BRB Nos. 04-0259 BLA
and 04-0259 BLA-A

LONNIE J. TACKETT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 11/18/2004
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Lonnie J. Tackett, Virgie, Kentucky, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] and employer cross-appeals the Decision and Order – Denying Benefits of Administrative Law Judge Joseph E. Kane 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).[2] Claimant filed the instant subsequent claim on March 8, 2001.[3] Director's Exhibit 4. On March 6, 2002, the district director denied benefits. Director's Exhibit 30. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on February 11, 2003. Director's Exhibits 31, 36. After crediting claimant with thirteen years of coal mine employment, the administrative law judge found that the new evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b) and 718.204(c).[4] The administrative thus determined that claimant failed to meet his burden to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d) since the prior denial. Accordingly, the administrative law judge denied benefits.

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[1] Susie Davis, the President of Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law judge's decision. Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

[2] 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Claimant filed a claim for benefits on March 13, 1998, which was denied by the district director on March 31, 1999 for failure to establish, 1) the existence of pneumoconiosis; (2) that the disease arose from coal mine work; and (3) total disability due to pneumoconiosis. Director's Exhibit 1.

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits based on claimant's failure to establish a change in any applicable condition of entitlement at 20 C.F.R. §725.309. Employer additionally filed a cross-appeal, challenging the administrative law judge's decision to exclude certain of employers exhibits based on the evidentiary limitations provided by 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal, maintaining that the administrative law judge properly denied benefits. The Director, however, also argues that the administrative law judge committed harmless error by admitting too many of employer's exhibits into the record in violation of 20 C.F.R. §725.414.[5] In response to employer's cross-appeal, the Director, argues the validity of the regulation at 20 C.F.R. §725.414. Employer has filed a reply to the Director's response.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this case, claimant's prior claim was denied because he failed to establish that he had pneumoconiosis, that the disease arose out of coal mine employment, or that he was totally disabled due to pneumoconiosis. *See* 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); Director's Exhibit 1. The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit has held that, in a case involving the prior regulations, in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the

[5] The Director, Office of Workers' Compensation Programs (the Director), maintains that the administrative law judge erred by admitting evidence submitted by employer in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(3)(i). The Director, however, argues that the error is harmless since the administrative law judge properly determined that claimant's new evidence failed to establish, at 20 C.F.R. §725.309, a change in one of the applicable conditions of entitlement since the prior denial of benefits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id*. In this case, the administrative law judge properly considered, in accordance with 20 C.F.R. §725.309(d) and *Ross*, whether the new evidence was sufficient to establish that claimant has coal workers' pneumoconiosis or that he is totally disabled due to pneumoconiosis. *See* Decision and Order at 5.

The administrative law judge first addressed whether the new evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a). He considered seven readings of three new x-rays dated May 5, 2001, August 16, 2001 and December 12, 2002. Director's Exhibits 15, 16, 18, 19; Employer's Exhibits 6, 7. Because all of these x-ray readings were negative, the administrative law judge correctly determined that the new x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 11.

Since there was no new biopsy evidence submitted since the denial of the prior claim, the administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).[6] *Id*. Similarly, since the record contains no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, and claimant is not entitled to either of the presumptions at 20 C.F.R. §§718.305 and 718.306, the administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[7] Decision and Order at 11-12.

The administrative law judge next considered whether the new medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision an Order at 12. The administrative law judge properly noted that Dr. Saha was a treating physician but that none of his office notes revealed that

[6] The administrative law judge correctly noted that biopsy evidence submitted with the prior claim was previously found insufficient to establish the existence of pneumoconiosis. Decision and Order at 11.

[7] The presumption provided at 20 C.F.R. §718.305 is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). The presumption provided at 20 C.F.R. §718.306 is also inapplicable because the instant claim is not a survivor's claim. *See* 20 C.F.R. §718.306.

claimant had been diagnosed with or treated for pneumoconiosis. Specifically, although Dr. Saha's March 21, 2001 report stated that claimant had undergone lung surgery which revealed "interstitial fibrosis which was consistent with coal workers' pneumoconiosis," the administrative law judge permissibly rejected Dr. Saha's opinion as undocumented and not well reasoned because the physician failed to explain the medical basis for his diagnosis.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Director's Exhibit 13; Decision and Order at 12. The administrative law judge also permissibly found that Dr. Baker's opinion was internally inconsistent and equivocal as to the existence of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR1-91 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67; Director's Exhibit 19; Decision and Order at 13. Specifically, the administrative law judge correctly noted that while Dr. Baker stated in his April 16, 2001 report that claimant's chronic bronchitis was due in part to coal dust exposure, Dr. Baker later responded "No" in the same report when asked whether claimant had an occupationally related lung disease caused by his coal mine employment. Director's Exhibit 19; Decision and Order at 8.

In contrast, the administrative law judge permissibly relied on the opinions of Drs. Dahhan, Caffrey, Rosenberg and Kleinerman to find that claimant did not have clinical or legal pneumoconiosis. *See* 20 C.F.R. §§718.201 and 718.202(a)(4); Decision and Order at 12. The administrative law judge permissibly determined that these physicians were highly qualified, and that their well reasoned and well documented opinions were entitled to controlling weight at 20 C.F.R. §718.202(a)(4). *See Clark*, 12 BLR at 1-149; *Lucostic*, 8 BLR at 1-46; Decision and Order at 12.

Based on the foregoing, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence at 20 C.F.R. §718.202(a)(4), as it is rational, supported by substantial evidence, and consistent with applicable law. Consequently, we affirm the administrative law judge's finding that claimant failed to establish that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a) based on the new evidence.

[8] The administrative law judge was not required to accord greater weight to the opinion of Dr. Saha based on his status as a treating physician. The Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Rather a treating physician should be given deference based upon their power to persuade. *Id*. In this case, the administrative law judge permissibly found Dr. Saha's opinion unpersuasive since he did not explain why he attributed claimant's biopsy finding of interstitial fibrosis to coal dust exposure. Director's Exhibit 13; Decision and Order at 12.

We next address the administrative law judge's findings on total disability. Because none of the new pulmonary function study evidence was qualifying for total disability,[9] the administrative law judge correctly determined that this evidence failed to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i). Director's Exhibits 15, 19; Employer's Exhibits 7; Decision and Order at 13. Likewise, the administrative law judge correctly determined that none of the new arterial blood gas study evidence was qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Director's Exhibits 15, 18; Employer's Exhibit 7; Decision and Order at 13-14. Further, the administrative law judge correctly found that since there was no evidence of record that claimant suffered from cor pulmonale, claimant was unable to establish a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 14. Lastly, the administrative law judge properly noted that "not one physician finds the miner to be disabled due to a pulmonary or respiratory impairment;" therefore claimant cannot establish total disability by the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10] Decision and Order at 14. Thus, because substantial evidence supports the administrative law judge's finding that the new evidence failed to establish that claimant has a totally disabling pulmonary or respiratory impairment, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b).

In light of our affirmance of the administrative law judge's findings that the new evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge's determination, pursuant to 20 C.F.R. §725.309 and *Ross*, that claimant failed to meet his burden to establish a change in one of the applicable

[9] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i) and (ii). A "non-qualifying test" produces results that exceed the table values.

[10] Drs. Baker and Rosenberg opined that claimant was not totally disabled from a pulmonary or respiratory impairment and that claimant could return to his usual coal mine work. Director's Exhibit 19; Employer's Exhibits 7, 11. Dr. Saha did not specifically address the issue of total disability. Director's Exhibit 13. Drs. Caffrey and Kleinerman opined that claimant did not have any respiratory impairment due to pneumoconiosis or coal dust exposure. Director's Exhibits 14, 17; Employer's Exhibit 12.

conditions of entitlement since the prior denial of benefits.[11] We therefore affirm the administrative law judge's denial of benefits.[12]

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

SO ORDERED.

_____
NANCY S. DOLDER
Chief, Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[11] In the instant claim, claimant's inability to establish the existence of pneumoconiosis precludes him from establishing a change in the third applicable condition of entitlement, which is whether claimant is totally disabled due to pneumoconiosis.

[12] Because we herein affirm the administrative law judge's denial of benefits based on his determination at 20 C.F.R. §725.309, we decline to address the arguments raised by employer in its cross-appeal and by the Director in its response brief thereto, regarding the administrative law judge's application of 20 C.F.R. §725.414.