BRB No. 99-0651 BLA

HERBERT HENSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	DATE ISSUED:
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Herbert Hensley, Stone, Kentucky, *pro se*.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

HALL, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel, the Decision and Order (98-BLA-0582) of Administrative Law Judge Robert L. Hillyard denying benefits 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). In this duplicate claim, the administrative law judge determined that claimant's prior claim had been finally denied on December 7, 1988, and that the newly submitted evidence was sufficient to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309.[1] Based on the filing date of

[1] Claimant filed his initial application for benefits on August 28, 1985, which the district director denied on January 22, 1986 on the grounds that claimant failed to establish

the claim, the administrative law judge applied the regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c), but insufficient to

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any elements of entitlement. Subsequent to this date, claimant submitted new evidence which the district director found sufficient to demonstrate the presence of a totally disabling respiratory impairment, but insufficient to establish the existence of pneumoconiosis. The district director again denied the claim on May 9, 1986. Claimant requested a hearing. His claim was held in abeyance until his state worker's compensation claim was completed. On March 22, 1988, the district director again denied this claim for the same reasons as he denied the claim on May 5, 1986. Claimant again requested a hearing. Employer moved to dismiss this claim on the grounds that claimant did not timely respond to the January 26, 1986 denial letter and, therefore, claimant had abandoned his claim. Administrative Law Judge Bernard J. Gilday, Jr. granted employer's motion and dismissed this claim by Order dated November 28, 1988 and filed with the district director on December 7, 1988. Claimant took no further action. *See* Director's Exhibit 36. As claimant submitted new evidence within one year of the January 26, 1986 denial, Judge Gilday improperly dismissed this request for modification by claimant as abandoned. *See* 20 C.F.R. §725.310. As all the evidence of record has been considered in the present claim, any error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

establish the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a)(1), 718.203(b), and insufficient to show that claimant's total disability was due to pneumoconiosis, 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.[2] The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.

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 1-85 (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 by 30 U.S.C. §932(a); *O'Keeffe 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. *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 raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In calculating the years of coal mine employment, the administrative law judge permissibly relied on the Social Security earnings statement when crediting claimant with twenty-three and one-half years of coal mine employment. *See Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). We, therefore, affirm the finding of the administrative law judge on the length of coal mine employment.

[2] We affirm the finding of the administrative law judge regarding the designation of employer as the responsible operator, as employer has not challenged this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With respect to Part 718, claimant bears the burden of establishing each and every element of entitlement.[3] *Perry*, *supra*; *Trent*, *supra*. The administrative law judge acted within his discretion when he found the weight of the x-ray evidence negative for the existence of pneumoconiosis based on a preponderance of the x-rays interpreted by Board-certified Radiologists and B-readers, and that, claimant, therefore, failed to meet his burden of proof at Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *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); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en*

[3] As this case arises within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge properly applied the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) in deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Ross*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him.

In the instant case, the administrative law judge found the newly submitted evidence sufficient to demonstrate a material change in conditions because it showed that "[c]laimant's respiratory impairment had worsened." Decision and Order at 17. Specifically, the administrative law judge stated that Dr. Fino found "that there had been a material change in "claimant's condition from a respiratory and/or pulmonary standpoint," and that "recent pulmonary function studies have resulted in values lower than the ones originating from the previous pulmonary function studies." Decision and Order at 17. As the claimant's prior claim, however, was denied because the evidence of record failed to show the presence of pneumoconiosis, *see* Decision and Order at 17, and not because claimant failed to establish total disability, the administrative law judge should have reviewed the newly submitted evidence to determine whether the evidence was sufficient to establish the existence of pneumoconiosis, the element of entitlement previously decided against claimant. *Id*. Thus, although the administrative law judge failed to review the newly submitted evidence under the proper standard, we need not remand this case for him to make new findings at Section 725.309(d) because we affirm the administrative law judge's finding on the merits, *i.e.*, that the evidence of record is insufficient to establish the existence of pneumoconiosis, a necessary element of entitlement. *See Larioni v. Director, OWCP*, 6 BLR 1-1291 (1983); *Perry*, *supra*.

banc).[4]

[4] At 20 C.F.R. §718.202(a)(1), the administrative law judge concluded that the record contained thirty-four interpretations of thirteen x-rays; that twenty-five of the interpretations were read by physicians who were Board-certified Radiologists and/or B-readers; that twenty of the interpretations by these readers were negative for pneumoconiosis and the remaining five interpretations were positive for pneumoconiosis; and that the most recent interpretations were negative. *See* Director's Exhibits 18-22, 34; Employer's Exhibits 2-7; Decision and Order at 17-18.

Turning to Section 718.202(a)(2), the administrative law judge properly found the biopsy reports insufficient to establish the existence of pneumoconiosis as none of the physicians diagnosed coal workers' pneumoconiosis and the physicians who diagnosed anthracosis, silicosis or fibrosis failed to affirmatively link their diagnoses to claimant's coal mine employment. *See* 30 U.S.C. §902(b), 20 C.F.R. §§718.201, 718.202(a)(2); *Perry*, *supra*; Decision and Order at 18-19.[5] We, therefore, affirm the finding of the administrative law judge at Section 718.202(a)(2) as it is supported by substantial evidence.

[5] At Section 718.202(a)(2), the record contains medical reports from Drs. Hunter, Sheils, Buckley, and Caffrey which address the results of the biopsy performed on claimant in March 1986. *See* Director's Exhibit 36. In reviewing the conclusions of these physicians, the administrative law judge correctly recognized that on his review of the biopsy slides, Dr. Hunter, a pathologist, found anthracosis in the hilar lymph node and subaortic lymph node but did not attribute these findings to claimant's coal dust exposure; that Dr. Lane, a Board-certified internist, found some anthracotic pigmentation, but no evidence of pneumoconiosis when he reviewed the biopsy slides; that Dr. Sheils, a Board-certified anatomical and clinical pathologist, could not make a diagnosis of pneumoconiosis nor could he rule out the presence of pneumoconiosis based on his review of the biopsy slides; that Dr. Buckley noted the existence of anthracosis, silicosis, and fibrosis, and stated that there was no coal workers' pneumoconiosis in the biopsy slides he reviewed, although he could not rule out the presence of pneumoconiosis elsewhere in the lungs; and that Dr. Caffrey, a Board-certified clinical and anatomical pathologist, found anthracotic pigment, but, in his review of the biopsy slides, did not see the necessary findings to make a diagnosis of coal workers' pneumoconiosis. *See* Decision and Order at 18; Director's Exhibit 36 at 35-36, 70, 141-164, 218, 219, 259-260.

The administrative law judge also correctly determined that claimant, a living miner, was not entitled to the presumptions set forth in Section 718.202 (a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306. We, therefore, affirm the finding of the administrative law judge at Section 718.202(a)(3).

At Section 718.202(a)(4), claimant can establish the existence of pneumoconiosis if he demonstrates the presence of a respiratory impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See* 20 C.F.R. §§718.201, 718.202(a)(4). In the instant case, the administrative law judge permissibly assigned greater weight to the reports of Drs. Fino and Branscomb, which found that claimant does not suffer from a pulmonary disease related to his coal mine employment, based on their superior qualifications and as their reports were supported by underlying documentation. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Church, supra*; *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge permissibly assigned less weight to the opinion of Dr. Hussain diagnosing coal workers' pneumoconiosis because Dr. Hussain did not address claimant's extensive smoking history and to the opinion of Dr. Younes diagnosing coal workers' pneumoconiosis because Dr. Younes did not provide a rationale for his conclusion that claimant's chronic obstructive pulmonary disease and chronic bronchitis were caused by smoking and coal mine employment and because the smoking and coal mine employment histories relied on by Dr. Younes were markedly higher than those found by the administrative law judge. *See Church, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra*; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Finally, in considering the earlier medical opinion evidence, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Broudy, Lane and Tuteur, which relate claimant's pulmonary impairment to his smoking and not his coal mine employment, because he found them better explained and supported by their underlying documentation. *See Church, supra*; *Fields, supra*; *Lucostic, supra*. We, therefore, affirm the finding of the administrative law judge that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) by medical opinion evidence as it is supported by substantial evidence.[6]

[6] Because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), an essential element of entitlement, we need not address the administrative law judge's other findings. In light of our colleague's dissent, however, we address those findings briefly. At Section 718.204(c), the administrative law judge properly concluded that claimant established the presence of a totally disabling respiratory impairment based on the nine valid, qualifying pulmonary

function studies of record and the medical opinions of Drs. Hussain, Fino, Branscomb, Younes, Tuteur, Lane, Broudy, Wright, Burdi, Sutherland, and Burdick, all of whom opined that claimant suffers from a disabling respiratory impairment. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d 1995), *aff'g* 16 BLR 1-11 (1991); *Trent*, *supra*; Director's Exhibits 11-16, 34, 36; Claimant's Exhibits 1, 2; Employer's Exhibits 4, 5, 9. In so doing, the administrative law judge correctly weighed the evidence supportive of claimant's burden of proof against the contrary probative evidence, which consisted of two non-qualifying pulmonary function studies and ten non-qualifying blood gas studies. *See Fields*, *supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*). We, therefore, affirm the findings of the administrative law judge at Section 718.204(c) as it is supported by substantial evidence.

Finally, at Section 718.204(b), the administrative law judge determined that Drs. Fino, Branscomb, Lane and Broudy stated that claimant's totally disabling respiratory impairment was due to claimant's smoking history and that Drs. Hussain, Younes, Wright and Sutherland opined that claimant's totally disabling respiratory impairment was due, in part, to his pneumoconiosis. The administrative law judge acted within his discretion when he found the evidence as to the etiology of claimant's totally disabling respiratory impairment in equipoise. Thus, the administrative law judge properly concluded that claimant had failed to meet his burden of proof by a preponderance of the evidence. *See Ondecko*, *supra*. We, therefore, affirm the finding of the administrative law judge at Section 718.204(b) and the denial of benefits as it is supported by substantial evidence.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JAMES F. BROWN
Administrative Appeals Judge

NELSON, Acting Administrative Appeals Judge, concurring in part and dissenting in part:

I join with my colleagues in affirming the findings of the administrative law judge on the length of coal mine employment and his findings at 20 C.F.R. §§718.202(a)(1), (3), (4), 718.204(c).

I respectfully disagree, however, with the majority's conclusions at 20 C.F.R. §718.202(a)(2). The administrative law judge found that the biopsy evidence did not establish coal workers' pneumoconiosis based on the medical opinions of Drs. Lane, Caffrey, Sheils, Buckley, and Hunter. Based on their review of 1986 biopsy slides, each physician opined that coal workers' pneumoconiosis could not be diagnosed. However, Dr. Hunter diagnosed anthracosis in the hilar lymph nodes and subaortic node, Dr. Sheils agreed with this diagnosis, and Dr. Buckley found anthracosis and silicosis of the lung, slight and anthracosis, silicosis, and fibrosis of the hilar lymph nodes. The definition of pneumoconiosis in 20 C.F.R. §718.201 specifically includes anthracosis, silicosis and fibrosis. *See* 20 C.F.R. §718.201; *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990) (a diagnosis of anthracosis is pneumoconiosis for purposes of the Act); *see also Peabody Coal Co. v. Director, OWCP [Rainey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). Thus, in light of the physicians' diagnoses, I would vacate the finding of the administrative law judge at Section 718.202(a)(2), and remand this case to the administrative law judge to determine if the diagnoses by Drs. Hunter, Sheils, and Buckley constitute pneumoconiosis as defined in the regulations. *See* 20 C.F.R. §§718.201, 718.202(a)(2); *see Bueno v. Director, OWCP*, 7 BLR 1-337 (1984); *see also Mangus v. Director, OWCP*, 882 F.2d 1527, 13 BLR

2-9, 2-20 (10th Cir. 1989). Because I would remand this case for further consideration on the issue of the existence of pneumoconiosis, I would also vacate the findings of the administrative law judge at 20 C.F.R. §718.204(b) and remand for further consideration of this issue, as well.

Concerning the findings of the administrative law judge at 20 C.F.R. §725.309, I agree with the majority that the administrative law judge erred in finding that claimant had established a material change in conditions based on the worsening of his pulmonary impairment. Although I prefer not to remand a case for additional findings on the issue of a material change in conditions when a claimant appeals without the assistance of counsel and the administrative law judge's findings which are favorable to claimant have not been challenged, in this instance, I would remand this case for the administrative law judge to make new findings on a material change in conditions since he must reconsider the existence of pneumoconiosis.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge