BRB No. 99-0622 BLA

BOBBY DENNIS SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SWITCH ENERGY CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS INSURANCE FUND	)	
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Bobby Dennis Shepherd, Cornettsville, Kentucky, *pro se*.

John T. Chafin (Kazee, Kinner & Chafin), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (1997-BLA-1311) of Administrative Law Judge Daniel J. Roketenetz denying benefits in a duplicate 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). In this duplicate claim, the administrative law judge found that claimant's prior claim

was finally denied on September 12, 1994.[1] The administrative law judge found that employer was the responsible operator and credited claimant with three years of coal mine employment. Based on the filing date of the claim, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. Pursuant to Part 718, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4). Thus, the administrative law judge concluded that claimant failed to demonstrate a material change in conditions at 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers'

[1] Claimant filed his initial claim for benefits on May 21, 1993. Director's Exhibit 29. The district director denied the claim on October 27, 1993 and again on September 12, 1994 because claimant failed to establish the existence of pneumoconiosis arising out of coal mine and the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. Part 718. *Id*. Claimant took no further action until he filed the present claim on March 25, 1996. Director's Exhibit 1. The district direct denied the present claim on August 9, 1996 on the grounds that the newly submitted evidence did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment, and was, therefore, insufficient to demonstrate a material change in conditions at 20 C.F.R. §725.309. Director's Exhibit 18. The district director also denied this claim for the same reasons after a conference on February 25, 1997. Director's Exhibit 28.

Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.

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 in a living miner's claim 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement.[2] *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 administrative law judge properly credited claimant with three years of coal mine employment based on Social Security earnings records. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984). We, therefore, affirm the finding of the administrative law judge on the length of coal mine employment as his determination is rational and supported by substantial evidence.

After considering the evidence submitted following the denial of claimant's prior claim, the administrative law judge correctly concluded that claimant failed to establish any element of entitlement he had previously failed to establish, *see* Decision and Order at 5; Director's Exhibit 29, and therefore found that claimant failed to establish a material change in conditions. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

[2] Since the miner's last coal mine employment took place in Kentucky, the law of the United States Court of Appeals for the Sixth Circuit applies. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

At Section 718.202(a)(1), the administrative law judge permissibly declined to consider the interpretations of the x-rays taken prior to the denial of claimant's previous claim on September 12, 1994.[3] *Id*. The administrative law judge correctly noted that the record contained four interpretations of the x-ray dated May 4, 1996, two interpretations of the x-ray dated April 8, 1996 and one interpretation of the x-ray dated August 8, 1995 and that the interpretations of the May 4, 1996 and April 8, 1996 x-rays were negative for pneumoconiosis and the interpretation of the August 8, 1995 x-ray was positive for pneumoconiosis. *See* Decision and Order at 6-7; Director's Exhibits 7A, 13-17A, 19. In finding this evidence insufficient to meet claimant's burden of proof, the administrative law judge acted within his discretion when he accorded more weight to the interpretations of the B-readers.[4] *See Church*

[3] The record contains three negative interpretations of an x-ray taken on February 21, 1994. *See* Director's Exhibit 27. The original interpretation of this x-ray was also negative and was part of the evidence upon which claimant's prior claim was denied. *See* Director's Exhibit 29. The x-rays dated December 13, 1994 and August 18, 1994, which were interpreted as negative for pneumoconiosis, and the x-ray dated December 12, 1992, which was interpreted as positive for pneumoconiosis, were not considered because these x-rays predated the denial of claimant's prior claim. *See* Director's Exhibits 9, 19.

[4] Because the record does not contain the qualifications of Drs. Binns, Wersha and Gogineni, the administrative law judge improperly found that these physicians were B-readers. *See* Decision and Order at 7; Director's Exhibits 16, 17, 17A. Since the administrative law judge did not err when he found the weight of the newly

v. Eastern Associated Coal Co., 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Likewise, the administrative law judge properly found the weight of the x-ray interpretations of the more qualified readers negative for pneumoconiosis. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). We, therefore, affirm the findings of the administrative law judge at Section 718.202(a)(1).

The administrative law judge also correctly determined that since the record contained no biopsy or autopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2) and that claimant, a living miner, was not entitled to the presumptions at Section 718.202 (a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306.

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submitted x-ray interpretations negative for pneumoconiosis, any error in crediting the interpretations of these physicians on the basis of their qualifications is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

At Section 718.202(a)(4), the administrative law judge permissibly found that the medical opinion of Dr. Sandlin, which diagnoses pneumoconiosis, was not documented and reasoned as the record does not contain any documentary evidence which supports Dr. Sandlin's medical diagnoses. *See Church*, *supra*; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibit 9. Likewise, the administrative law judge acted within his discretion when he declined to find reasoned the medical opinion of Dr. Sundaram, which also diagnoses pneumoconiosis, because the record does not contain the documentary evidence upon which he based his opinion. *Id*. Furthermore, the administrative law judge acted within his discretion when he accorded probative weight to the medical opinions of Drs. Dahhan and Wicker, which do not find the existence of pneumoconiosis, because he found these opinions supported by their underlying documentation and objective tests results.[5] *See Carson*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(4) as it is supported by substantial evidence. *See Perry*, *supra*.

At Section 718.204(c)(1), the administrative law judge incorrectly concluded that all of the newly submitted pulmonary function studies were nonqualifying as the post-bronchodilator test performed by Dr. Dahhan on May 4, 1996 met the regulatory standards for disability.[6] *See* 20 C.F.R. §718.204(c)(1), Appendix B. However, as the remaining new pulmonary function studies are nonqualifying, we need not remand this case for further consideration as any error by the administrative law judge is harmless inasmuch as the record does not contain any additional evidence regarding the presence of a totally disabling respiratory impairment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Fields*, *supra*. The administrative law judge properly concluded that all of the newly submitted blood gas study tests were nonqualifying under the regulatory criteria and that the record did not contain any evidence of cor pulmonale. *See* 20 C.F.R. §718.204(c)(2), Appendix C; 20 C.F.R. §718.204(c)(3). Finally, at Section 718.204(c)(4), the administrative law judge permissibly concluded that the medical opinions of Drs. Sandlin, Sundaram,

[5] While the administrative law judge did not address Dr. Dahhan's failure to discuss his qualifying pulmonary function study, we need not remand this case for further consideration as the record does not contain any credible evidence on the existence of pneumoconiosis. *See Larioni*, *supra*.

[6] The qualifying values in Dr. Dahhan's post-bronchodilator test are as follows: FEV1 2.07, MVV 78, and the FEV1/FVC ratio of 53%. *See* 20 C.F.R. §718.204(c)(1), Appendix B.

Dahhan, and Wicker did not diagnose a respiratory or pulmonary impairment, and were, therefore, insufficient to support claimant's burden of proof. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995) *aff'g* 16 BLR 1-11 (1991). We, therefore, affirm the finding of the administrative law judge that the newly submitted evidence was insufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c). We also affirm the finding of the administrative law judge that claimant failed to show a material change in conditions pursuant to Section 725.309 as none of the newly submitted evidence established any of the elements of entitlement which claimant had failed to establish in his previous claim.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge