BRB No. 97-0864 BLA

JIMMY D. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	DATE ISSUED:
	)	
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 Denying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Tim White, Vansant, Virginia, lay representative, for claimant.

Curtis D. McKenzie (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1], without the benefit of counsel, appeals the Decision and Order Denying Benefits (95-BLA-0691) of Administrative Law Judge Daniel A. Sarno, Jr., on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

[1] Claimant is Jimmy D. Owens, the miner, who filed his original application for benefits with the Department of Labor (DOL) on December 22, 1987. Director's Exhibit 26. This claim was denied by Administrative Law Judge Robert L. Hillyard by Decision and Order dated March 29, 1991, on the basis that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability pursuant to Section 718.204(c). *Id*. Following claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Owens v. Harmon Mining Corp.*, BRB No. 91-1158 BLA (Aug. 25, 1992)(unpub.). *Id.* No appeal or further action was taken on this claim. Claimant then filed a duplicate claim with DOL on January 25, 1994. Director's Exhibit 1.

amended, 30 U.S.C. §901 *et seq*. The case is before the Board for the second time. The administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and therefore claimant had failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied the claim without rendering a finding as to whether the evidence was sufficient to establish a material change in conditions by establishing total respiratory disability at 20 C.F.R. §718.204(c).

In an appeal filed by a claimant 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); *Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). 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). Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a) is supported by substantial evidence, and that the administrative law judge's failure to consider whether the evidence establishes a material change in conditions by establishing a totally disabling respiratory impairment pursuant to Section 718.204(c) is harmless error, and therefore, it urges affirmance of the administrative law judge's denial of benefits.

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 considering the newly submitted x-ray interpretation evidence at Section 718.202(a)(1), the administrative law judge accurately summarized the 15 x-ray interpretations, and found that 14 were negative for the existence of pneumoconiosis and that only one interpretation, submitted by Dr. Bassali, Claimant's Exhibit 1, was positive for pneumoconiosis. Decision and Order at 9. The administrative law judge considered the qualifications of all of the readers, found them all to be the same, and then permissibly found that the preponderance of the evidence failed to establish the existence of pneumoconiosis. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). The administrative law judge then concluded that the x-ray interpretation evidence failed to establish a material change in conditions pursuant to Section 725.309(d). We affirm, therefore, the administrative law judge's finding pursuant to Section 718.202(a)(1), as it is supported by substantial evidence.

The administrative law judge further found that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge correctly found that only Dr. Modi, Claimant's Exhibit 2, opined that claimant suffered from pneumoconiosis, whereas Drs. Fritzhand, Director's Exhibit 9; Dahhan,

Director's Exhibit 25, Employer's Exhibits 13, 17; and Fino, Employer's Exhibits 1, 16, 18, all opined that claimant did not have pneumoconiosis. Decision and Order at 10. The administrative law judge permissibly credited the opinions of Drs. Dahhan and Fino as "well reasoned, documented and based upon objective evidence," and noted that both the physicians were pulmonary specialists. Decision and Order at 10; *Church v. Eastern Associated Coal Co.*, 21 BLR 1-52 (1997) *aff'g on recon.*, 20 BLR 1-8 (1996); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). The administrative law judge found that Dr. Fritzhand's opinion was supported by the conclusions of Drs. Dahhan and Fino. The administrative law judge then permissibly concluded that the weight of the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), and thereby, failed to establish a material change in conditions pursuant to Section 725.309(d). We affirm, therefore, the administrative law judge's determination that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(4), and fails to establish a material change in conditions at Section 725.309(d), as it is supported by substantial evidence.[2]

The administrative law judge however failed to render a finding as to whether the newly submitted evidence establishes total respiratory disability at Section 718.204(c), and thus, whether the total disability evidence establishes a material change in conditions at Section 725.309(d). The record contains newly submitted pulmonary function studies, blood gas studies and validation reports that the administrative law judge did not weigh. Director's Exhibits 7, 25, 29; Employer's Exhibits 1, 4, 10; Claimant's Exhibits 1, 3. Moreover, the newly submitted opinion by Dr. Modi, could, if credited, establish a material change in conditions at Section 718.204(c)(4). Claimant's Exhibit 1. Contrary to employer's assertion, the administrative law judge is required to weigh this evidence to determine if it is sufficient to establish a material change in conditions pursuant to *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). We remand the case, therefore, to the administrative law judge for him to render a finding as to whether the newly submitted evidence establishes total respiratory disability at Section 718.204(c), and thereby, a material change in conditions at Section 725.309(c), as required in *Rutter, supra*. On remand, should the administrative law judge find that claimant established a material change in conditions at Section 725.309(c), he must the evaluate the record as a whole to determine if it is sufficient to establish entitlement on the merits. *Id*.

[2] The administrative law judge correctly concluded that claimant did not attempt to establish the presence of pneumoconiosis at Section 718.202(a)(2), (3) inasmuch as the record does not contain any newly submitted biopsy evidence, or evidence of complicated pneumoconiosis. Decision and Order at 10, n.5.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge