BRB No. 00-0568 BLA

ESTHER DAFF (Widow of HAROLD DAFF) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Esther Daff, Richmond, Kentucky, *pro se*.

Helen H. Cox (Judith E. Kramer, Acting 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIUM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order - Denying Benefits (99-BLA-0263 and 99-BLA-0264) of Administrative Law Judge Donald W. Mosser on a duplicate miner's claim and a survivor's 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*.[2] The administrative law judge found that the newly submitted evidence was insufficient

[1]Claimant is Esther Daff, surviving spouse of Harold Daff, the miner.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000), and total respiratory disability at 20 C.F.R. §718.204(c)(2000), and thus, was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(c)(2000) in the miner's claim and precluded an award of benefits in the survivor's claim. Accordingly, the administrative law judge denied both claims. On appeal, claimant identifies evidence supportive of her claim. The Director, Office of Workers' Compensation Programs (the Director), responds, seeking affirmance of the denial.

The procedural history of the two instant claims is as follows: The miner filed his first claim for benefits with the Department of Labor (DOL) on April 29, 1994. The district director denied the claim because the evidence failed to establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 17. The miner took no further action on this claim. The miner filed a second claim with the DOL on August 23, 1996. Director's Exhibit 1. The miner died on February 6, 1996. Director's Exhibit 26. In May of 1998, claimant filed a survivor's claim with DOL. Director's Exhibit 23. Following a hearing, Administrative Law Judge Donald W. Mosser issued a Decision and Order dated January 26, 2000, denying benefits in both claims. Claimant then filed the instant appeal with the Board.

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on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which only the Director has responded.[3] Based upon the brief submitted by the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of the appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Director responds to claimant's appeal, asserting that the administrative law judge's Decision and Order is supported by substantial evidence, and urging affirmance.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) in order to establish entitlement to survivor's benefits. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

[3]The Director's brief, dated March 8, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. Pursuant to the Board's instructions, claimant's failure to submit a brief within 20 days following receipt of the Board's Order dated February 21, 2001 is construed as a position that the challenged regulations will not affect the outcome of this case.

Initially, with respect to the miner's claim, we note that the administrative law judge applied the correct legal standard applicable to duplicate claims filed in cases which arise within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit, namely, whether the newly submitted evidence establishes at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); 20 C.F.R. §725.309(d)(2000).[4]

[4]We note that while 20 C.F.R.§725.309(d) has been amended by the 2001 amendments, the new regulation applies only to claims filed on or after January 19, 2001, and thus, is not applicable to the instant claim.

With respect to the administrative law judge's finding at Section 718.202(a)(1)(2000), the administrative law judge correctly found that the record contained four newly submitted x-ray interpretations of record. Decision and Order at 7. He correctly found that both Drs. Sargent and Clarke submitted x-ray interpretations of an April 30, 1996 x-ray which were positive for pneumoconiosis, Director's Exhibits 10, 13; Decision and Order at 7; and correctly found that Dr. Sargent was a B-reader[5] and a Board-certified radiologist. He also correctly noted that Dr. Sargent read the x-ray as 1/0 and stated that he would need more films in order to rule out other disease processes such as tuberculosis. Director's Exhibit 10; Decision and Order at 7. He then found that Dr. Westerfield, a B-reader, and Dr. Sargent, each read the September 10, 1996 x-ray as negative for pneumoconiosis. Directors Exhibits, 11, 9; Decision and Order at 7. The administrative law judge then rationally discounted Dr. Sargent's positive reading of the April 30, 1996 film on the basis that his comments relating to the interpretation rendered it a qualified interpretation. *See Justice v. Island Creek Coal Co.,* 11 BLR 1- 91 (1988)*; Campbell v. Island Creek Coal Co.*, 11 BLR 1-16 (1987). The administrative law judge then weighed Dr. Clarke's positive interpretation against the negative interpretations of the September 10, 1996 film by Drs. Sargent and Westerfield, and permissibly credited the negative readings because of the readers' superior qualifications, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*), and because Dr. Sargent did not question the validity of this x-ray. Decision and Order at 7. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence of record fails to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1).

The administrative law judge correctly concluded that the record does not contain any autopsy or biopsy evidence, hence pneumoconiosis could not be established by such evidence. *See* 20 C.F.R. §718.202(a)(2). Moreover, the administrative law judge correctly concluded that none of the presumptions contained in Section 718.202(a)(3)(2000) was

[5]A B-reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R §718.202(a)(1)(ii)(E); 42 C.F.R §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211 (1985).

applicable. *See* 20 C.F.R. §§718.202(a)(3); 718.304; 718.305, 718.306. Accordingly, we affirm the administrative law judge's findings thereunder.

With respect to the administrative law judge's finding at Section 718.202(a)(4)(2000), the administrative law judge correctly found that the record contains three relevant reports. Dr. Clarke opined that claimant suffered from pneumoconiosis. Director's Exhibit 6. In addition, the hospital records contain a diagnosis of chronic obstructive pulmonary disease, possibly black lung. Director's Exhibit 30. Finally, Dr. Westerfield, whom the administrative law judge correctly found is Board-certified in internal medicine and pulmonary disease, opined that claimant did not suffer from pneumoconiosis. Director's Exhibit 7. The administrative law judge permissibly discounted the hospital records because the diagnosis of possible black lung was unconfirmed and appeared to be a history provided by the miner. *See Heaton v. Director, OWCP*, 6 BLR 1- 222 (1984); *Bushilla v. North American Coal Corp.*, 6 BLR 1-365 (1983). He then accorded greater weight to Dr. Westerfield's opinion, over that of Dr. Clarke and the hospital records, on the basis of Dr. Westerfield's superior credentials, *see Worhach, supra; Clark, supra;* and because he rationally concluded that Dr. Westerfield's opinion was better supported by the objective data of record. *See Wilt v. Wolverine Mining Co.,* 14 BLR 1-70 (1990); *McMath v. Director, OWCP, 12 BLR 1-6 (1988); Rafferty v. Jones & Laughlin Steel Corp.,* 9 BLR 1-231 (1987*)*. We affirm, therefore, the administrative law judge's finding that, based upon a preponderance of the evidence, the medical opinions of record fail to establish the existence of pneumoconiosis, as it is supported by substantial evidence and is in accordance with applicable law. *See* 20 C.F.R. §718.202(a)(4). As the evidence thereby fails to establish the existence of pneumoconiosis at Section 718.202(a), it is insufficient to establish that a material change in conditions at Section 725.309(d)(2000).

In addressing the issue of total disability,[6] the administrative law judge correctly concluded that the newly submitted evidence consisted of one pulmonary function study, which produced non-qualifying values. Director's Exhibits, 5, 7. We therefore affirm the administrative law judge's finding the pulmonary function study evidence is insufficient to establish total respiratory disability. *See* 20 C.F.R. §718.204(b)(2)(i); *Clark, supra; Fields v. Island Creek Coal Corp.,* 10 BLR 1-19 (1987)*; Winchester v. Director v. OWCP, 9 BLR 1-177 (1986)*.

[6]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

The administrative law judge also correctly found that the newly submitted evidence consisted of one blood gas study which produced non-qualifying values. Director's Exhibit 7. We therefore affirm the administrative law judge's finding that the blood gas study evidence is insufficient to establish total respiratory disability. *See* 20 C.F.R. §718.204(b)(2)(ii); *Clark, supra; Fields, supra; Tucker v Director v. OWCP*, 10 BLR 1-35 (1987).

With respect to the administrative law judge's finding at Section 718.204(c)(3)(2000), the administrative law judge correctly found that the newly submitted evidence contains no evidence of cor pulmonale with right sided congestive heart disease. Decision and Order at 8. We therefore affirm the administrative law judge's finding that total respiratory disability is not established by evidence of cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987).

The administrative law judge also found that the medical opinions of record were insufficient to establish total disability at Section 718.204(c)(4)(2000). The administrative law judge found that the record contained the opinions of two doctors. The administrative law judge found that Dr. Clarke diagnosed total respiratory disability, Director's Exhibit 6, while Dr. Westerfield opined that claimant did not have a totally disabling respiratory impairment, but rather, was totally disabled solely due to his cardiac condition. Director's Exhibit 7; Decision and Order at 8. The administrative law judge then rationally gave greater weight to Dr. Westerfield's opinion, over Dr. Clarke's opinion, on the basis that the former possessed superior pulmonary credentials, *Worhach, supra; Clark, supra; Tackett, supra;* and because he rationally found that the former opinion was better supported by the objective data of record. See *Wilt , supra; McMath, supra; Rafferty, supra.* We affirm, therefore, the administrative law judge's finding that the newly submitted evidence is insufficient to establish total respiratory disability, *see* 20 C.F.R §718.204(b)(2)(iv), and thus insufficient to establish a material change in conditions pursuant to Section 725.309(d)(2000). *See Ross, supra.* As the administrative law judge's findings preclude entitlement pursuant to the 20 C.F.R. Part 718 regulations in the miner's claim, we affirm the administrative law judge's denial of benefits with respect to the miner's claim. *See Trent, supra: Perry, supra*.

With respect to the survivor's claim, the administrative law judge correctly found that there was no evidence in the record which indicated that pneumoconiosis either caused or hastened the miner's death, and as such the evidence was insufficient to establish that pneumoconiosis caused the miner's death pursuant to Section 718.205(2000). Inasmuch as this finding mandates a denial of benefits in the survivor's claim, we affirm the administrative law judge's denial of benefits in the survivor's claim. *See* 20 C.F.R. §718.205; *Trumbo, supra*; *Dillon, supra; Neeley, supra*.

Accordingly, the administrative law judge's Decision and Order- Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge