BRB No. 06-0790 BLA

HARVEY H. JOHNSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHANCE COAL CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	DATE ISSUED: 06/28/2007
	)	
Employer/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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Harvey H. Johnson, Jr., Maidsville, West Virginia, *pro se*.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (04-BLA-6667) of Administrative Law Stephen L. Purcell 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 subsequent claim on September 30, 2002. Director's Exhibit 4. The district director issued a Proposed Decision and Order denying benefits on May 4, 2004. [1] Director's Exhibit 30. Claimant requested a hearing, which was held on August 22, 2005.[2] The administrative law judge accepted the parties' stipulation to 17.416 years of coal mine employment. The administrative law judge found that the new evidence was insufficient to establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2), and thus, that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant has submitted a letter on appeal challenging the administrative law judge's denial of his claim. Claimant asserts that the administrative law judge erred in selectively analyzing the evidence by considering only the medical evidence that was unfavorable to his claim. Claimant argues that because he was awarded black lung benefits by the State of West Virginia in 1983, the positive chest x-rays from his state claim, along with other medical records from West Virginia hospitals, establish the presence of pneumoconiosis. Claimant argues that in light of the irreversible nature of his obstructive ventilatory defect, the administrative law judge erred in finding that he failed to establish pneumoconiosis. Claimant argues that he was prejudiced by the denial of the opportunity to perform his arterial blood gas study with exercise, and appears to also argue that the arterial blood gas testing conditions were not conducive to the production of qualifying results. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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

[1] Claimant filed an initial claim for benefits on August 24, 1995, which was denied by the district director on the grounds that claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim on May 9, 2000. Director's Exhibit 2. The district director also denied claimant's duplicate claim because the evidence was insufficient to establish the existence of pneumoconiosis, that the disease was caused by coal mine employment, and total disability due to pneumoconiosis. *Id*. Claimant took no further action with regard to the denial of his duplicate claim until he filed the instant subsequent claim on September 30, 2002. Director's Exhibit 4.

[2] Claimant appeared without counsel. The administrative law judge properly determined that claimant's waiver of counsel was voluntary, that claimant understood the nature of the hearing, and that claimant was competent to proceed without counsel. Hearing Transcript at 5-6. *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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, 363 (1965).

In order to establish entitlement to benefits 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 one of these elements precludes 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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the newly submitted evidence demonstrates that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Claimant's prior application for benefits was denied on August 11, 2000, for failure to establish any of the requisite elements of entitlement. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment in order to proceed with his claim.[3] 20 C.F.R. §725.309(d)(2),(3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Pursuant to Section 718.202(a)(1), the administrative law judge noted that there were two new x-rays dated December 18, 2002 and June 22, 2002, both of which had been read as negative for pneumoconiosis. Director's Exhibits 19, 20; Employer's Exhibit 1; Decision and Order at 3. Therefore, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis under that subsection.[4] The administrative law judge properly noted that since there was no biopsy

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 6.

[4] A review of the record indicates that Dr. Gaziano interpreted the December 12, 2002 x-ray as negative for pneumoconiosis, whereas the administrative law judge mistakenly stated that the x-ray was interpreted for film quality only. Decision and Order at 3; Director's Exhibit 20. We consider this error to be harmless since the administrative law judge's mischaracterization of the x-ray had no impact on the outcome of the claim. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

evidence of record to prove the existence of the disease, claimant was unable to establish that he suffered from pneumoconiosis pursuant to Section 718.202(a)(2). Decision and Order at 9. Additionally, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(3), since he was unable to avail himself of any of the presumptions provided by that subsection for proving the existence of the disease. *Id*.

In evaluating the medical opinion evidence relevant to whether claimant had established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge initially noted claimant's testimony that he smoked one pack per day for seventeen years. *Id.* In reviewing the medical opinion evidence, the administrative law judge determined that Dr. Jaworski's diagnosis of a mild obstructive lung disease due to smoking and coal dust exposure was supportive of a finding of legal pneumoconiosis. Decision and Order at 11; Director's Exhibit 16. In contrast, he found that Dr. Renn opined that claimant had no respiratory condition attributable to his coal dust exposure. Decision and Order at 11; Employer's Exhibit 1. In weighing the conflicting opinions, the administrative law judge accorded Dr. Jaworski's opinion less weight in comparison to that of Dr. Renn, because he found that Dr. Jaworski failed to provide any rationale or explanation for his conclusions, while Dr. Renn's findings were well-explained with references to the objective evidence. Decision and Order at 11. The administrative law judge observed that Dr. Renn eliminated coal dust exposure as a cause of claimant's mild obstructive impairment by pointing to a pattern of pulmonary function testing values that the physician explained was typical of impairment caused by smoking, and atypical of that caused by coal mine dust inhalation. *Id*. Determining that Dr. Renn's explanation for elimination of coal dust exposure as a contributing cause of claimant's impairment was more detailed and better reasoned than Dr. Jaworski's opinion, the administrative law judge properly assigned controlling weight to Dr. Renn's opinion that claimant did not have pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); Decision and Order at 3.

The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, when rational and supported by substantial evidence, *see Anderson,* 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4). We thus affirm the administrative law judge's determination, based on his review of all of the relevant evidence, that claimant failed to satisfy his burden of proving the existence of

pneumoconiosis pursuant to Section 718.202(a). *See Island Creek Coal Co. v Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000); Decision and Order at 11.[5]

The administrative law judge next considered the issue of total disability pursuant to Section 718.204(b)(2). Because the two newly submitted pulmonary function studies conducted by Drs. Jaworski and Renn each produced non-qualifying results, the administrative law judge properly determined that claimant was unable to establish total disability pursuant to Section 718.204(b)(2)(i).[6] Director's Exhibit 18; Employer's Exhibit 1; Decision and Order at 11. Likewise, because the two newly submitted arterial blood gas studies produced non-qualifying values, the administrative law judge correctly determined that claimant was unable to establish total disability pursuant to Section 718.204(b)(ii).[7] Director's Exhibit 17; Employer's Exhibit 1; Decision and Order at 12. Additionally, because there was no evidence demonstrating that claimant had cor pulmonale with right-sided congestive heart failure, the administrative law judge properly

[5] The administrative law judge considered the evidence pursuant to 20 C.F.R. §718.203, and determined that because claimant worked in coal mine employment for 17.416 years, claimant would be entitled to the rebuttable presumption that pneumoconiosis arose from coal mine employment pursuant to 20 C.F.R. §718.203. Decision and Order at 11. However, because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge properly determined that consideration of the issue of disease causation under Section 718.203 was moot. *Id.*

[6] A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] We reject claimant's assertion that he was prejudiced because he was denied the opportunity to perform his most recent arterial blood gas studies with exercise. Pursuant to 20 C.F.R. §718.105, "[n]o blood-gas study shall be performed if medically contraindicated." Dr. Jaworski's December 18, 2002 report indicates that exercise was "medically contraindicated" due to claimant's history of angina and a stent placement in 1998. Director's Exhibits 16, 17. Claimant was not prejudiced, as a review of Dr. Renn's June 29, 2004 report reveals that claimant was not offered a testing with exercise due to claimant's "decreased exercise tolerance" and his "presently active lumbar musculoskeletal problems." Employer's Exhibit 1 at 4. Furthermore, although claimant argues that his arterial blood gas studies produced elevated values due to testing conditions, such as the temperature of the room and the presence of an oxygen tank, he has not demonstrated that any of the newly submitted arterial blood gas studies were non-conforming, according to the quality standards enumerated in 20 C.F.R. §718.105 and Appendix C to Part 718.

found that claimant was unable to establish total disability pursuant to Section 718.204(b)(2)(iii). Decision and Order at 12.

With respect to the medical opinion evidence relevant to the issue of total disability at Section 718.204(b)(2)(iv), the administrative law judge properly noted that both Drs. Jaworski and Renn were in agreement that claimant was not totally disabled from a respiratory or pulmonary impairment, and that claimant retained the pulmonary capacity to return to his previous coal mine employment. Decision and Order at 12. Thus, the administrative law judge properly found that claimant failed to establish that he suffered from a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). *Id.*

Although claimant contends that evidence submitted in conjunction with his prior claim should have been considered by the administrative law judge, Claimant's Letter on Appeal at 4 (unpaginated), the administrative law judge properly focused his analysis *first* on whether the new evidence, submitted in conjunction with claimant's subsequent claim, was sufficient to show a change in one of the applicable condition of entitlement, *i.e.*, the existence of pneumoconiosis or total respiratory disability, that served as the basis for the denial of claimant's prior claim. 20 C.F.R. §725.309(d). Although the record contains x-ray and other evidence submitted in conjunction with claimant's prior claims, the administrative law judge was not required to review that evidence until such time as claimant demonstrated, based on the new evidence, that he suffered from pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Consequently the administrative law judge was not required to reevaluate whether the entirety of the medical record, including the evidence referred to by claimant, was sufficient to establish claimant's entitlement to benefits. *See* 20 C.F.R. §725.309. We must also reject claimant's argument that the administrative law judge erred in finding that he failed to establish pneumoconiosis in light of the irreversible nature of the disease. As discussed *supra*, the administrative law judge permissibly determined that claimant does not suffer from pneumoconiosis, based on his review of the newly submitted evidence. Claimant's Letter on Appeal at 1 (unpaginated); Decision and Order at 8-11.

Consequently, because claimant failed to establish either the existence of pneumoconiosis or total disability, the elements of entitlement that were previously adjudicated against him, the administrative law judge properly determined that claimant failed to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d); *see White*, 23 BLR at 1-4. We affirm, therefore, the administrative law judge's denial of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge