BRB No. 99-0847 BLA

SHERMAN BENNETT NUNLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OSBORNE BROTHERS, INCORPORATED	)	DATE ISSUED:
	)	
Primary Employer- Respondent	)	
	)	
U.S. STEEL MINING COMPANY, LLC)		
	)	
Secondary 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sherman Bennett Nunley, Squire, West Virginia, *pro se*.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, 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-0948) of Administrative Law Judge Robert L. Hillyard 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 Act). The administrative law judge found that claimant established twenty-five and one-third years of coal mine employment, and based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718.[1] The administrative law judge reviewed all of the newly submitted evidence pursuant to 20 C.F.R. §725.309(d) and found that claimant failed to establish a material change in conditions, as claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(c), elements previously adjudicated against him. *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); cert. denied, 117 S.Ct. 763 (1997); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). Accordingly, benefits were denied.

Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer is not participating in this appeal.[2] The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

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). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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).

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[1] Claimant filed his first claim for benefits on January 29, 1996. Director's Exhibit 26. This claim was denied on May 24, 1996, as claimant failed to establish any element of entitlement. Director's Exhibit 25. Claimant filed his duplicate claim on June 4, 1997. Director's Exhibit 1.

[2] The administrative law judge dismissed U.S. Steel Mining Co., LLC, as a responsible operator. Decision and Order at 7.

The administrative law judge initially reviewed the readings of the two x-rays taken subsequent to the previous denial of benefits pursuant to Section 718.202(a)(1). All three readings were interpreted by B-readers: two as positive for the existence of pneumoconiosis, and one as negative. Director's Exhibits 12, 13; Employer's Exhibit 1. The administrative law judge, weighing the x-ray readings, permissibly found them in equipoise. Decision and Order at 11. Thus, as claimant bears the burden of establishing the existence of pneumoconiosis by a preponderance of the evidence, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). *See* 20 C.F.R. §718.403; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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). Accordingly, we affirm the administrative law judge's finding that the newly submitted x-ray evidence of record fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[3]

The administrative law judge next found that the newly submitted evidence contained two medical opinions: Dr. Ranavaya found coal workers' pneumoconiosis, Director's Exhibits 10, 26, while Dr. Hippensteel did not. Employer's Exhibit 1. The administrative law judge permissibly found that as both physicians came to logical conclusions based on the objective data before them, and as there was no evidence in the record regarding their qualifications, the evidence was in equipoise as he was unable to credit one opinion over the other. Decision and Order at 11; *Ondecko*, *supra*. Accordingly, the administrative law judge properly found that claimant failed to meet his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Ondecko*, *supra*. The administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4) is therefore affirmed. *See Island Creek Coal Co. v. Compton*, F.3d , BLR , No. 98-2051 (Mar. 2, 2000, 4th Cir.).

[3] Total disability cannot be established pursuant to Section 718.202(a)(2) and (3) on the record in this case. 20 C.F.R. §718.202(a)(2) and (3).

The administrative law judge next considered the newly submitted evidence pursuant to Section 718.204(c). The administrative law judge rationally found that as the two pulmonary function studies yielded non-qualifying [4] results and as one of the blood gas studies was qualifying and one was not, the pulmonary function studies and blood gas studies were insufficient to establish total disability pursuant to Section 718.204(c)(1) and (c)(2). *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Ondecko*, *supra*.[5]

Finally, the administrative law judge considered the newly submitted medical opinions pursuant to Section 718.204(c)(4). The administrative law judge noted that Dr. Ranavaya found that claimant has a severe pulmonary impairment which would prevent him from performing his last or usual coal mine employment, Director's Exhibit 10, while Dr. Hippensteel found no permanent impairment from pneumoconiosis. Dr. Hippensteel also stated that claimant was unable to work or exercise because of his nonpulmonary problems which were not related to coal dust inhalation in any way. Employer's Exhibit 1. The administrative law judge found Dr. Hippensteel's opinion better supported by the objective evidence and better explained, and therefore properly accorded his opinion greater weight.[6] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); Decision and Order at 12. Finally, weighing all the relevant evidence together, the administrative law judge properly found that it was insufficient to establish total disability at Section 718.204(c). *See Ondecko*, *supra*; *Fields*, *supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Thus, as claimant failed to establish any element of entitlement previously found against him, the administrative law

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[4] 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(c)(1), (c)(2).

[5] As the record contains no evidence of cor pulmonale with right sided congestive heart failure, claimant cannot establish total disability pursuant to Section 718.204(c)(3). 20 C.F.R. §718.204(c)(3).

[6] As the Director notes, the administrative law judge erred in considering a February 1996 nonqualifying blood gas study and the February 1996 opinion of Dr. Ranavaya that claimant had no pulmonary impairment, evidence from the first claim. Director's Exhibit 26; Decision and Order at 12. Any error the administrative law judge may have committed in considering this evidence, however, is harmless as the administrative law judge properly found that the newly submitted evidence did not establish total disability. Decision and Order 11-12; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

judge properly found that claimant failed to establish a material change in conditions at Section 725.309(d) pursuant to *Rutter*, *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

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge