BRB No. 00-0256 BLA

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| CALVIN R. FOSTER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| ALLIED-SIGNAL INCORPORATED | ) | |
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| Employer-Respondent | ) | DATE ISSUED: |
| | ) | |
| 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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Calvin R. Foster, Oak Hill, West Virginia, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denying Benefits (99-BLA-0117) of Administrative Law Judge Edward Terhune Miller 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). Claimant filed his most recent application for benefits on December 16, 1997. Director's Exhibit 1. In a Decision and

[1]Claimant's initial claim for benefits, filed with the Social Security Administration on May 3, 1973, was finally denied on November 26, 1975. Director's Exhibit 53. Claimant filed a second claim with the United States Department of Labor on September 23, 1974, which was denied on March 14, 1980. Director's Exhibit 24. Claimant's third claim, filed on December 23, 1982, was denied on December 10, 1987, due to claimant's failure to establish any required element of entitlement. Director's Exhibit 24. Claimant filed an

Order issued on November 3, 1999, the administrative law judge found that the evidence of record and employer's stipulation at the hearing, established twenty-three years of coal mine employment, and found that the evidence of record was insufficient to establish the presence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c), thereby precluding a finding of a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

In the instant appeal, claimant generally contends that he is entitled to benefits. Employer and the Director, Office of Workers' Compensation Programs, have not participated 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. *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 are in accordance 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

Where a claimant filed a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Lisa Lee Mines v. Director, OWCP*

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untimely appeal to the Board which granted employer's motion to dismiss the appeal on May 31, 1988. On May 1, 1989, claimant filed a fourth claim. Director's Exhibit 24. The record is silent on whether any action was taken regarding this claim, and on May 13, 1990, claimant filed a fifth claim for benefits which was denied on September 6, 1990, again due to claimant's failure to establish any required element of entitlement. Director's Exhibit 25. On November 5, 1991, claimant filed a sixth application for benefits which was denied on April 30, 1992 by the district director. Director's Exhibit 26.

*[Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997).

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4). At 20 C.F.R. §718.202(a)(1), the administrative law judge weighed the conflicting interpretations of the x-rays of record , and accorded determinative weight to the greater number of negative readings performed by physicians who are both B readers and Board-certified radiologists. Thus, the administrative law judge rationally found that claimant did not satisfy his burden of proof at Section 718.202(a)(1). Director's Exhibits 10, 11, 19, 20; Employer's Exhibits 3-5; Claimant's Exhibit 1; Decision and Order at 5; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

In addition, the administrative law judge properly found that the requirements of 20 C.F.R. §718.202(a)(2),(3) were not met since the record contains no biopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* Director's Exhibit 1; Decision and Order at 4; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally determined that the January 1999 operative report and discharge summary of Dr. Ratnani, which noted a history of pneumoconiosis, were unreasoned since this physician failed to explain the basis for this diagnosis. Claimant's Exhibit 2; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra; Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). The administrative law judge also rationally accorded less weight to Dr. Rasmussen's diagnosis of pneumoconiosis since this physician did not provide a "reasonable rationale" for ruling out

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[2]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 24.

[3]A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R.§37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

claimant's significant coronary condition as a source of claimant's shortness of breath, which was contrary to the opinion of Dr. Zaldivar. Decision and Order at 8. Director's Exhibit 7. *Clark, supra; Sabett v. Director, OWCP,* 7 BLR 1-299 (1984); *Fuller v. Gibralter Coal Corp,* 6 BLR 1-1291 (1984). Moreover, it was within the administrative law judge's discretion to credit as well documented and reasoned, the report of Dr. Zaldivar, who found no evidence of pneumoconiosis, since this physician provided a thorough explanation of why the record evidence did not support a diagnosis of pneumoconiosis, the administrative law judge found that his report was better supported by the objective evidence of record, and based on his superior qualifications as a Board-certified pulmonologist. Employer's Exhibit 5; *Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.,* 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Trumbo, supra; Clark supra; Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989)*; Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985). Accordingly, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

We further hold that substantial evidence supports the administrative law judge's determination that the existence of a totally disabling respiratory impairment was not established pursuant to Section 718.204(c). The administrative law judge properly found that claimant failed to demonstrate a totally disabling respiratory impairment under Section 718.204(c)(1), as all of the pulmonary function studies submitted in support of the duplicate claim produced non-qualifying results. Director's Exhibit 6; Employer's Exhibit 5; *Ondecko, supra*. Pursuant to Section 718.204(c)(2), the administrative law judge considered the qualifying results at rest, and the non-qualifying results of the exercise portion of the arterial blood gas study dated February 9, 1998, and the non-qualifying results of the study performed on June 3, 1998, and implicitly credited the preponderance of the non-qualifying studies as most probative of claimant's condition. Director's Exhibit 8; Employer's Exhibit 5; Decision and Order at 6-8. *Ondecko, supra; Schetroma v. Director, OWCP,* 18 BLR 1-19 (1993). We also affirm the administrative law judge's findings at Section 718.204(c)(3), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. *See generally Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991). The administrative law judge then considered the relevant medical reports of record pursuant to Section 718.204(c)(4), and rationally credited the report of Dr. Zaldivar, who found no evidence of a totally disabling respiratory impairment, as well documented and reasoned since it was better

[4]The record indicates that Dr. Rasmussen is Board-certified only in internal medicine. Director's Exhibit 7.

[5]A "qualifying" pulmonary function or blood gas study yields values equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(2).

supported by the objective evidence of record, and based upon his qualifications as a Board-certified pulmonologist. Employer's Exhibit 5; *Clark, supra; Dillon, supra.* Moreover, it was within the administrative law judge's discretion to find that Dr. Rasmussen's opinion of totally disabling pneumoconiosis was unreasoned as it was not supported by the objective evidence of record, and this physician failed to provide a reasonable rationale for ruling out claimant's heart disease as a cause of his respiratory condition. Director's Exhibit 7; *See Hicks, supra; Underwood, supra; Trumbo, supra.* As the administrative law judge's finding that claimant failed to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c) is supported by substantial evidence, it is affirmed. Inasmuch, as claimant has failed to establish an element of entitlement previously decided against him, we also affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309, and thus is ineligible for benefits. *Ondecko, supra; Rutter, supra.*

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge