BRBB No. 03-0661 BLA

CLETIS ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENDURO COAL COMPANY	)	DATE ISSUED: 05/26/2004
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

Cletis Adkins, Elkhorn City, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2002-BLA-5162) of Administrative Law Judge Rudolph L. Jansen rendered 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).[1] The administrative law judge found, and the parties stipulated to, fourteen and one-half years of coal mine employment and the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the date of filing. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, elements of entitlement previously adjudicated against claimant. The administrative law judge, therefore, found that a material change in conditions was not established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.[2]

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) 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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *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 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his first claim for benefits on March 18, 1980, which was denied on June 2, 1986. Director's Exhibit 1. Claimant's appeal of that denial was dismissed as abandoned on May 27, 1987. Director's Exhibit 1. Claimant filed the instant duplicate claim on February 6, 2001, which was denied on February 4, 2002. Director's Exhibit 32.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Of the five readings of the three new x-rays, the only positive reading was by a physician whose qualifications are not in the record, while negative readings were done by a dually qualified physician, and a B-reader. The administrative law judge accorded greater weight to the numerical superiority of the negative readings by a B-reader and a dually qualified physician than to the single positive reading by a physician whose qualifications were unknown. Decision and Order at 7; Director's Exhibits 8, 14-16, 32, 35, 40; Claimant's Exhibit 1. This was rational. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence in the record, this was a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record. Decision and Order at 10; 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Considering the medical opinion evidence of record, the administrative law judge properly accorded greater weight to the opinions of Drs. Broudy and Dahhan, finding no evidence of coal workers' pneumoconiosis, than to the contrary opinion of Dr. Hussain, because he found them to be better supported by the objective evidence, and because Dr. Broudy had better qualifications than Dr. Hussain.[3] The administrative law judge accorded less weight to Dr. Hussain's opinion because he failed to explain his diagnosis and to consider claimant's smoking history. This was rational. Director's Exhibits 18, 31; Employer's Exhibits 1, 2; Decision and Order at 11; *Jericol v. Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Colleries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.32 834, 22 BLR 2-320 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark*, 9 BLR 1-36; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

[3] The record shows that Dr. Broudy is Board-certified in internal and pulmonary medicine. Decision and Order at 8; Employer's Exhibit 1. The credentials of Dr. Dahhan and Dr. Hussain are not contained in the record. Decision and Order at 8; Employer's Exhibit 2; Director's Exhibit 18.

Turning to the issue of total disability, the administrative law judge properly found the new evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(iii) as three out of the four new pulmonary function studies, including the most recent study, produced non-qualifying[4] values, all of the blood gas studies produced non-qualifying values, and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Director's Exhibits 18, 10; Employer's Exhibits 1, 2; 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 12; *Schretoma v. Director, OWCP*, 18 BLR 1-19 (1983); *Newell v. Freeman United Coal Mining Co.*, 10 BLR 1-19 (1987); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). As to the medical opinion evidence, the administrative law judge rationally accorded greater weight to the opinions of Drs. Broudy and Dahhan, than to Dr. Hussain's opinion, because he found them to be better supported by the objective evidence, because of Dr. Broudy's superior qualifications, and because Dr. Hussain failed to consider the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark*, 12 BLR 1-149; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988); *Dillon*, 11 BLR 1-113; *Fields*, 10 BLR 1-19; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*);*King*, 8 BLR 1-262; *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, *aff'd on recon.*, 9 BLR 1-236 (1986).

The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *Maypray*, 7 BLR 1-683, and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis or total respiratory disability pursuant to Sections 718.202(a) and 718.204(b)(2). Consequently, the administrative law judge properly found that claimant failed to establish a material change in conditions. *Ross*, 42 F.3d 993, 19 BLR 2-10.

[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, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.[5]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[5] We do not address employer's contention that the claim was not timely filed as the claim has been denied on the merits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see* Employer's Brief at 2 n.2.