BRB No. 01-0196 BLA

JACKIE D. KING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Jackie D. King, Jackson, Ohio, *pro se.*

Maryellen Corna (Porter, Wright, Morris & Arthur, LLP), Columbus, Ohio, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (99-BLA-1327) of Administrative Law Judge Donald W. Mosser 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).[1] The administrative law judge determined that this case involves a request for modification of the district director's December 1989 denial of claimant's July 18, 1989 duplicate claim. Initially, the administrative law judge credited claimant

[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 (2001).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an Order on August 3, 2001 requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). On August 10, 2001, the Board issued an Order rescinding its August 3, 2001 Order.

[2] Claimant filed his initial application for benefits on April 28, 1986, which was denied by the district director on September 6, 1986, finding that claimant failed to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 32 at 1, 41. No further action was taken on this claim.

Claimant filed a second application for benefits on July 18, 1989, which was denied by the district director on December 12, 1989, on the grounds that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibit 33 at 2, 52. No further action was taken on this claim.

Claimant filed a third application for benefits on February 11, 1997, which was denied by the district director on June 2, 1997. Director's Exhibits 1, 13. On September 3, 1997, claimant filed a request for modification, which was denied by the district director on December 22, 1997. Director's Exhibits 14, 16.

Claimant thereafter filed his current request for modification on June 22, 1998. Director's Exhibit 18.

with eleven years of coal mine employment and adjudicated the case pursuant to 20 C.F.R. Part 718 (2000). In considering claimant's request for modification, the administrative law judge found that the newly submitted medical evidence of record, *i.e.*, that evidence submitted since the December 1989 denial, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The administrative law judge further found the newly submitted medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) (2000). Therefore, the administrative law judge found the new evidence insufficient to establish a material change in conditions. Accordingly, the administrative law judge denied the claim. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of claimant's request for modification. The Director, Office of Workers' Compensation Programs has filed a letter stating that he will not file a response brief in this appeal.

In an appeal filed by a claimant 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). 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 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 under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001); *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. *Id.*

Claimant's original claim, filed in April 1986, was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 32 at 1. Claimant's subsequent claims, filed in 1989 and 1997, were denied because claimant failed to establish a material change in his condition. *See* Director's Exhibits 13, 33 at 2.

In the present case, the administrative law judge noted that this case involves modification of a duplicate claim. Decision and Order at 10-11. The administrative law judge stated that he must consider the new evidence submitted in support of claimant's request for modification, in conjunction with the evidence submitted subsequent to the 1989 denial, to determine if it is sufficient to meet the standard enunciated by the United States Court of Appeals for the

Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). *Id*. In *Ross*, the Sixth Circuit court held that in order to establish a material change in conditions, an administrative law judge must determine whether the new evidence is sufficient to prove one of the elements of entitlement that formed the basis of the prior denial. *See Ross*, *supra*. The original 1986 claim was denied because claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Decision and Order at 11; Director's Exhibit 32 at 1. Therefore, the relevant issue before the administrative law judge, in this request for modification, is whether the newly submitted evidence, that evidence submitted subsequent to the December 1989 denial of claimant's duplicate claim, was sufficient to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni, supra*; *see also Ross, supra*.

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's Decision and Order denying claimant's request for modification. Initially, the administrative law judge credited claimant with eleven years of coal mine employment, based on claimant's testimony, his Social Security Administration earning records and employer's concession to at least eight years of coal mine employment. Decision and Order at 4-5. In particular, the administrative law judge credited claimant with three years of coal mine employment, based on his testimony regarding underground coal mine work for his father beginning in 1951, *see* Hearing Transcript at 14-15, and eight years of coal mine employment for employer, based on employer's concession and the Social Security earnings records. Decision and Order at 4; Hearing Transcript at 6-7. However, the administrative law judge properly found that claimant's employment with Dundas Pallet Company and W. W. Jeffers did not constitute covered coal mine employment because claimant's job duties for these companies entailed loading processed coal and transporting it to consumers and, therefore, were not integral to the preparation of coal since the coal was already in the stream of commerce. Decision and Order at 4-5; Hearing Transcript at 11-15, 32-35, 45-47; Director's Exhibits 20, 22; *see Southard v. Director, OWCP*, 732 F.2d 66, 69, 6 BLR 2-26 (6th Cir. 1984); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Foster v. Director, OWCP*, 8 BLR 1-188 (1985); *Shaw v. Director, OWCP*, 7 BLR 1-652, 1-654 (1985). Because the administrative law judge

[3]Although the Department of Labor has made substantive revisions to 20 C.F.R. §§725.309 and 725.310 (2000), these revisions only apply to claims filed after January 19, 2001.

considered all of the relevant evidence and acted reasonably in relying upon claimant's testimony and his Social Security Administration earnings records, in crediting claimant with eleven years of coal mine employment, this finding is affirmed. *See Dawson v. Old Ben Coal Co.,* 11 BLR 1-58 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988); *Vickery, supra*.

Pursuant to Section 718.202(a)(1), the administrative law judge reasonably found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis. Weighing the newly submitted x-ray evidence, the administrative law judge found that the record contains ten interpretations of seven x-ray films. Two x-ray interpretations, by physicians dually qualified as Board-certified radiologists and B readers, were read as negative for the existence of pneumoconiosis, and one interpretation, by a dually qualified physician, was read as positive for the existence of pneumoconiosis. Decision and Order at 11-12; Director's Exhibit 10; Employer's Exhibit 5. The administrative law judge further found that the remaining interpretations of the x-ray films were silent as to the presence or absence of pneumoconiosis and, therefore, within a reasonable exercise of his discretion as trier-of-fact, found that they were not supportive of a finding of pneumoconiosis. Decision and Order at 12; Director's Exhibits 9, 27; Employer's Exhibits 4, 5; *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Because the administrative law judge considered all of the x-ray evidence, we affirm his finding that the weight of the newly submitted x-ray evidence by the highly qualified physicians is insufficient to establish the existence of pneumoconiosis. Decision and Order at 11-12; Director's Exhibit 10; Employer's Exhibit 5; 20 C.F.R. §718.202(a)(1) (2001); *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), *aff'd*, 806 F.2d 258 (4th Cir. 1986)(table).

We also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(2) (2000) as there is no biopsy evidence of record. Decision and Order at 12; 20 C.F.R. §718.202(a)(2) (2001). Likewise, the administrative law judge rationally found that claimant is not entitled to the presumptions set forth under 20 C.F.R. §718.202(a)(3) (2001), *i.e.*, there is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2001); the claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e) (2001); and, the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a) (2001). Decision and Order at 12; 20 C.F.R. §718.202(a)(3) (2001).

In addition, we affirm the administrative law judge's finding that the new medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Decision and Order

at 7, 9. The administrative law judge found that the record contains the medical opinions of Drs. Manchester, Linder, Pacht and Lockey, Decision and Order at 7-10; Director's Exhibits 7, 28; Employer's Exhibits 3, 5, of which Drs. Manchester and Linder included diagnoses of the existence of pneumoconiosis. Decision and Order at 13-14; Director's Exhibit 7. However, within a reasonable exercise of his discretion as trier-of-fact, the administrative law judge accorded little weight to the opinion of Dr. Manchester, finding that the physician did not adequately explain his diagnosis. Rather, the administrative law judge found that Dr. Manchester appears to base his opinion on the fact that claimant was previously diagnosed with pneumoconiosis and does not otherwise evaluate the evidence on that issue. Decision and Order at 13; Director's Exhibit 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *see also Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

With regards to Dr. Linder's diagnosis of an obstructive impairment which was work-related, the administrative law judge found that it was sufficient to constitute a diagnosis of pneumoconiosis pursuant to 20 C.F.R. §718.201 (2000). Decision and Order at 13; Director's Exhibit 7. However, the administrative law judge reasonably found that Dr. Linder's opinion was outweighed by the contrary opinion of Dr. Pacht, that there was no evidence of pneumoconiosis or other occupationally related lung disease, because Dr. Pacht's opinion was based on a more recent examination of claimant and, therefore, provided a more current picture of claimant's health. Decision and Order at 13; Director's Exhibit 28; Employer's Exhibit 3; *see Gillespie v. Badger Coal Co.*, 7 BLR 1- 839 (1985); *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Moreover, the administrative law judge reasonably found Dr. Pacht's opinion to be supported by the reasoned and documented opinion of Dr. Lockey. Decision and Order at 14; Employer's Exhibit 5; *see generally Snorton v. Zeigler Coal Co.,* 9 BLR 1-106 (1986); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Inasmuch as the administrative law judge considered all of the relevant medical opinions, we affirm the administrative law judge's finding that the newly submitted medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2001). *See Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

With regard to the existence of a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the newly submitted medical evidence was insufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2)(i)-(iv) (2001). Decision and Order at 14-

[4]The administrative law judge applied the disability regulation set forth at

15. The administrative law judge reasonably found that the pulmonary function study evidence was insufficient to demonstrate total disability inasmuch as the newly submitted pulmonary function studies produced non-qualifying results. Decision and Order at 7, 14; Director's Exhibits 6, 28; Employer's Exhibit 3; 20 C.F.R. §718.204(b)(2)(i) (2001). Likewise, the administrative law judge properly found that the newly submitted blood gas studies were non-qualifying and, thus, insufficient to demonstrate total disability. Decision and Order at 7, 14; Director's Exhibit 8; Employer's Exhibit 3; 20 C.F.R. §718.204(b)(2)(ii) (2001). In addition, the record contains no evidence of cor pulmonale with right sided congestive heart failure and, therefore, the administrative law judge properly found that total disability was not demonstrated pursuant to Section 718.204(b)(2)(iii) (2001). Decision and Order at 14; 20 C.F.R. §718.204(b)(2)(iii) (2001); *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

Furthermore, the administrative law judge reasonably found that total disability was not demonstrated at Section 718.204(c)(4) (2000), as the newly submitted medical opinions of record were insufficient to demonstrate total respiratory or pulmonary disability. Decision and Order at 7-8, 14-15; Director's Exhibit 7, 28; Employer's Exhibits 1-5; 20 C.F.R. §718.204(b)(2)(iv) (2001); *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*).

Because the administrative law judge properly determined that claimant failed to establish a material change in conditions, *see Ross*, *supra,* we affirm his denial of benefits.

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20 C.F.R. §718.204(C) (2000). After revision of the regulations, the disability regulation is now set forth at C.F.R.§718.204(b) (2000).

[5] 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, Appendices B, C (2001), respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2001).

[6] The administrative law judge found that Dr. Linder opined that claimant had a slight impairment, but that it does not cause a disability. Decision and Order at 15; Director's Exhibit 7. The administrative law judge also found that Dr. Pacht and Dr. Lockey did not offer an opinion as to whether claimant is totally disabled. Decision and Order at 15; Director's Exhibit 28; Employer's Exhibits 3, 5. In addition, the administrative law judge found that Dr. Manchester "indicated that he does not feel that he can speak on the question of whether or not Mr. King is totally disabled." Decision and Order at 15; Director's Exhibit 7.

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

NANCY S. DOLDER
Administrative Appeals Judge