BRB No. 99-0827 BLA

ORA WALKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Ora Walker, Patriot, Ohio, *pro se.*

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-0068) of Administrative Law Judge Donald W. Mosser 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). Claimant filed his initial application for benefits on June 28, 1977. Director's Exhibit 31. In a Decision and Order issued on January 17, 1986, Administrative Law Judge Rudolf L. Jansen credited claimant with twenty years of coal mine employment and found that the evidence of record was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). Director's Exhibit 31. Accordingly,

benefits were denied. Claimant filed another application for benefits on October 20, 1993, which was denied by the district director on February 8, 1994, on the ground that claimant failed to establish any of the elements of entitlement. Director's Exhibit 32.

Claimant filed the present, duplicate claim on December 6, 1997. Director's Exhibit 1. At the formal hearing, Administrative Law Judge Donald W. Mosser (the administrative law judge) accepted employer's concession that claimant had established twenty years of coal mine employment. After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish the presence of pneumoconiosis or a totally disabling respiratory impairment and thus, failed to establish a material change in conditions. 20 C.F.R. §725.309(d). Accordingly, benefits were again denied. In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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); *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 are in accordance with applicable 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 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*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

Where a claimant filed a claim 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 has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously

adjudicated against the claimant.[1] *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied,* 519 U.S. 1090 (1997).

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4). At 20 C.F.R. §718.202(a)(1), the administrative law judge weighed the conflicting interpretations of the x-ray dated February 3, 1998, and accorded greater weight to the readings performed by physicians who are B readers, which resulted in one positive reading by Dr. Gaziano, and one negative reading by Dr. Zaldivar.[2] Thus, the administrative law judge properly found that as the readings of the B readers were "split," this x-ray did not assist claimant in satisfying his burden of proof under 20 C.F.R. §718.202(a)(1). Director's Exhibits 13, 14, 28. The administrative law judge further found this determination supported by the uniformly negative readings of the subsequent x-ray films of record. Director's Exhibit 28; Employer's Exhibit 1; Decision and Order at 10. As the administrative law judge's findings pursuant to this subsection are rational and supported by substantial evidence, they are affirmed. *Director, OWCP v.*

[1]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the State of West Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 9.

[2]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 by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R.§37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985).

Greenwich Collieries [Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988).

We also affirm the administrative law judge's finding that the requirements of 20 C.F.R. §718.202(a)(2),(3) were not met since the record contains no biopsy or autopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* Director's Exhibit 1; Decision and Order at 10; *Langerud v. Director, OWCP,* 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally determined that Dr. Linder's initial diagnosis of pneumoconiosis was entitled to little weight since this physician appeared to retract his finding of pneumoconiosis in his deposition testimony, and therefore was equivocal on this issue. Decision and Order at 10-11; Director's Exhibits 9, 11; Employer's Exhibit 3; *see Nance v. Benefits Review Board,* 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988); *Campbell v. Director, OWCP,* 11 BLR 1-16 (1987). Dr. Jamorra's diagnosis of pneumoconiosis was rationally given little weight as he did not indicate that he was aware of claimant's employment or smoking histories. Dr. Long's finding of no evidence of the disease was also properly accorded little weight since she did not examine the miner or have the opportunity to examine the recent medical evidence. Director's Exhibits 8, 32. *See Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark, supra; Justice, supra.* Moreover, it was within the administrative law judge's discretion to credit the reports of Drs. Zaldivar and Fino, both of whom found no evidence of pneumoconiosis, as well documented and reasoned, and based upon their qualifications as Board-certified pulmonologists. Director's Exhibit 28; Employer's Exhibits 2, 4; *Trumbo, supra; Clark supra*; *Dillon, supra*. Accordingly, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[3]

[3]Inasmuch as the administrative law judge rationally determined that claimant did not establish the existence of pneumoconiosis by any of the methods set forth in 20 C.F.R. §718.202(a)(1)-(4), we need not remand this case for reconsideration pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, F.3d , 2000 WL 524798 (4th Cir. May 2, 2000). In *Compton*, the Fourth Circuit held that in determining whether the existence

of pneumoconiosis has been demonstrated under 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge must weigh all relevant evidence together.

We also hold that substantial evidence supports the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c). The administrative law judge properly found that claimant failed to demonstrate a totally disabling respiratory impairment under 20 C.F.R. §718.204(c)(1), (2), as all of the objective tests submitted in support of the duplicate claim produced non-qualifying results.[4] Director's Exhibits 7, 8, 12, 26, 28. The administrative law judge also rationally found that total disability could not be established at 20 C.F.R. §718.204(c)(3), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. *See generally Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991). The administrative law judge then considered the relevant medical reports of record pursuant to 20 C.F.R. §718.204(c)(4) and rationally credited the reports of Drs. Zaldivar, Fino, and Long, and the deposition testimony of Dr. Linder, all of whom concluded that claimant did not have a totally disabling respiratory impairment, because these reports were better supported by the objective evidence of record and based upon the superior qualifications of Drs. Fino, Zaldivar, and Linder. *Trumbo, supra; Scott, supra; Clark, supra; Dillon, supra.* As claimant has failed to establish an element of proof previously decided against him, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309, and thus, is ineligible for benefits. *Ondecko, supra; Rutter, supra.*

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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. *See Clark, supra; Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

[4]A "qualifying" pulmonary function or blood gas study yields values equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(c)(2).

Accordingly, the Decision and Order of the administrative law judge 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