BRB No. 98-0297 BLA

LUTHER S. MATNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Luther S. Matney, Grundy, Virginia, *pro se*.

Martin E. Hall (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (97-BLA-115) of Administrative Law Judge Stuart A. Levin 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). The administrative law judge found, and the parties stipulated to, at least thirty years of coal mine employment and based on the date

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] After considering the newly submitted evidence of record, the administrative law judge concluded that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[3] Considering the entire record, however, the administrative law judge concluded that the evidence was insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would 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. *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 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

[2] Claimant filed his initial claim for benefits on June 27, 1973, which was finally denied by the district director on April 24, 1980. Claimant filed his second claim on September 21, 1983, which was denied by the administrative law judge on February 25, 1988. Director's Exhibit 32. On appeal, the Board affirmed the denial on June 21, 1990. Claimant filed the instant claim on August 21, 1995, which was denied by the district director on October 31, 1995 and April 1, 1996. Director's Exhibits 1, 15, 21.

[3] The administrative law judge found the newly submitted evidence of record sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (4), elements which were previously adjudicated against claimant.

(1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the preponderance of the negative x-ray readings by physicians with superior qualifications. Director's Exhibits 12, 13, 18-20; 28; Employer's Exhibit 2; Decision and Order at 5; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there is no biopsy of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 10; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Further, the administrative law judge considered the entirety of the medical opinion evidence of record and permissibly found the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge permissibly accorded more weight to the opinions of Drs. Dahhan, Tutuer, Fino, and Iosif, finding no pneumoconiosis, based on their superior credentials, and as better reasoned and supported by the objective evidence of record. *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) ; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Employer's Exhibits 1, 3, 4, 6, 7; Decision and Order at 11. The administrative law judge is empowered to weigh the medical opinion evidence of record 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. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is

insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, entitlement thereunder is precluded. *Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge