BRB No. 98-0362 BLA

EMORY E. KEEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Emory E. Keen, Richlands, Virginia, *pro se*.

J. Matthew McCracken (Judith E. Kramer, Deputy Solicitor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (96-BLA-026) of Administrative Law Judge Frederick D. Neusner denying benefits on a duplicate 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 thirteen years of coal mine employment and based on the date of filing,

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 2. After considering the newly submitted evidence of record, the administrative law judge concluded that the evidence was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), and thus, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to 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 (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

[2] Claimant filed his first claim for benefits on March 30, 1981, which was denied by the district director on October 9, 1981. Director's Exhibit 22. Claimant filed his second claim on September 8, 1984, which was denied by the district director on November 16, 1994 and July 25, 1995, and by the administrative law judge on August 26, 1996. Director's Exhibits 1, 17, 21 32. The Board vacated and remanded the case on July 23, 1997.

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 newly submitted 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 13, 14, 20; Decision and Order at 3; *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). Although not specifically addressed by the administrative law judge, the existence of pneumoconiosis cannot be 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. *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Further, the administrative law judge considered the entirety of the newly submitted medical opinion evidence of record and permissibly found the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) as Drs. Forehand and Spagnola did not diagnose pneumoconiosis. *Perry, supra*; Director's Exhibits 11, 24; Decision and Order at 3.

The administrative law judge, in the instant case, also permissibly determined that the newly submitted evidence of record was insufficient to establish total disability pursuant to Section 718.204. *Piccin, supra*. The administrative law judge properly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as the newly submitted pulmonary function study and blood gas study of record produced non-qualifying values[3] and there is no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* 20 C.F.R. 718.204(c)(1)-(3); Director's Exhibit 10, 12; Decision and Order at 3-4; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge properly considered the entirety of the newly submitted medical opinion evidence of record and properly found the evidence insufficient to establish total disability as Drs. Forehand and Spagnolo did not diagnose any respiratory impairment. Director's Exhibits 11, 24; Decision and Order at 4; *Jewell Smokeless Coal Corp. v. Street*, 42 F. 3d 241 (4th Cir. 1994); *Clark, supra*; *Dillon v. Peabody Coal* Co., 11 BLR 1-113 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *King v. Consolidation Coal*

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

Co., 8 BLR 1-262 (1985). 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. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis and total disability as supported by substantial evidence and in accordance with law. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Inasmuch as claimant has failed to establish the existence of pneumoconiosis or total disability, elements of entitlement that were previously adjudicated against him, we affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309. *Rutter*, *supra*.

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

REGINA C. McGRANERY
Administrative Appeals Judge