BRB No. 03-0598 BLA

LEON ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MCCOY ELKHORN COAL CORPORATION	)	DATE ISSUED: 03/08/2004
	)	
Employer	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leon Adkins, Steele, Kentucky, *pro se*.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order - Denying Benefits (2002-BLA-5434) of Administrative Law Judge Joseph E. Kane 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).[1] Initially, the administrative law judge found that this case involves the filing of a subsequent claim dated January 26, 2001, pursuant to 20 C.F.R. §725.309.[2] Decision and Order at 3, 10. The administrative law judge credited claimant with thirty-five years of coal mine employment, Decision and Order at 5, and adjudicated the claim under 20 C.F.R. Part 718. Addressing the merits of entitlement, the administrative law judge 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). Decision and Order at 11-13. In addition, the administrative law judge found that the new evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 13-15. Consequently, the administrative law judge found that claimant failed to demonstrate a change in any condition of entitlement upon which the prior claim was denied. Accordingly, the administrative law judge denied claimant's application for benefits. On appeal, claimant generally states his disagreement with the administrative law judge's denial of benefits. Employer has not submitted a brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be

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[1] 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 on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant's initial application for benefits, filed on August 5, 1998, was denied by the district director on December 1, 1998, based on the determination that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718. Decision and Order at 3, 10; Director's Exhibit 1.

[3] The administrative law judge's decision to credit claimant with thirty-five years of coal mine employment has not been challenged by the parties. Since this finding is not adverse to claimant, it is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant filed his second application for benefits on January 26, 2001, shortly after the amended regulations took effect. The amended regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. 20 C.F.R. §725.309(d). The regulations further state that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d)…) has changed since the date upon which the order denying the prior claim became final."[4] 20 C.F.R. §725.309(d). In this case, claimant's prior claim was denied based on the determination that the evidence of record was insufficient to establish any of the requisite elements of entitlement pursuant to 20 C.F.R. Part 718. Director's Exhibit 1.

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the

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[4] In defining the conditions of entitlement in a miner's claim, 20 C.F.R. §725.202(d) states:

> An individual is eligible for benefits under this subchapter if the individual:
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> (1) Is a miner as defined in this section; and
> (2) Has met the requirements for entitlement to benefits by establishing that he or she:
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> (i) Has pneumoconiosis (see §718.202), and
> (ii) The pneumoconiosis arose out of coal mine employment (see §718.203), and
> (iii) Is totally disabled (see §718.204(c)), and
> (iv) The pneumoconiosis contributes to the total disability (see §718.204(c)), and
>
> (3) Has filed a claim for benefits in accordance with the provisions of this part.

20 C.F.R. §725.202(d). Although the regulations refer to establishing that the miner is "totally disabled (see §718.204(c))," 20 C.F.R. §725.202(d)(2)(iii), total disability is established pursuant to 20 C.F.R. §718.204(b), while disability causation is established pursuant to 20 C.F.R. §718.204(c).

administrative law judge's finding that the newly submitted evidence is insufficient to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. In determining whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge rationally found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis. Within a reasonable exercise of his discretion as trier-of-fact, the administrative law judge accorded greater weight to the negative x-ray interpretation by Dr. Poulos, based on his superior qualifications as a B reader and Board-certified radiologist, over a positive reading of the same film by Dr. Hussain, who possesses no specific radiological qualifications.[5] Decision and Order at 11; Director's Exhibits 8, 10; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

In addition, we affirm the administrative law judge's determination that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3). Decision and Order at 11. The administrative law judge properly found that there is no biopsy evidence of record and, therefore, that claimant has not established the existence of pneumoconiosis under Section 718.202(a)(2). Decision and Order at 11; 20 C.F.R. §718.202(a)(2). In addition, he properly found that claimant was not entitled to the presumptions set forth at 20 C.F.R. §718.202(a)(3), *i.e.*, there is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e); and the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a). Decision and Order at 11; 20 C.F.R. §718.202(a)(3).

With respect to the medical opinion evidence, we affirm the administrative law judge's finding that the two newly submitted medical opinions were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 12-13. The administrative law judge found the medical opinion of Dr. Hussain, which included a diagnosis of pneumoconiosis and COPD, to be entitled to no evidentiary weight based on his determination that Dr. Hussain failed to adequately explain the bases for his diagnosis. Decision and Order at 12; Director's Exhibit 8; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002), *cert. denied*, 123 S.Ct 1483 (2003); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*,

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[5] The newly submitted x-ray evidence consists of three interpretations of the March 28, 2001 x-ray film, one interpretation was positive for pneumoconiosis, one interpretation was negative, and the third interpretation was read solely to determine the quality of the film. Decision and Order at 7; Director's Exhibits 8, 10.

12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Furthermore, the administrative law judge reasonably found Dr. Hussain's diagnosis of COPD to be insufficient to establish the existence of pneumoconiosis because the physician opined that it was due to claimant's tobacco smoking and did not relate it to claimant's coal dust exposure or coal mine employment. Decision and Order at 12-13; Director's Exhibit 8; 20 C.F.R. §§718.201, 718.202(a)(4); *see Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Handy v. Director, OWCP*, 16 BLR 1-73 (1990).

In addition, we affirm the administrative law judge's finding that the opinion of Dr. Rosenberg, diagnosing the existence of simple coal workers' pneumoconiosis, is insufficient to establish the existence of pneumoconiosis, as it is based solely on the physician's positive interpretation of a chest x-ray and does not otherwise provide a basis for his diagnosis. Decision and Order at 13; Employer's Exhibit (unnumbered); *Worhach*, 17 BLR 1-105; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Inasmuch as the administrative law judge considered the relevant evidence of record, we affirm his finding that the newly submitted evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a).

Furthermore, we affirm the administrative law judge's finding that the preponderance of the newly submitted medical evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2), as supported by substantial evidence. Decision and Order at 13-15. The administrative law judge properly found the newly submitted pulmonary function study and blood gas study did not produce qualifying values, and, thus, were insufficient to demonstrate total disability.[6] Decision and Order at 8, 14; Director's Exhibit 8; 20 C.F.R. §718.204(b)(2)(i)-(ii). In addition, the administrative law judge correctly found that the current record contains no evidence of cor pulmonale with right sided congestive heart failure and, therefore, as a matter of law, total disability was not demonstrated pursuant to Section 718.204(b)(2)(iii). Decision and Order at 14; 20 C.F.R. §718.204(b)(2)(iii).

Finally, we affirm the administrative law judge's finding that total disability was not demonstrated at Section 718.204(b)(2)(iv), as the newly submitted medical opinions of record were insufficient to demonstrate total respiratory or pulmonary disability. The administrative law judge reasonably found that Dr. Hussain's diagnosis of a mild pulmonary impairment was not sufficient to demonstrate total disability pursuant to

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[6] 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, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

Section 718.204(b)(2)(iv), as the physician failed to adequately explain the basis for his opinion. Decision and Order at 15; Director's Exhibit 8; *see Hill*, 123 F.3d 412, 21 BLR 2-192; *Rowe*, 710 F.2d 251, 5 BLR 2-99; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Additionally, the administrative law judge properly found that the medical opinion of Dr. Rosenberg stated that claimant does not suffer from a respiratory impairment and retains the respiratory capacity to perform his usual coal mine employment. Decision and Order at 15; Employer's Exhibit (unnumbered); *Carson*, 19 BLR 1-16; *Gee*, 9 BLR 1-4. Consequently, the administrative law judge properly exercised his discretion in determining that the medical opinions of record were insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Decision and Order at 15; *see Carson*, 19 BLR 1-16*; Taylor*, 12 BLR 1-83; *see also Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Therefore, as the administrative law judge has considered all of the relevant evidence of record, we affirm his finding that based on the evidence as a whole, claimant has failed to establish a total respiratory disability pursuant to Section 718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

As claimant has failed to establish either the existence of pneumoconiosis or a total respiratory disability, we affirm the administrative law judge's denial of this claim based on his finding that claimant failed to demonstrate a change in any condition of entitlement upon which the prior claim was denied. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, BLR , BRB No. 03-0367 BLA (Jan. 22, 2004).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge