BRB No. 98-0912 BLA

DELMAR M. STREET	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	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- Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Delmar M. Street, Rowe, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:
Claimant[1], without the benefit of counsel[2], appeals the Decision and Order- Rejection

[1] Claimant is Delmar Street, the miner, who filed three claims with the Department of Labor (DOL). The first, filed on September 25, 1986, was dismissed at claimant's request by Administrative Law Judge Giles J. McCarthy in an Order of Dismissal dated May 11, 1988. Director's Exhibit 22. Thereafter, claimant filed a second claim on March 25, 1992 with DOL. Director's Exhibit 22. This claim was denied by the district director on October 22, 1992. *Id*. Claimant never appealed this determination, and thus, it became final. Claimant then filed a third claim, the instant duplicate claim, on January 9, 1995. Director's Exhibit 1.

[2] Ron Carson, a benefits counselor, with Stone Mountain Health Services of Vansant, Virginia, requested , on behalf of claimant, that the Board review the administrative law

of Claim (67-BLA-0114) of Administrative Law Judge Edward Terhune Miller on 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 administrative law judge concluded that the evidence did not establish a material change in condition pursuant to 20 C.F.R. §725.309(d) as it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). As these were the elements of entitlement, claimant failed to establish in his previous claim, the administrative law judge citing *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), denied benefits.

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); *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 responds that the administrative law judge's Decision and Order is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a brief in the instant case.

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is total disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant files for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must

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judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *See Rutter*, *supra*. If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter*, *supra*.

Claimant was previously denied benefits because he failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and because he failed to establish a totally disabling respiratory impairment arising out of coal mine employment pursuant to Section 718.204(b), (c). Director's Exhibit 21. Therefore, the threshold issue in claimant's duplicate claim is whether the new evidence establishes a material change in conditions by proving either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability arising out of coal mine employment pursuant to Section 718.204(b), (c). *See Rutter*, *supra*.

The administrative law judge initially found that the newly submitted evidence failed to establish a material change in conditions pursuant to Section 725.309(d), as it failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge found the newly submitted x-ray evidence of record was interpreted negative for the existence of pneumoconiosis. Director's Exhibits 12, 13; Employer's Exhibit 1; Decision and Order at 5. The administrative law judge therefore correctly found that this evidence was insufficient to establish a material change in conditions and the existence of pneumoconiosis. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Inasmuch as the administrative law judge's finding that all of the newly submitted x-rays are negative is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence fails to establish a material change in conditions pursuant to Section 725.309(d) insofar as it fails to establish the existence of pneumoconiosis at Section 718.202(a)(1).

The administrative law judge also correctly concluded that the record did not contain any autopsy or biopsy evidence, so that the existence of pneumoconiosis could not be established under Section 718.202(a)(2). Moreover, the administrative law judge correctly concluded that none of the presumptions contained at Section 718.202(a)(3) were applicable. *See* 20 C.F.R. §§718.304; 718.305, 718.306. Accordingly, we affirm the administrative law judge's findings thereunder.

The administrative law judge also found that the newly submitted evidence failed to establish a material change in conditions pursuant to Section 725.309 as it failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge correctly noted that as both Dr. Iosif, Director's Exhibit 10, and Dr. Castle, Employer's Exhibit 3, submitted opinions that claimant did not suffer from pneumoconiosis, they were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

See Worhach, *supra*; *Trent*, *supra*. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish a material change in conditions pursuant to Section 725.309(d) as it fails to establish the existence of pneumoconiosis at Section 718.202(a)(4).

The administrative law judge also found that the newly submitted evidence fails to establish a material change in conditions pursuant to Section 725.309(d) by establishing total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b). The administrative law judge correctly found that both Drs. Iosif, Director's Exhibit 10, and Castle, Employer's Exhibit 3, opined that claimant was disabled by non-respiratory impairments, including lumbar spine disorder, but did not have any respiratory disability due to pneumoconiosis. Decision and Order at 6. Thus, the administrative law judge permissibly concluded that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b), and this finding is consistent with applicable law. *See Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 38, 14 BLR 2-68, 2-76 (4th Cir. 1990); *Scott v. Mason Coal Co.*, 14 BLR 1-37, 1-39 (1990). We affirm, therefore, the administrative law judge's finding at Section 718.204(b).[3] As this finding precludes a finding of material change in conditions pursuant to Section 725.309(d), *Rutter*, we affirm the administrative law judge's denial of benefits in the instant duplicate claim.

Accordingly, the administrative law judge's Decision and Order - Rejection of Claim is affirmed.

SO ORDERED.

[3] Further, we note that both of the newly submitted pulmonary function studies are non-qualifying, Director's exhibit 9; Employer's Exhibit 3, both newly submitted blood gas studies are non-qualifying, Director's Exhibit 11; Employer's Exhibit 3, and the opinions of Drs. Iosif and Castle are insufficient to establish a totally disabling respiratory impairment. *See Beatty v. Danri Corp.*, 16 BLR 1-11 (1991).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge