BRB No. 06-0840 BLA

JOHN L. PARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 05/21/2007
	)	
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 John M. Vittone, Administrative Law Judge, United States Department of Labor.

John L. Parker, Burnwell, Alabama, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (04 BLA-6700) of Administrative Law Judge John M. Vittone rendered on a subsequent 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 subsequent claim on September 26, 2003.[1] Director's Exhibit 3. The

[1] Claimant initially filed a claim for benefits on June 4, 1992. The district director found that claimant failed to establish any of the requisite elements of entitlement, and therefore, the claim was denied on October 13, 1992. Director's Exhibit 1. Claimant filed a duplicate claim on March 16, 1995. *Id.* In a Decision and Order issued on March 12, 1997, Administrative Law Judge Richard E. Huddleston denied benefits because he found that claimant had failed to establish a material change in conditions under 20

district director issued a Proposed Decision and Order denying benefits on June 28, 2004. Director's Exhibit 20. Claimant requested a hearing, which was held on March 23, 2005. In his Decision and Order dated May 23, 2006, the administrative law judge reviewed the newly submitted evidence and found it to be sufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment; and therefore, that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, after reviewing all of the record evidence, including the evidence submitted with the prior claims, the administrative law judge determined that claimant did not suffer from coal workers' pneumoconiosis, and that he failed to establish total disability due pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally alleges that the administrative law judge erred in denying his claim.[2] Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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. *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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence. We specifically affirm the administrative law judge's

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C.F.R. §718.309 (2000). *Id*. Claimant took no further action with regard to the denial of his duplicate claim until he filed the instant, subsequent claim on September 26, 2003. Director's Exhibit 3.

[2] Claimant stated in his letter on appeal that he has new evidence to present in his case. We note that claimant may submit any additional evidence, along with a request for modification, to the district director for consideration, at anytime within one year of the date of this decision. *See* 20 C.F.R. §725.310.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as claimant's last coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[4]

In a living miner's claim, in order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one 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*).

In considering whether claimant established the existence of pneumoconiosis, the administrative law judge first reviewed all of the x-ray evidence.[5] He correctly noted that the record contains eight interpretations of four x-rays dated August 3, 1992, April 11, 1995, January 9, 2004, and January 13, 2005, of which there were no positive readings for pneumoconiosis. Decision and Order at 9; *see* Director's Exhibits 1, 10; Claimant's Exhibit 1; Employer's Exhibit 1. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §§718.102(b), 718.202(a)(1).

Since there is no biopsy evidence in the record, the administrative law judge properly found that claimant was unable to establish the existence of pneumoconiosis

[4] Because this case involves a subsequent claim, the administrative law judge first considered whether the newly submitted evidence was sufficient to establish a change in an applicable condition of entitlement since the prior denial of claimant's duplicate claim on March 16, 1995. *See* 20 C.F.R. §725.309; Decision and Order at 3. Because the administrative law judge found that the new evidence established that claimant was totally disabled, he found that claimant had satisfied his burden of establishing a change in an applicable condition of entitlement under Section 725.309. Decision and Order at 8-9. The administrative law judge then weighed the new evidence, along with the prior claim evidence, relevant to whether claimant was entitled to benefits under 20 C.F.R. Part 718. Decision and Order at 9; *see generally White v. New White Coal Co.*, 23 BLR 1-1 (2004). We affirm the administrative law judge's finding pursuant to 20 C.F.R. §725.309 as that finding is unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[5] There are four methods by which a claimant may establish the existence of pneumoconiosis: (1) x-ray evidence; (2) biopsy or autopsy evidence of the disease; (3) by application of the regulatory presumptions; and (4) a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined at 20 C.F.R. §718.201. *See* 20 C.F.R. §718.202(a)(1)-(4).

pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 6. Similarly, since there is no evidence in the record to establish that claimant suffers from complicated pneumoconiosis under 20 C.F.R. §718.304, and claimant is not eligible for the presumptions set forth at 20 C.F.R. §§718.305 and 718.306, the administrative law judge properly found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[6] *Id*.

Under Section 718.202(a)(4), the administrative law judge weighed four medical opinions relevant to whether claimant suffered from pneumoconiosis. Dr. Hasson, Dr. Goldstein, and Dr. Hawkins, each performed a Department of Labor evaluation of claimant and opined that he suffered from idiopathic asthma and not coal workers' pneumoconiosis. They did not diagnose any respiratory condition attributable to coal dust exposure that would satisfy the legal definition of pneumoconiosis. *See* 20 C.F.R. §718.201.[7] In contrast, claimant's treating physician, Dr. Hall, offered an opinion that

[6] The presumption provided at 20 C.F.R. §718.305 is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). The presumption provided at 20 C.F.R. §718.306 is also inapplicable because the instant claim is not a survivor's claim. *See* 20 C.F.R. §718.306.

[7] The record developed in conjunction with the prior miner's claims contains a Department of Labor examination report prepared by Dr. Hasson on August 3, 1992. Director's Exhibit 1. Dr. Hasson diagnosed that claimant suffered from idiopathic asthma and hypertensive arteriosclerotic heart disease, but he did not diagnose pneumoconiosis. *Id*. Similarly, Dr. Goldstein performed a Department of Labor examination on April 11, 1995 and opined that claimant suffered from hypertension and possibly asthma, but he did not diagnose pneumoconiosis or any coal-dust related respiratory condition. *Id*. There is a "Black Lung Medical Evaluation Form" signed by Dr. Hall, claimant's treating physician, which was submitted to the district director on February 23, 1995. Director's Exhibit 1. Claimant's Exhibit 1. When Dr. Hall was asked whether claimant suffered from coal workers' pneumoconiosis, or a significant respiratory impairment due to coal dust exposure, Dr. Hall answered "yes." *Id*. He also answered "yes" when he was asked whether claimant suffered from asthma. Director's Exhibit 1. He indicated that claimant's respiratory condition was due to coal dust exposure in coal mine employment since claimant "does not smoke." *Id*. Dr. Hall most recently prepared a report on February 3, 2005 in conjunction with claimant's subsequent claim. Dr. Hall stated that he had treated claimant for approximately twenty years for bouts of pneumonia, sinusitis and asthmatic bronchitis. Dr. Hall opined that all of these conditions were due to interstitial lung disease and complicated by "black lung disease." Claimant's Exhibit 1. Dr. Hall opined that claimant suffered from coal workers' pneumoconiosis based on claimant's forty year work history in the mines and since claimant had "stopped smoking over thirty years ago and there has been no other

claimant suffered from both clinical pneumoconiosis and interstitial lung disease, encompassing asthma and chronic bronchitis, which he attributed to coal dust exposure. *See* 20 C.F.R. §718.201.

In weighing the conflicting medical opinion evidence, the administrative law judge properly evaluated Dr. Hall's opinion in accordance with the criteria set forth at Section 718.104(d).[8] The administrative law judge permissibly assigned less probative weight to Dr. Hall's diagnosis of clinical and legal pneumoconiosis since the administrative law judge found that Dr. Hall failed to explain "what, if any objective laboratory testing he conducted. Decision and Order at 7; *see Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Parsons v. Wolf Creek Collieries*, 23 BLR. 1-29 (2004) (*en banc* on recon.); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). As noted by the administrative law judge, Dr. Hall's diagnosis of clinical pneumoconiosis appears to be based solely on claimant's history of coal mine employment. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). The administrative law judge also properly questioned the basis for Dr. Hall's diagnosis of interstitial lung disease, noting that a January 13, 2005 CT scan, which was part of the same exhibit that contained Dr. Hall's February 2005 report, showed that claimant had no discernable interstitial or nodular disease. Decision and Order at 7; Claimant's Exhibit 1. Thus, the administrative law judge properly concluded that Dr. Hall's opinion was insufficiently reasoned to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Conversely, the administrative law judge permissibly relied on Dr. Hawkins's better reasoned diagnosis, that claimant does not suffer from either clinical or legal pneumoconiosis, since he found that Dr. Hawkins performed a comprehensive

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significant work history." *Id*. Claimant was also examined by Dr. Hawkins on January 9. 2004. Director's Exhibit 10. Dr. Hawkins noted that claimant had no x-ray evidence of pneumoconiosis. *Id*. He diagnosed that claimant suffered from asthmatic bronchitis, dyspnea, and moderate airflow obstruction. Director's Exhibit 10. He reported that the etiology of claimant's cardiopulmonary diagnosis was "atopic." *Id*.

[8] Section 718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of a treating physician: 1) Nature of relationship; 2) Duration of relationship; 3) Frequency of treatment; 4) Extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation further requires that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

examination, including objective testing to support his opinion. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4).

The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, when rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Since claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR at 1-2.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge