BRB No. 97-1459 BLA

BILLY J. RICHARDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA "B" MINING 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.

Billy J. Richardson, Swords Creek, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (97-BLA-302) 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 is a duplicate claim in which the

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing him 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).

administrative law judge determined that pursuant to the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), the evidence submitted by claimant on his duplicate claim was sufficient to establish a material change in conditions, as the evidence established at least one of the elements of entitlement previously adjudicated against claimant. Decision and Order at 16. Thus, the administrative law judge adjudicated the claim on the merits. The administrative law judge found that although in the instant claim claimant established that he is now totally disabled, he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that his disability is due to pneumoconiosis within the meaning of 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to 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. *McFall v. Jewell Ridge Coal Corp.*, 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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

To be entitled to benefits 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. 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. The record contains thirty-three x-ray interpretations of nine x-rays, of which the administrative law judge found that there are three positive readings.[2] Director's Exhibits 11, 31, 38. Only one positive interpretation was rendered by a

[2] The administrative law judge found that Dr. Navani's reading of 0/1, see Director's Exhibit 11, constituted a positive finding of pneumoconiosis. Decision

B-reader. *See* Director's Exhibit 31. The administrative law judge also noted that nine B-readers rendered thirty negative interpretations of the x-ray evidence. Director's Exhibits 11,12, 20, 23, 24, 28, 29, 30, 31,33, 35; Employer's Exhibits 2, 7-10. The record shows that the majority of these physicians are also board certified radiologists. The administrative law judge considered the numerical weight of the evidence, the qualifications of the physicians, the consistency of the evidence, and the recency of the x-rays and concluded that claimant failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Inasmuch as the administrative law judge properly weighed the x-ray evidence by considering not only the numerical weight of the evidence but the qualifications of the x-ray readers, we affirm the administrative law judge's finding that the preponderance of the x-ray evidence fails to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(1).[3] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-*

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and Order at 18. However, a reading of 0/1 does not constitute a finding of pneumoconiosis under the regulations. *See* 20 C.F.R. §718.102; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). In light of the administrative law judge's ultimate determination, a remand is not required as substantial evidence supports his conclusion. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[3] The administrative law judge properly found that the existence of pneumoconiosis could not be established pursuant to 20 C.F.R. §718.202(a)(2) as there was no biopsy evidence of record, and, that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) as he was not entitled to the presumptions contained therein as this is a living miner's claim filed after January 1, 1982 and there is no evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §§718.202(a)(2), 718.202(a)(3), 718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Director's Exhibit 1.

Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Pursuant to Section 718.202(a)(4), the administrative law judge permissibly accorded less weight to the two medical opinions of record opining that claimant suffers from pneumoconiosis. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge found that Dr. Iosef's diagnosis of pneumoconiosis was clouded by the fact that he had no knowledge that claimant suffers from asthma and because the physician relied on non-qualifying pulmonary function study and blood gas study results as well as on the positive x-ray reading by Dr. Sutherland, which was found outweighed by the negative x-ray interpretations of record. The administrative law judge accorded less weight to Dr. Forehand's diagnosis of the presence of pneumoconiosis because this physician also failed to initially acknowledge claimant's asthma and subsequently tried, without success, to explain the disease away in defining claimant's lung impairment as pneumoconiosis. Thus, the administrative law judge rationally questioned the reliability of these two medical opinions. *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Piccin, supra*. Moreover, the administrative law judge permissibly credited the opinions of Drs. Castle, Fino and Sargent, all stating that claimant does not suffer from pneumoconiosis, on the basis of the physician's awareness of claimant's asthma condition, because they were the more qualified respiratory experts and because their diagnoses were "supported by the patient history, test results, examinations, negative x-rays and are consistent with one-another (sic)." Decision and Order at 19. Inasmuch as the administrative law judge legitimately credited the medical reports of the most qualified physicians, which he found to be well-documented and whose reliability was substantiated by the medical and historical data, *see generally Trumbo v. Reading Anthracite Co.*, 17 BLR 1-185 (1993); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), *rev'd on other grounds*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), we decline to disturb his credibility determinations. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Thus, we affirm the administrative law judge's crediting of the medical opinions of Drs. Castle, Fino and Sargent and his finding that claimant failed to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4).

Inasmuch as claimant has failed to establish the presence of pneumoconiosis, an essential element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra; Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge