BRB No. 97-1363 BLA

CARL THOMAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEATRICE POCAHONTAS COMPANY	)	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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Carl Thomas, Honaker, Virginia, *pro se.*

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1], without the assistance of counsel[2], appeals the Decision and Order (97-BLA-400) of Administrative Law Judge Richard A. Morgan denying benefits on a 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). This claim is a duplicate claim.

[1] Claimant is Carl Thomas, the miner, whose first two claims for benefits, filed on June 4, 1979 and April 4, 1990, were denied on August 4, 1988 and March 11, 1992 respectively. Director's Exhibits 36, 37. Claimant filed the instant claim for benefits on May 13, 1996. Director's Exhibit 1.

[2] Tim White, a benefits counselor with Stone Mountain Health Services, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See* 20 C.F.R. §§802-211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant's initial claims were finally denied on August 4, 1988 and March 11, 1992. Director's Exhibits 36, 37.

The administrative law judge found that claimant failed to establish the existence of pneumoconiosis, total respiratory disability, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b), (c) and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 (1965).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1364, 20 BLR 2-227, 235 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis, total respiratory disability and total disability due to pneumoconiosis pursuant to Sections 718.202(a) and 718.204(b), (c). Director's Exhibits 36, 37.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and

conclusions of law are supported by substantial evidence and contain no reversible error therein. The newly submitted x-ray evidence of record consists of eighteen interpretations of three x-rays. Director's Exhibits 15, 17, 30, 31; Employer's Exhibits 1-4, 7, 9. Of the eighteen interpretations, only two readings of a film dated May 31, 1996 were positive for the existence of pneumoconiosis. Director's Exhibits 15, 17. The administrative law judge acted within his discretion in finding the positive interpretations of Drs. Forehand and Gaziano, both B-readers, to be entitled to less weight than the negative interpretations of the same film by Drs. Wiot, Shipley, Spitz and Kim, all B-readers and board certified radiologists, on the basis of the latter physicians' superior qualifications. Decision and Order at 19; Director's Exhibit 30; Employer's Exhibit 7; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries, Inc.,* 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Perry, supra*. Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

We also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3) inasmuch as the record contains no autopsy or biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305(e), 718.306; Decision and Order at 6; Director's Exhibit 1.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinion evidence which consists of opinions by Drs. Forehand, Prince, Castle, Dahhan, Jarboe and Fino. Director's Exhibits 10, 18, 29, 31; Employer's Exhibits 4-6, 8, 9. Dr. Forehand is the only physician to diagnose pneumoconiosis. Director's Exhibit 10. The administrative law judge acted within his discretion in finding that Dr. Forehand's opinion is outweighed by the opinions of Drs. Prince, Castle, Dahhan, Jarboe and Fino on the basis of their superior credentials. Decision and Order at 20; *Parulis, supra; Lafferty, supra; McMath, supra; Dillon, supra; Martinez, supra; Wetzel, supra*; *Perry, supra*. Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c)(1), the administrative law judge initially acted within his discretion in determining that claimant is sixty-eight inches tall. Decision and Order at 22; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). The administrative law judge then considered the three newly submitted pulmonary function studies of record, only one of which yielded results which are qualifying for a man who is sixty-eight inches tall and

seventy years old.[3] Director's Exhibits 8, 9, 10, 24, 31; Employer's Exhibit 9. The qualifying results were obtained in the pre-bronchodilator stage of a pulmonary function study performed on September 10, 1996 by Dr. Castle. Director's Exhibit 31; Employer's Exhibit 9. The post-bronchodilator results of the same study were non-qualifying. Director's Exhibit 31; Employer's Exhibit 9. The administrative law judge rationally found that the preponderance of the pulmonary function study evidence is non-qualifying. Decision and Order at 22; *Lafferty, supra; Perry, supra; Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1) as it is supported by substantial evidence.

Pursuant to Section 718.204(c)(2), the administrative law judge considered the two newly submitted arterial blood gas studies of record. Director's Exhibit 11; Employer's Exhibit 9. The arterial blood gas study performed on September 10, 1996 by Dr. Castle yielded non-qualifying results, while the study performed by Dr. Forehand on May 31, 1996 yielded non-qualifying results at rest and qualifying results after exercise. Director's Exhibit 11; Employer's Exhibit 9. The administrative law judge, acting within his discretion, assigned less weight to the qualifying exercise values on the basis of Dr. Castle's criticism of those results. Decision and Order at 22; Employer's Exhibit 9; *Lafferty, supra; Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge then rationally concluded that the preponderance of the arterial blood gas study evidence is non-qualifying. Decision and Order at 22; *Lafferty, supra; Perry, supra; Piccin, supra.* Also, pursuant to Section 718.204(c)(3), the administrative law judge properly found that there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Consequently, we affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(2), (3) as they are supported by substantial evidence.

Pursuant to Section 718.204 (b), (c)(4), the administrative law judge considered the six newly submitted medical opinions of record. Only Dr. Forehand opined that claimant has total respiratory disability and that he is totally disabled due to pneumoconiosis. Director's Exhibit 10, 18. The administrative law judge acted within his discretion in finding that Dr. Forehand's opinion is outweighed by the opinions of Drs. Prince, Castle, Dahhan, Jarboe and Fino, that claimant is not totally disabled from a respiratory standpoint and that claimant's disability is unrelated to coal mine dust exposure, on the basis of their superior qualifications. Decision and Order at 22-25; *Parulis, supra; Lafferty, supra; McMath, supra;*

[3]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. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Dillon, supra; Martinez, supra; Wetzel, supra; *Perry, supra*. Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total respiratory disability and total disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(4) as it is supported by substantial evidence.

The administrative law judge is empowered to weigh the 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. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson, supra*. Thus, we affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis, total respiratory disability and total disability due to pneumoconiosis pursuant to Sections 718.202(a) and 718.204(b), (c)(4). Further, because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, total respiratory disability and total disability due to pneumoconiosis based upon the newly submitted evidence, we also affirm the administrative law judge's findings that claimant failed to establish a material change in conditions pursuant to Section 725.309. *Rutter, supra*. Consequently, we affirm the denial of benefits as it is supported by substantial evidence and in accordance with law. *Rutter, supra; Piccin, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge