BRB No. 99-0846 BLA

STORMY HOWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADDINGTON, INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
ADDINGTON RESOURCES, INCORPORATED	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Stormy Howard, West Liberty, Kentucky, *pro se*.

David H. Neeley (Neeley & Reynolds Law Offices, P.S.C.), Prestonburg, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (98-BLA-0594) of Administrative Law Judge Daniel J. Roketenetz on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

[1] Claimant is Stormy Howard, who filed his first application for benefits on August

Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Adjudicating this duplicate claim pursuant to 20 C.F.R. Part 718, the administrative law judge considered all of the newly submitted evidence since the prior denial of the claim and found that claimant failed to establish both the existence of pneumoconiosis under 20 C.F.R. §718.202(a) and total respiratory disability under 20 C.F.R. §718.204(c). Therefore, the administrative law judge determined that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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 Co.*, 12 BLR 1-176 (1989). 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 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).

Pursuant to Section 725.309, the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, articulated the standard for adjudicating duplicate claims, holding that "to assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him." *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-18 (6th Cir. 1994). In this case, the previous denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. *See* Director's Exhibit 44.

After consideration of the Decision and Order and the evidence of record, we

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21, 1990, which was finally denied on January 18, 1991. Director's Exhibit 44. Claimant did not appeal this denial. Subsequently, claimant filed a duplicate claim for benefits on September 11, 1996, which is the subject of the appeal before us. Director's Exhibit 1.

conclude that the administrative law judge's denial of benefits is supported by substantial evidence, contains no reversible error, and therefore, is affirmed. Relevant to Section 718.202(a)(1), the x-ray evidence submitted since the previous denial consists of thirty-seven interpretations of six chest x-ray films. There are a total of eleven positive readings consisting of two interpretations rendered by B-readers who are also Board-certified radiologists and nine readings provided by five B-readers. In addition, there are twenty-six negative readings provided by eleven Board-certified radiologists who are also B-readers, one B-reader, and one physician whose radiological expertise is not of record. Director's Exhibits 11-13, 24-29, 31, 36, 38, 41-43. After examining each x-ray reading and evaluating those rendered by the Board-certified radiologists who are also B-readers, the administrative law judge, within a proper exercise of his discretion, found that while only two dually qualified radiologists rendered positive x-ray readings, the preponderance of the x-ray evidence was negative based on the negative readings of several, dually qualified radiologists. *See* 20 C.F.R. §718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6. Because the administrative law judge accorded greater weight to the negative readings by the radiologists with the dual qualifications, he concluded that the existence of pneumoconiosis was not established under Section 718.202(a)(1). *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Inasmuch as the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Relevant to Section 718.202(a)(2), the administrative law judge properly found that the newly submitted evidence contains no biopsy evidence. *See* 20 C.F.R. §718.202(a)(2). Additionally, under Section 718.202(a)(3), the administrative law judge correctly noted that the presumption at Section 718.304 is inapplicable because there is no evidence of complicated pneumoconiosis and, as this is a living miner's claim filed after January 1, 1982, none of the presumptions referenced in Section 718.202(a)(3) are applicable. *See* 20 C.F.R. §718.202(a)(3). Hence, we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2) and (a)(3) inasmuch as these determinations are rational and supported by the evidentiary record. *See* 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306; Decision and Order at 6-7.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), there are five medical opinions submitted since the previous denial. Dr. Jonan, claimant's treating physician, diagnosed the existence of

pneumoconiosis. Director's Exhibits 32, 36. Similarly, Dr. Westerfield diagnosed coal workers' pneumoconiosis in all three of his reports. Director's Exhibits 7-9, 29. Dr. Fino reviewed the medical records and diagnosed the presence of simple pneumoconiosis by x-ray. Director's Exhibits 38, 41. Dr. Burki also reviewed the medical evidence and in response to the query as to whether his review supported a finding of pneumoconiosis, he stated, "Possibly - based on chest x-ray interpretations by 'B' readers, 4 [four] of which are reported positive and 4 [four] negative." Director's Exhibit 29. In contrast, Dr. Dineen's report concluded that there is no radiographic, spirometric, or clinical evidence of coal workers' pneumoconiosis or silicosis. Director's Exhibits 25, 29.

The administrative law judge permissibly found Dr. Jonan's opinion, contained in a letter dated July 14, 1997, worthy of little, if any, weight because Dr. Jonan failed to indicate how he reached his conclusion that claimant suffers from pneumoconiosis and failed to provide any reasoning or medical documentation for his conclusion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 8-9. Likewise, the administrative law judge found Dr. Westerfield's diagnosis of pneumoconiosis, which he found to be based in part on a positive x-ray and qualifying blood gas study, less persuasive inasmuch as the reliability of this physician's opinion was questionable in light of the negative x-ray readings by more highly qualified radiologists and a subsequent, non-qualifying blood gas study. *See Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984), *citing Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983)(administrative law judge may properly consider evidence which undermines reliability of objective tests upon which physician's opinion is based inasmuch as such consideration is relevant in determining whether physician's report is reasoned); *see also Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 9. The administrative law judge also properly found that Dr. Burki was unable to opine whether pneumoconiosis is present. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 9. Consequently, the administrative law judge reasonably accorded determinative weight to Dr. Dineen's opinion because of his superior medical expertise, *see Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985), and because his opinion was better supported by underlying objective evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9. Furthermore, although the administrative law judge acknowledged that Dr. Fino had found the x-ray evidence to be positive for pneumoconiosis, he nevertheless reasonably found that Dr. Fino's conclusions were supportive of Dr. Dineen's opinion because Dr. Fino opined that there was no other evidence of any pulmonary impairment or respiratory disease due to coal mine employment. *See Worhach, supra*; *Anderson, supra*; Decision and Order at 9.

Accordingly, inasmuch as the administrative law judge rationally found that Dr. Dineen's opinion was entitled to dispositive weight, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

We next affirm the administrative law judge's finding that total disability is not established pursuant to Section 718.204(c)(1) as this determination is rational and supported by substantial evidence. The administrative law judge properly determined that neither of the two newly submitted pulmonary function studies produced qualifying values, therefore, we affirm his finding that total disability is not demonstrated pursuant Section 718.204(c)(1).[2] *See* 20 C.F.R. §718.204(c)(1); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 11; Director's Exhibits 6, 25, 29.

With respect to Section 718.204(c)(2), there are two newly submitted blood gas studies consisting of the October 2, 1996 study which yielded qualifying values and the March 18, 1997 test which yielded non-qualifying values. Director's Exhibits 10, 25, 29. The October 1996 test was validated by Dr. Younes on November 7, 1996. Director's Exhibits 25, 29. Although the administrative law judge found that the March 1997 non-qualifying blood gas study was the more probative because it was the most recent test, he nonetheless rationally found that the blood gas study evidence was evenly balanced and that claimant failed therefore to carry his burden of establishing total disability by a preponderance of the evidence, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, affirm the administrative law judge's determination under Section 718.204(c)(2). *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele*, 6 BLR at 1-382 n.4; Decision and Order at 11.

Because the administrative law judge properly found that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, we affirm his determination that total disability cannot be demonstrated under Section 718.204(c)(3). *See* 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989);

[2] 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 and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(c)(1), (2).

Decision and Order at 11.

With respect to Section 718.204(c)(4), the administrative law judge found that claimant also failed to demonstrate total disability on the basis of the medical opinion evidence. Relevant to total disability, Drs. Westerfield and Jonan opined that claimant is totally disabled. Director's Exhibits 7-9, 29, 32, 36. Dr. Fino opined that claimant has no respiratory or pulmonary impairment. Director's Exhibits 38, 41. Drs. Dineen and Burki opined that claimant retains the respiratory functional capacity to perform his usual coal mine work. Director's Exhibits 25, 29. The administrative law judge, within a proper exercise of his discretion, discounted the opinions of Drs. Westerfield and Jonan because their reports were neither well documented nor well reasoned. *See Trumbo, supra*; *King, supra*; *Lucostic, supra*; Decision and Order at 11. The administrative law judge permissibly found Dr. Dineen's opinion entitled to determinative weight because Dr. Dineen's opinion that claimant is not totally disabled was well supported by the objective laboratory data and by the opinions of Drs. Fino and Burki, who similarly opined that claimant is not totally disabled from a pulmonary standpoint. *Ibid*. Inasmuch as it is within the administrative law judge's discretion, as the finder-of-fact, to accord persuasive weight to the physicians' opinions that he finds to be better reasoned, we affirm the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(c)(4). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986); *Lucostic, supra*. Inasmuch as the administrative law judge determination that claimant failed to demonstrate total disability under subsection (c)(4) is rational and supported by substantial evidence, we affirm this finding.

Inasmuch as the administrative law judge properly considered all of the newly submitted evidence of record to determine that claimant failed to establish the existence of pneumoconiosis and total disability, elements that were previously adjudicated against claimant, we affirm the administrative law judge's findings that claimant also failed to establish a material change in conditions, the threshold requirement for consideration of all of the evidence on the merits. *See* 20 C.F.R. §725.309; *Ross, supra*.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge