BRB No. 98-0364 BLA

LAYMON MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEWELL RIDGE MINING CORPORATION/ SEA "B" MINING CORPORATION	)	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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Laymon Mitchell, Jewell Ridge, Virginia, *pro se*.

Timothy Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

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 (97-BLA-652) of Administrative Law Judge Michael P. Lesniak, 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

[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).

found at least twelve years of coal mine employment and based on the date of filing, adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 3. The administrative law judge concluded that the newly submitted evidence of record 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. Employer responds, urging affirmance of the denial of benefits. 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

[2] Claimant filed his initial claim for benefits on December 17, 1980, which was denied by the district director on April 30, 1981 and March 5, 1982. Director's Exhibit 22. Claimant filed his second claim on September 11, 1989, which was denied by the district director on December 21, 1989. Director's Exhibit 22. The instant claim was filed May 6, 1996, which was denied by the district director on November 4, 1996. Director's Exhibits 1, 2, 22.

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 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) as all the x-rays of record were read as negative for pneumoconiosis. Employer's Exhibits 5-14, 18, 46, 47; Director's Exhibits 10, 11, 27.5; Decision and Order at 10; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *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. *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 10; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). In considering the entirety of the newly submitted medical opinion evidence of record at Section 718.202(a)(4), the administrative law judge permissibly found that the existence of pneumoconiosis was not established based on the medical opinions of record as Drs. Sargent and Iosif opined that claimant did not have pneumoconiosis and the remaining medical records only indicate treatment for claimant's heart condition and rheumatoid arthritis. Director's Exhibit 8; Employer's Exhibits 1, 16, 19, 20; Decision and Order at 10; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *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).

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 preponderance of the more recent pulmonary function studies and all of the blood gas studies 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 7, 9, 27.2, 28.2, Employer's Exhibits 1, 15, 27 , 46, 47 5; Claimant's Exhibit 1; Decision and Order at 14; *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Newell v. Freeman United*

[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).

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 medical opinion evidence of record and properly found the evidence insufficient to establish total respiratory or pulmonary disability as the Social Security records indicate disability due to rheumatoid arthritis and Drs. Sargent and Iosif found disability due to smoking. Director's Exhibit 8; Employer's Exhibit 1; Decision and Order at 11; *Jewell Smokeless Coal Corp. v. Street*, 42 F. 3d 241 (4th Cir. 1994); *Clark, supra*; *Dillon, supra*; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *King, 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. *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