

BRB No. 00-0223 BLA

RAYMOND C. CERESI)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JEDDO-HIGHLAND COAL CO.)	
)	
and)	
)	
LACKAWANNA CASUALTY COMPANY)	DATE ISSUED:
)	
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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Raymond C. Ceresi, Wilkes-Barre, Pennsylvania, *pro se*.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman and Goggin), Bethlehem, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (1998-

¹Claimant is Raymond C. Ceresi, the miner, who filed claims for benefits on April 26,

BLA-01347) of Administrative Law Judge Ainsworth H. Brown denying benefits 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). This claim involves a duplicate claim. The administrative law judge noted that the parties agreed that claimant established at least twenty-five years of qualifying coal mine employment and found that the newly submitted evidence failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, thus, the evidence was insufficient to establish a material change in conditions pursuant 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs, responds declining to submit a brief on 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). In the instant claim, since claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or total respiratory disability, the evidence developed subsequent to the prior denial must establish either that claimant has pneumoconiosis or a totally disabling respiratory impairment. *See Director's Exhibit 31*; 20 C.F.R. §§718.3, 718.202, 718.204; *Swarrow, supra*; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

After consideration of the administrative law judge's Decision and Order and the

1991, October 29, 1992 and March 21, 1995 which were denied on September 16, 1991, March 4, 1993 and May 11, 1995, respectively. Director's Exhibits 29-31. Claimant filed the instant claim for benefits on August 13, 1997. Director's Exhibit 1.

evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. In the instant claim, the administrative law judge first considered the newly submitted x-ray evidence of record pursuant to Section 718.202(a)(1). The record contains twenty-one newly submitted interpretations of three x-rays, but only two interpretations are positive for the existence of pneumoconiosis. Director's Exhibits 5-8, 18-20, 26-28; Employer's Exhibit 5. Dr. Gaia, a Board-certified radiologist, interpreted films dated September 4, 1997 and November 6, 1997, as positive for the existence of pneumoconiosis. Director's Exhibits 7, 8. Dr. Barrett, a B-reader and a Board-certified radiologist, interpreted the September and November x-rays as negative for the existence of pneumoconiosis. Director's Exhibits 5, 6. The administrative law judge properly considered the qualifications of the physicians, noted that the record does not contain any positive x-ray readings by doctors who were both a B reader and a board-certified radiologist, and acted within his discretion to conclude that claimant failed to establish a material change in conditions. Decision and Order at 2, 4; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3) inasmuch as the record contains no biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. See 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306; Director's Exhibit 1.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinion evidence, which consists of the opinions of Drs. Callahan and Dittman, neither of whom diagnosed pneumoconiosis, and Dr. Aquilina, who opined that claimant has pneumoconiosis. Director's Exhibits 22, 23; Employer's Exhibits 3, 4. The administrative law judge acted within his discretion in

²A "B reader" is a physician who has demonstrated a proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. §37.51. A physician who is a Board-certified radiologist has received certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §727.206(b)(2)(iii).

finding that the opinion of Dr. Dittman, who is Board-certified in internal medicine and Board-eligible in pulmonary diseases, is entitled to greater weight than the opinion of Dr. Aquilina, who is Board-certified in anesthesia, and whose opinion he found “premised in large part on subjective systems,” on the basis of Dr. Dittman’s superior credentials. Decision and Order at 4; *Parulis, supra*; *Lafferty, supra*; *McMath, supra*; *Dillon, supra*; *Martinez, supra*; *Wetzel, supra*. Consequently, we affirm the administrative law judge’s finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c)(1) and (c)(2), the administrative law judge considered the newly submitted pulmonary function and arterial blood gas studies, none of which yielded qualifying results. Director’s Exhibits 2, 4, 22, 23; Employer’s Exhibits 1, 2, 6. The administrative law judge properly found the newly submitted pulmonary function and arterial blood gas studies to be insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1), (2). Decision and Order at 5. The administrative law judge also properly found that the record contains no evidence of cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(c)(3). Consequently, we affirm the administrative law judge’s findings that claimant failed to establish total respiratory disability pursuant to Sections 718.204(c)(1)-(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Dittman, Callahan and Aquilina. Director’s Exhibits 22, 23; Employer’s Exhibits 3, 4. Dr. Aquilina opined that claimant has a totally disabling respiratory impairment and Dr. Callahan opined that claimant has a severe respiratory impairment. Director’s Exhibits 3, 22; Claimant’s Exhibit 2. The administrative law judge rationally assigned Drs. Aquilina and Callahan’s opinions less weight than the contrary opinion of Dr. Dittman because the former opinions were not supported by the objective studies of record and, as noted earlier, the administrative law judge reasonably relied on Dr. Dittman’s superior credentials. Decision and Order at 5; *Parulis, supra*; *Lafferty, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath, supra*; *Dillon, supra*; *Martinez, supra*; *Wetzel, supra*. As a result, we affirm the administrative law judge’s findings that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4) and, thus, failed to establish a material change in conditions pursuant to Section 725.309. Consequently, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge