BRB No. 02-0360 BLA

LONNIE BRACKEN SALYER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SAARCAR COAL INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
ASHLAND COAL, INCORPORATED	)	
	)	
Carrier	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Lonnie Bracken Salyer, Flatgap, Kentucky, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (01-BLA-0809) of Administrative Law Judge Joseph E. Kane 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).[1] Considering the newly submitted evidence submitted in support of this duplicate claim, the administrative law judge found that

[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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

claimant failed to establish the existence of pneumoconiosis, or total disability due to pneumoconiosis, elements previously adjudicated against claimant, and therefore, found that claimant failed to establish a material change in conditions.[2] Accordingly, benefits were denied.

On appeal, claimant contends that he is entitled to benefits. Employer has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish 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*).

Before considering the administrative law judge's findings regarding the evidence we must first determine whether the administrative law judge properly found that this claim was timely filed. Section 725.308(a) states in pertinent part: that a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. 20 C.F.R. §725.308(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that:

> [t]he three-year limitations clock begins to tick *the first time* that a

[2] Claimant's first claim was filed on June 1, 1990 and denied by the district director on November 6, 1990 and January 8, 1991. Director's Exhibits 42-1, 42-16, 42-21. Claimant filed a second claim on March 20, 2000.

> miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to [*Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)], the clock may only be turned back if the miner returns to the mines after a denial of benefits.

Tennessee Consolidation Coal Co. v. Kirk, 264 F.3d 602, 608 (emphasis in original).[3] The Sixth Circuit distinguished between "premature claims that are unsupported by a medical determination" which do not trigger the statute of limitations, and "[m]edically supported claims" which do trigger the statutory period. *Id*.

In this case, the administrative law judge, citing *Ross*, *supra*, appears to have found that claimant's earlier claim was premature and unsupported by a medical determination sufficient to trigger the statute of limitations. The administrative law judge stated that because claimant "propounds no evidence produced earlier tha[n] three years before the instant claim, I find that *Sharondale* controls. Accordingly, I find that the claimant's application for benefits was timely filed." Decision and Order at 4. Because it appears that the only physician's opinion submitted in support of the prior 1990 claim did not state that claimant was totally disabled due to pneumoconiosis, Director's Exhibit 42-11, the administrative law judge properly found that claimant's duplicate claim was timely filed. *See Kirk*, *supra*; *Ross*, *supra*; *Abshire v. D & L Co.*, BRB No. 01-0827 BLA, BLR (Sep. 30, 2002); *Furgerson v. Jericol Mining, Inc.*, BRB No. 01-0728 BLA, BLR (Sep. 24, 2002); *Adkins v. Donaldson Mine Co.*, 19 BLR 1-36 (1993); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993).

In finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the majority of negative interpretations by physicians possessing the dual qualifications of Board-certified radiologist and B reader. This was rational. 20 C.F.R. §718.202(a)(1); *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), *see Perry*, *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Decision and Order at 10. Further, inasmuch as there were no biopsy reports, the

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis based on that evidence. 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis by the use of presumptions covering complicated pneumoconiosis, claims filed prior to January 1, 1982, or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Turning to the newly submitted physicians' opinions, the administrative law judge accorded little weight to Dr. Sundaram's opinion diagnosing the existence of pneumoconiosis, as he found it relied on claimant's "exposure to coal dust over ten years of surface mining," was poorly reasoned, poorly documented, and deficient in details regarding claimant's coal dust exposure. Decision and Order at 14. This was rational. Director's Exhibit 2. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Clark, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Similarly, the administrative law judge rationally accorded little weight to Dr. Belhasen's opinion diagnosing the existence of pneumoconiosis, because it provided no objective medical results, was vague in its conclusions regarding the existence of pneumoconiosis and was neither well reasoned nor well documented. Decision and Order at 14; Director's Exhibit 30; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Clark, supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also accorded less weight to Dr. Powell's opinion that claimant did not have pneumoconiosis, because his opinion was not supported by adequate documentation or reasoning. Decision and Order at 15. In contrast, the administrative law judge accorded greater weight to the opinions of Drs. Fino and Broudy, which did not diagnose the existence of pneumoconiosis or any occupationally acquired disease, because he found the opinions to be well documented and reasoned, inasmuch as the opinions reached clear conclusions and were adequately supported by explicit, objective medical findings. Decision and Order at 14; Director's Exhibit 27; Employer's Exhibit 1. Hence, the administrative law judge did not abuse his discretion in finding the opinions of Drs. Fino and Broudy entitled to determinative weight. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark, supra*; *Lucostic, supra*.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *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 if the administrative law judge's findings are supported by substantial evidence. *See Clark, supra*; *Anderson, supra*. Thus, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis and therefore, a material change in conditions on that basis. *Ross, supra*.

Turning to the issue of total disability, the administrative law judge correctly found that neither the newly submitted pulmonary function studies nor the newly submitted blood gas studies were qualifying, and did not, therefore, establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(ii), (iii); Director's Exhibits 10, 12, 27. Likewise, the administrative law judge correctly found that because the record did not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability could not be established on that basis. 20 C.F.R. §718.204(b)(2)(iii).

Turning to the physicians' opinions, the administrative law judge accorded greater weight to the opinions of Drs. Broudy and Fino, that claimant retains the respiratory capacity to perform the work of a miner, because they were well-documented and reasoned and they both demonstrated familiarity with the exertional requirements of claimant's coal mine employment. He accorded less weight to Dr. Sundaram's opinion, the sole opinion to find total disability, because Dr. Sundaram's opinion did not "contain a complete and substantial recitation of the reasoning that led to the doctor's conclusion," and there was "no evidence anywhere in Dr. Sundaram's report that he was familiar with the exertional requirements of the claimant's job." Decision and Order at 19. This was rational. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark*, *supra*; *Anderson*, *supra*; *Lucostic*, *supra*; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). The administrative law judge also accorded less weight to Dr. Powell's opinion of no total disability because he did not demonstrate any knowledge of the exertional requirements of claimant's job. We, therefore, affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and total disability and thus, could not establish a material change in conditions. *See Ross*, *supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge