BRB No. 99-0665 BLA

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

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Dorothy L. Page (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, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-829) of Administrative Law Judge Thomas F. Phalen, Jr. 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). The administrative law judge found at least twenty-six years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4-5. After determining that the instant claim was a duplicate claim,[1] the administrative law

[1]Claimant filed his initial claim for benefits with the Social Security Administration on December 20, 1972. Director's Exhibit 25. Claimant also filed a claim with the Department of Labor on August 30, 1977. Director's Exhibit 25. Both

judge noted the proper standard and found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c)(4). The Director, Office of Workers' Compensation Programs, responds urging affirmance of the administrative law judge's Decision and Order.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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

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claims were finally denied by the Department of Labor on December 5, 1983. Director's Exhibit 25. Claimant did not appeal the denial but subsequently filed a second claim on May 30, 1991, which was finally denied on May 26, 1995, because claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 25. Claimant filed his most recent claim on April 29, 1997. Director's Exhibit 1.

[2]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-616 (1983).

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)(*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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Considering the newly submitted evidence, the administrative law judge rationally found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge correctly noted that the previous claim was denied as claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Decision and Order at 3, 6; Director's Exhibit 25. The United States Court of Appeals for the Sixth Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[3] *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Considering the newly submitted evidence to determine if a material change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin, supra*. The administrative law judge, in the instant case, permissibly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge noted that of the four newly submitted x-ray interpretations of record, all of the interpretations were by physicians who were either B-readers or B-readers and Board-certified radiologists. Decision and Order at 6-7. Of these interpretations, three readings are negative for pneumoconiosis, Director's Exhibits 7, 8, 22, and

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the State of Tennessee. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

one reading is positive. Director's Exhibit 9. The administrative law judge then concluded that, based upon the number of negative interpretations and the credentials of the physicians rendering these interpretations, the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 7. Since the administrative law judge rationally relied on the preponderance of the x-ray readings by physicians who are B-readers and Board-certified radiologists, substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). *See* Director's Exhibits 7, 8, 9, 22; Decision and Order at 7; *Staton v. Norfolk & Western Railroad 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Sheckler v. Clinchfield Coal Co*. 7 BLR 1-128 (1984).

In addressing the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered the entirety of the newly submitted medical opinions of Drs. Baker and Broudy. Whereas Dr. Baker opined that claimant suffers from pneumoconiosis, Director's Exhibit 5, Dr. Broudy opined that claimant does not suffer from pneumoconiosis. Director's Exhibit 22. The administrative law judge, after noting that both physicians were board-certified in internal medicine and pulmonary disease, properly accorded determinative weight to the opinion of Dr. Broudy over the contrary opinion of Dr. Baker because his opinion is better supported by the objective evidence. *See Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.,* 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 8-9. Contrary to claimant's contention, the administrative law judge properly noted that Dr. Baker was claimant's treating physician and further provided a rational reason for finding his opinion entitled to less weight. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Wetzel, supra*; Decision and Order at 8-9. Thus, we affirm the administrative law judge's finding that the preponderance of the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Perry, supra*.

With respect to 20 C.F.R. §718.204(c)(4), the administrative law judge, also rationally determined that the evidence of record was insufficient to establish total disability. *Piccin*, *supra*. The administrative law judge permissibly concluded that the newly submitted evidence was insufficient to establish total disability as no physician of record opined that claimant was suffering from a totally disabling respiratory or

pulmonary impairment.[4] Director's Exhibits 5, 22; Decision and Order at 11; *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1988); *Fields, supra*; *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.* 9 BLR 1-104 (1986)(*en banc*); *Gee v. W. G. Moore and Sons,* 9 BLR 1-4 (1986)(*en banc*); *Perry, supra*. Contrary to claimant's contention, opinions finding no significant or compensable impairment need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel, supra*. Moreover, we reject claimant's arguments that the administrative law judge failed to consider that he is totally disabled for comparable and gainful work because of his age, work experience and education, since the newly submitted medical opinions do not establish the existence of a totally disabling respiratory impairment under Section 718.204(c).[5] *Carson v. Westmoreland Coal Co.,* 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

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. *Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as the administrative law judge in this case adequately examined and discussed all of the relevant newly submitted evidence as it relates to the existence of pneumoconiosis and total disability and permissibly concluded that this evidence fails to carry claimant's burden of establishing a material change in conditions pursuant to 20 C.F.R. §725.309, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and is in accordance with law.

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

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[4]Dr. Baker opined that claimant has a mild impairment and has the respiratory capacity to perform his last coal mine employment. Director's Exhibit 5. Dr. Broudy opined that claimant has the respiratory capacity to return to coal mine employment or to do similarly arduous manual labor. Director's Exhibit 22.

[5] Claimant's reliance on *Bentley v. Director, OWCP,* 7 BLR 1-612 (1982) is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge