BRB No. 99-0237 BLA

VICTOR E. DOWDY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
JEWELL RIDGE MINING CORPORATION and SEA "B" MINING COMPANY	)	
	)	
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.

Vincent J. Carroll, Richlands, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0190) of Administrative Law Judge Richard A. Morgan denying benefits on a duplicate claim[1] filed pursuant

[1]This duplicate claim filed on March 20, 1997, was properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718. Director's Exhibit 1. Claimant's first claim, filed on December 6, 1988, was denied by the Department of Labor claims examiner on May 15, 1989 because the evidence did not establish total

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). After crediting claimant with 18.3 years of coal mine employment, the administrative law judge found that employer conceded total disability pursuant to 20 C.F.R. §718.204(c), and consequently, a material change in conditions pursuant to 20 C.F.R. §725.309(d). However, the administrative law judge denied benefits because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.§§718.202(a) and 718.203(b) or total disability due to pneumoconiosis under 20 C.F.R. §718.204(b). On appeal, claimant argues that the smoking history on which the administrative law judge based his decision is inaccurate. Claimant also argues that the administrative law judge erred in finding that claimant did not suffer from pneumoconiosis or that pneumoconiosis did not cause claimant's total disability, and erred in weighing the medical evidence without considering its recency.[2] In response, employer argues that the administrative law judge's denial of

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disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Director's Exhibit 28. There is no record that claimant further pursue the 1988 claim.

[2]In support of his contention that he has sustained his burden of proof on the issue of causation of total disability, claimant argues that he "invokes the presumption" of total disability with two medical opinions by examining physicians that included two qualifying pulmonary function studies. Claimant's Brief at 3. The interim presumption of total disability due to pneumoconiosis arising under 20 C.F.R. Part 727 is inapplicable to the instant claim. *See* 20 C.F.R. §727.203(a). Because this claim was filed after March 31, 1980, the administrative law judge properly

benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board, and may not be disturbed. 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 under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. *See Perry v. Director, OWCP,* 9 BLR 1-1 (1986) (*en banc*).

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applied the permanent criteria under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.1(b) and 718.2; Director's Exhibit 1.

[3]We affirm the administrative law judge's finding of a material change in conditions pursuant to 20 C.F.R. §725.309(d), as well as his finding of length of coal mine employment as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant argues that the recent x-ray evidence of record and claimant's years of coal mine employment establish the existence of pneumoconiosis. In his analysis of the twenty x-ray interpretations of record under Section 718.202(a)(1), the administrative law judge correctly found that only Dr. Alexander, a Board-certified radiologist and B reader, rendered positive readings of the x-rays taken on April 28, 1997 and August 14, 1997, two of the eight x-rays submitted for interpretation. Decision and Order at 16; Director's Exhibits 14, 15, 20, 21, 28; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 3-6, 12, 14-16. Drs. Scott, Wheeler and Pendergrass, who are also dually qualified as Board-certified radiologists and B readers and Drs. Forehand, Gaziano and Sargent, who are B readers, read the same x-rays as negative for pneumoconiosis. Decision and Order 16; Director's Exhibits 14, 15, 20, 21; Employer's Exhibit 1. The administrative law judge properly found that the earliest x-rays taken on September 8,1971, December 18, 1973, December 28, 1988[4] and March 24, 1995 were unanimously read as negative for pneumoconiosis, as were the most recent x-rays of record taken on January 13 and 22, 1998.[5] Decision and Order at 15, 16; Director's Exhibit 28; Employer's Exhibits 3-6, 12, 15, 16. As the majority of qualified physicians interpreted the x-ray evidence as negative for pneumoconiosis, the administrative law judge properly found that the x-ray evidence does not support a finding of pneumoconiosis under Section 718.202(a)(1). Decision and Order at 5; *see Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61

[4]In his analysis of the six readings of the earliest four films, the administrative law judge mistakenly listed as negative for pneumoconiosis a reading of an x-ray taken on December 28, 1973 that is not part of the record, Decision and Order at 15, and did not refer to the x-ray taken on December 28, 1988 that he correctly noted in his Decision and Order at page 5. The administrative law judge's error is harmless as the December 28, 1988 x-ray was unanimously interpreted as negative for pneumoconiosis by Dr. Pitman, a Board-certified radiologist and B reader and Dr. Dumic, a Board-certified radiologist. *See Larioni v. Director. OWCP,* 6 BLR 1-1276 (1984); Decision and Order at 5; Director's Exhibit 28.

[5]The administrative law judge properly found that the x-ray taken on January 13, 1998 was read as negative for pneumoconiosis by Drs. Wheeler and Scott who are Board-certified radiologists and B readers and Dr. Naik, whose qualifications are not in the record. Decision and Order at 16. Additionally, the administrative law judge properly found that Dr. Pathak, a B reader and British Board-certified radiologist, noted changes in the January 22, 1998 film compatible with chronic obstructive pulmonary disease, but no evidence of pulmonary mass, nodules or infiltrates on either side. He noted "two or three small 1-2 mm nodular densities along the pleural surfaces" probably related to an old inflammatory etiology. *Id;* Employer's Exhibit 14.

(4th Cir. 1992).

Although the administrative law judge did not make findings under 20 C.F.R. §718.202(a)(2) and (a)(3), the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, and the presumptions contained in 20 C.F.R. §§718.305 and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(e); Director's Exhibit 1. Consequently, claimant cannot, as a matter of law, establish the existence of pneumoconiosis under Section 718.202(a)(2) and (a)(3).

Under Section 718.202(a)(4), claimant argues that the administrative law judge erred in distinguishing between restrictive and obstructive disease, based on the opinions of Drs. Sargent and Castle. Drs. Sargent and Castle determined that claimant's respiratory impairment was purely obstructive, compatible with a smoking related condition rather than pneumoconiosis, which causes a mixed obstructive and restrictive impairment. However, the administrative law judge properly found, and claimant does not dispute, that both physicians determined that claimant's obstructive impairment reversed with bronchodilator and that this was not consistent with pneumoconiosis. Decision and Order at 17; Director's Exhibit 20; Employer's Exhibit 2, 7, 10. Therefore, the administrative law judge permissibly relied on the opinions of Drs. Castle and Sargent to find that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4). *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983)

In addition, claimant argues that the administrative law judge relied on an inaccurate smoking history in finding that claimant smoked at least one-half of a pack of cigarettes per day for twenty-seven years with periods of up to one and one-half packs per day. Claimant only argues that the smoking history is inaccurate because Dr. Abernathy reported a smoking history of one and one-half packs of cigarettes, although he explained to Dr. Albernathy's nurse that he only smoked one and one-half packs one night while fishing, but the nurse never corrected the record to so indicate. We affirm, as unchallenged, the administrative law judge's finding that claimant smoked for apppoximatively twenty-seven years. *Skrack*, *supra.* With respect to the number of cigarettes smoked per day, the administrative law judge noted that claimant admitted to smoking one pack per day for one year, acknowledged that he smoked one and one-half packs on one day and that the remaining reported histories by examining and reviewing physicians range from three to four cigarettes per day to one and one-half packs per day. Decision and Order at 4. The administrative law judge did not base his smoking history finding only on Dr. Abernathy's reported smoking history. Moreover, the administrative law judge noted Dr. Abernathy's medical opinion that claimant suffers from mild

bronchitis caused by cigarette smoking, but found his opinion entitled to lesser weight than those of the Board-certified physicians. Decision and Order at 16. Any alleged mistake by the administrative law judge regarding claimant's smoking history is harmless as it is not disputed that the administrative law judge permissibly gave less weight to the opinions of Drs. Forehand and Jabour, the only doctors of record to diagnose pneumoconiosis because of their qualifications,[6] *inter alia,* and because he properly found the contrary opinions of Drs. Sargent and Castle better supported by the evidence of record. *Mc Math v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*)*; Skrack, supra*; *Kozele, supra*; Decision and Order at 16, 17.

Inasmuch as claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement, an award of benefits under 20 C.F.R. Part 718 is precluded. *See Anderson v. Valley Camp of Utah,* Inc. 12 BLR 1-111 (1989); *Perry, supra.* Therefore, we need not address claimant's arguments under 20 C.F.R. §718.204(b). *Endrezzi v. Bethlehem Mines Corp.*, 8 BLR 1-11 (1985).

[6]The administrative law judge properly found that Dr. Forehand is Board-certified in pediatrics, allergy and immunology. In contrast Dr. Sargent, who examined claimant and opined that claimant had tobacco-smoking-induced chronic bronchitis, is Board-certified in internal medicine and pulmonary diseases. Decision and Order at 11, 17; Director's Exhibit 20; Employer's Exhibit 2. The administrative law judge properly found that Dr. Sargent's opinion was supported by that of Dr. Castle, who is also Board-certified in internal medicine and pulmonary diseases. Decision and Order at 12,17; Employer's Exhibits 7, 10. Similarly, the administrative law judge found that Dr. Jabour relied on a CT scan that he said showed pleural base nodules consistent with pneumoconiosis, an opinion contradicted by Drs. Wheeler and Scott, who are both Board-certified radiologists and B readers, and by Dr. Castle, a B reader and Board-certified pulmonologist. Decision and Order at 17; Claimant's Exhibit 2. Dr. Castle opined that the plural based nodules observed by Dr. Jabour are not cause by pneumoconiosis. *Id.* Although the administrative law judge noted that Dr. Jabour's letterhead identifies him as a "Diplomate of the American [*sic]* of Internal Medicine in Pulmonary and Internal Medicine,"Decision and Order at 17, the record does not show that Dr. Jabour holds special qualifications in reading CT scans.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge