3; Director's Exhibit 14. The administrative law judge rationally considered the quality of the evidence in determining whether the opinions of record were supported by the underlying documentation and adequately explained. See *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Clark*, 12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry*, 9 BLR 1-1; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 3-4. Because the administrative law judge properly weighed all of the newly submitted x-rays and medical opinions of record and rationally concluded that the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a). *Clark*, 12 BLR 1-149; *Perry*, 9 BLR 1-1.

The administrative law judge also permissibly concluded that the newly submitted evidence, as well as the other evidence of record, failed to establish total disability pursuant to Section 718.204(b). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established pursuant to Section 718.204(b)(2)(i)-(ii), the administrative law judge found that the validity of the pulmonary function study

applies to claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

was “challenged”² and that the blood gas study evidence of record was non-qualifying and, thus, that total disability was not established thereunder.³ Decision and Order at 4-5. Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right-sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3). *Newell v. Director, OWCP*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); see *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff’d on recon. (en banc)* 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); Decision and Order at 5.

The administrative law judge next considered whether total disability was demonstrated pursuant to Section 718.204(b)(2)(iv). Regarding the opinion of Dr. Sehgal, the administrative law judge found it undocumented and unreasoned because the doctor failed to explain or discuss whether claimant had a pulmonary disability. Decision and Order at 5. Similarly, regarding the opinion of Dr. Westerman, while finding that the physician referred to claimant’s “advanced age” and made a possible reference to a 25% impairment, the administrative law judge found that Dr. Westerman failed to provide a definitive assessment of whether claimant has the respiratory capacity to perform his usual coal mine employment. Decision and Order at 5. Although the administrative law judge acknowledged Dr. Westerman’s notation in the “History of Present Illness” portion of his report that claimant has dyspnea at 200-300 feet and does not climb inclines, he permissibly declined to find that the newly submitted medical opinions of record established total disability pursuant to Section 718.204(b)(2)(iv). See *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff’d on recon.*, 9 BLR 1-104 (1986)(en banc); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of

² The February 11, 2002 pulmonary function study was incomplete because the comments indicate that claimant would not try to attempt the last two tests. Director’s Exhibit 9. The “Interpretation” stated that “there is a sever obstructive lung defect,” however, the administrative law judge found Dr. Michos, a consulting pulmonary specialist, opined that the study was not acceptable. Decision and Order at 4; Director’s Exhibit 10.

³A “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 and C, respectively. A “non-qualifying” study exceeds those values. See 20 C.F.R. §718.204(b)(2)(i)-(ii).

entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to 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. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). As the administrative law judge weighed all of the newly submitted medical evidence and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability due to pneumoconiosis pursuant to Section 718.204(b), we affirm his finding that the evidence was insufficient to establish a material change in conditions pursuant to Section 725.309. Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence.

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