BRB No. 98-1310 BLA

LEO SEEBER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Leo Seeber, Oneida, Tennessee, *pro se*.

Cathryn Celeste Helm (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-0305) of Administrative Law Judge Robert L. Hillyard 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge considered the newly submitted evidence of record and concluded that the evidence was insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), and thus insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs, urges affirmance of the denial of

benefits, but requests that the Board remand the case to the district director for development of additional medical evidence. Employer did not participate 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. *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 conclusions of law are rational, supported by substantial evidence, and in accordance with 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 to benefits in a living miner's claim 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

The administrative law judge rationally found that the new evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as all of the new x-rays of record were read negative for pneumoconiosis. Director's Exhibits 10, 12, 13, 16; Decision and Order at 10; *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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). In addition, the existence of pneumoconiosis cannot be established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence of record, this was a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In addition, after considering the entirety of the newly submitted medical opinion evidence of record pursuant to Section 718.202(a)(4), the administrative law judge permissibly found the evidence insufficient to establish the existence of pneumoconiosis as the treatment notes from the Oak Grove clinic provided no explanation for its black lung finding and Dr. Seargeant found no evidence of pneumoconiosis. Director's Exhibits 10, 16; Decision and Order at 10; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Perry*, *supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

The administrative law judge also permissibly determined that the newly submitted evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4) as the one qualifying pulmonary function study of record was invalidated

due to poor effort, the blood gas studies of record produced non-qualifying values[1] and there was no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 9, 11, 25 28, 35; Decision and Order at 13-14; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141 (1984); *Larioni, supra*. Further, the administrative law judge rationally determined that the new evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4) as Dr. Seargeant did not diagnose any totally disabling respiratory conditions and his opinion is supported by the objective evidence of record. Director's Exhibits 10, 16; Decision and Order at 11; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir.1989); *Gee v. Director, OWCP*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986). 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 when they are supported by substantial evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(c) and therefore insufficient to establish a material change in conditions at Section 725.309(d) as they are supported by substantial evidence and in accordance with law. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

However, as Director contends, he has not met his statutory obligation of providing claimant with a complete, credible pulmonary evaluation as Dr. Seargeant's diagnosis of possible chronic bronchitis was equivocal, and incomplete since Dr. Seargeant failed to discuss the cause of the disease, and because Dr. Seargeant failed to address the extent of any respiratory impairment other than with the notation "N/A." 30 U.S.C. 923(b); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-54 (1990); *Clark, supra*; *Justice v. Island Creek Coal Co.*,

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

11 BLR 1-91 (1988). Thus, we remand the case to the district director for the development of additional medical evidence to cure the defects in Dr. Seargeant's report.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and the case is remanded to the district director for further development of additional evidence consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge