BRB No. 97-1214 BLA

JOHN FARMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

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

John Farmer, Pikeville, Kentucky, *pro se*.

Dorothy L. Page (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (96-BLA-1656) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge reviewed the procedural history of this case and noted that the instant case involved a duplicate claim.[1] The administrative law judge dismissed the named operator, and determined that the Black Lung Disability Trust Fund would be responsible for the payment

[1] Claimant filed an application for benefits on May 15, 1992, which was denied by the claims examiner, Director's Exhibits 69-99, 69-100, and later by the district director on May 17, 1993, Director's Exhibit 69-9. The claim was then administratively closed. Director's Exhibit 69-1. The instant claim was filed on February 16, 1995. Director's Exhibit 1.

of any benefits. The administrative law judge noted the standard for establishing a material change in conditions enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross,* 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), and found the newly submitted evidence insufficient to establish a material change in conditions. Accordingly, he denied benefits.

Claimant submitted a letter to the Board challenging all of the evidence in the record as hearsay, contending that it needs to be "sworn to," and he argues that reliance upon this evidence violates his civil rights and is unconstitutional. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's finding that the newly submitted evidence does not establish a material change in conditions.

In an appeal by a claimant filed 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

The administrative law judge determined that claimant did not establish a material change in conditions by establishing the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge considered all of the newly submitted x-ray evidence, which includes twelve negative interpretations of three films, noted the qualifications of the interpreting physicians, and found "As there is no x-ray evidence of pneumoconiosis contained in the record, Claimant fails to establish the existence of pneumoconiosis under Section 718.202(a)(1)." Decision and Order - Denial of Benefits at 8. Inasmuch as the administrative law judge properly found the x-ray evidence insufficient to satisfy claimant's burden of establishing the existence of pneumoconiosis, we affirm this finding. *See* Director's Exhibits 19, 21, 22, 36-38, 62 65-67, Employer's Exhibit 2; *see also 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); *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).

The administrative law judge also found that the existence of pneumoconiosis was not established pursuant to Sections 718.202(a)(2) or (a)(3). Since the administrative law judge properly found that the newly submitted evidence does not contain any biopsy evidence, or evidence of complicated pneumoconiosis in this living miner's case filed after January 1, 1982, we affirm this finding. *See* 20 C.F.R. §§718.202(a)(2)-(3), 718.304, 718.305, 718.306.

In addition, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge found that "no physician of record has diagnosed the Claimant as suffering from coal workers' pneumoconiosis as it is defined in Section 718.201." Decision and Order - Denial of Benefits at 8. Since, as the administrative law judge found, the newly submitted medical opinions do not diagnose coal workers' pneumoconiosis,[2] *see* Director's Exhibits 15, 64, 67; Employer's Exhibit 2, we affirm the administrative law judge's finding that claimant has not satisfied his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

The administrative law judge also determined that claimant did not establish a material change in conditions by establishing that he is now totally disabled due to a respiratory or pulmonary impairment pursuant to Section 718.204(c). In considering the pulmonary function study evidence pursuant to Section 718.204(c)(1), the administrative law judge stated that the two pulmonary function studies administered by Dr. Fritzhand on March 22, 1995 and May 19, 1995[3] were invalidated by Drs. Fritzhand and Kraman due to poor patient effort, and that Dr. Vuskovich invalidated the pulmonary function study he administered on August 30, 1995.[4] The administrative law judge, who is charged with evaluating the evidence and drawing inferences from it, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), reasonably construed Dr. Fritzhand's comments regarding claimant's lack of effort on the pulmonary function studies, *see* Director's Exhibits 13, 14, as invalidating the test results. *See* 20 C.F.R. §718.103; 20 C.F.R.

[2] The newly submitted evidence includes the medical opinions of Drs. Lane, Fritzhand, Vuskovich and Fino, all of whom either opined that claimant does not suffer from an occupationally acquired pulmonary condition as a result of his coal mine dust exposure, Director's Exhibits 15, 64, 67; Employer's Exhibit 2, or did not identify coal workers' pneumoconiosis in the list of diagnosed conditions, Director's Exhibit 19.

[3] The administrative law judge incorrectly referred to this study as being administered on March 19, 1995. *See* Decision and Order - Denial of Benefits at 9.

[4] The record contains the results of three newly submitted pulmonary function studies. Dr. Fritzhand administered pulmonary function tests on March 22, 1995 and May 19, 1995. Both of the tests yielded qualifying results, and Dr. Fritzhand indicated on both tests that claimant "made no effort to inhale deeply or exhale forcefully," Director's Exhibit 13, and that he "would not inspire deeply or attempt to blow hard," Director's Exhibit 14. Both of these tests were invalidated by Dr. Kraman for less than optimal effort, cooperation and comprehension, and Dr. Kraman noted claimant's poor cooperation according to the administering physician. Director's Exhibits 13, 14. The record also contains the results of the pulmonary function study administered by Dr. Vuskovich on August 30, 1995, which yielded non-qualifying results. Director's Exhibit 67. Dr. Vuskovich stated that this study was invalid due to poor effort. Director's Exhibit 67.

Appendix B. We, therefore, affirm the administrative law judge's evaluation of all of the newly submitted pulmonary function study evidence and his reasonable and permissible finding that it is insufficient to demonstrate total disability pursuant to Section 718.204(c)(1). *See Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge also found that the one newly submitted blood gas study of record did not demonstrate total disability pursuant to Section 718.204(c)(2). Inasmuch as the administrative law judge properly described the blood gas study evidence, and accurately determined that this study yielded non-qualifying results, *see* Director's Exhibit 19, we affirm his finding that the blood gas study evidence does not demonstrate total disability pursuant to Section 718.204(c)(2).

The administrative law judge next found that total disability was not demonstrated pursuant to Section 718.204(c)(3). Since, as the administrative law judge found, there is no evidence in the record of cor pulmonale with right sided congestive heart failure, we affirm this finding.

Finally, the administrative law judge determined that the medical opinion evidence did not demonstrate total disability pursuant to Section 718.204(c)(4). The administrative law judge stated "Drs. Lane, Fritzhand, Vuskovich and Fino submitted medical reports in this matter and all were uniform in their opinions that the Claimant was not totally disabled and could resume his coal mine employment." Decision and Order - Denial of Benefits at 10. The administrative law judge correctly characterized the newly submitted medical opinion evidence,[5] *see* Director's Exhibits 15, 19, 67; Employer's Exhibit 2. Inasmuch as all of the newly submitted medical opinions indicate that claimant has the respiratory ability to perform coal mine employment, we affirm the administrative law judge's finding that the medical opinion evidence fails to demonstrate total disability pursuant to Section 718.204(c)(4).

Consequently, we affirm the administrative law judge's finding that the evidence fails to establish a material change in conditions, *see Ross, supra*.

We now consider the specific assertions raised by claimant on appeal. Claimant argues that the evidence in the record is hearsay and contends that it does not qualify as evidence until it is "sworn to." Further, claimant maintains that reliance upon this evidence violates his civil rights and is unconstitutional. Claimant also alleges that ninety-nine percent of the evidence is false. Claimant also asserts that he attempted to cross-examine

[5] Drs. Lane, Vuskovich and Fino each opined that claimant has the respiratory ability to perform the work of a coal miner, Director's Exhibits 15, 67; Employer's Exhibit 2, and Dr. Fritzhand opined that claimant has no impairment, Director's Exhibit 19.

physicians but that he has been denied this right. Claimant argues that Dr. Vuskovich's reports are false and contends that there is no way Dr. Penman read the July 8, 1988 x-ray.

The Act incorporates by reference Section 23(a) of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §923(a), which precludes mandatory application of common law or statutory rules of evidence. 33 U.S.C. §923(a) as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§702.338-39. The Board has noted that the regulations and case law emphasize that the Federal Rules of Evidence were not intended to apply to administrative hearings, such as this. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). Further, the administrative law judge is generally not bound by common law or statutory rules of evidence. 20 C.F.R. §725.455; *Cochran, supra*. In addition, claimant is advised that Section 413(b) of the Act, 30 U.S.C. §923(b), mandates that "all relevant evidence shall be considered," and it is well established that all relevant evidence should be admitted and that the adjudicator should determine the weight to be assigned it. *See Cochran, supra*.

We reject claimant's assertion that the evidence in the record is hearsay and is false. Claimant made a similar assertion at the hearing. *See* Hearing Transcript at 6. After considering claimant's challenges to the admission of the evidence, the administrative law judge noted claimant's objections and "received Director's Exhibits 1 through 70 into the record." Hearing Transcript at 12. We affirm the administrative law judge's reasonable decision to admit the proffered evidence over claimant's objections, *see* 30 U.S.C. §923(b), *Cochran, supra*, and we therefore reject claimant's challenge to the evidence contained in the record.[6]

Further, we reject claimant's assertion that the physicians were not available for cross-examination. Although none of the physicians was present at the hearing, claimant could have cross-examined the physicians by means of deposition. The opportunity for such cross-examination satisfies claimant's right to procedural due process. *See Richardson v. Perales,* 402 U.S. 389 (1971); *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991). Claimant's right to due process has not been violated inasmuch as the record does not reflect that claimant made any such request. *See Lewis, supra*; *see also Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984)(the administrative law judge is granted broad discretion in resolving procedural issues).

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

SO ORDERED.

[6] We also note that the record does not support claimant's assertion that ninety-nine percent of the evidence is false.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge