BRB No. 99-0213 BLA

KERMIT CHANEY Claimant-Petitioner v. STREET CONTRACTING, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Kermit Chaney, Pikeville, Kentucky, *pro se.*

David H. Neeley (Neeley & Reynolds Law Offices, P.S.C.), Prestonsburg, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (97-BLA-342) of Administrative Law Judge Thomas F. Phalen, Jr. 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] The

[1]Claimant initially filed a claim on June 8, 1989, which was denied by the

administrative law judge found that the parties stipulated to a coal mine employment history of thirteen and three-quarter years and that the evidence of record supports the stipulation. Decision and Order at 4. The administrative law judge further concluded that the instant claim constitutes a duplicate claim and was thus governed by the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, in *Sharondale Coal Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In assessing the evidence, the administrative law judge concluded that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 11-12. The administrative law judge further found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and that the weight of the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 12-14. The administrative law judge further found that, even if claimant had established the existence of pneumoconiosis, the newly submitted evidence failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Decision and Order at 14-16. Accordingly, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309, and thus denied benefits. Employer, in response, urges that the administrative law judge's denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest has not filed a brief.[2]

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district director because claimant failed to establish any elements of entitlement. Director's Exhibit 47. Claimant filed a second claim on May 13, 1993. Director's Exhibit 1. Street Contracting, Incorporated (Street) was initially identified as responsible operator and controverted the claim. After denial by the district director, claimant sought a hearing before an administrative law judge. Eventually, pursuant to the Director's motion, the case was remanded to the district director to see if Street had sufficient assets and to identify any other potential responsible operators. Subsequently, Coal Preparation, Incorporated (Coal Preparation), was notified of the claim and its status as a potential responsible operator and, it too, contested entitlement. After a second hearing, Administrative Law Judge Phalen issued a Decision and Order denying benefits on October 27, 1998. Subsequent to claimant's *pro se* appeal, the Director filed a Motion to Dismiss Coal Preparation as a party in this case. The Board granted this Motion and dismissed Coal Preparation as a party. The Board thus accepted Street's brief as part of the record. *See Chaney v. Street Contracting, Inc.* BRB No. 99-0213 BLA (Order)(May 25, 1999)(unpub.).

[2]We affirm as not adverse to claimant and unchallenged on appeal by the other parties,

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

In *Ross, supra*, the Sixth Circuit held that, in order to establish a material change in conditions pursuant to Section 725.309, a claimant must establish at least one of the elements of entitlement previously adjudicated against him in the prior claim. *See Ross, supra.*

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the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge considered the entirety of the newly submitted x-ray evidence and concluded that only two of the twenty-five interpretations were read as positive for the existence of pneumoconiosis. *See* Director's Exhibits 32, 33. The administrative law judge found that while these positive interpretations were rendered by physicians with no particular qualifications in interpreting x-rays, the weight of the negative interpretations, *see* Director's Exhibits 20-23, 24-30, 32, 33, 49; Employer's Exhibit 1, were rendered by physicians with the superior qualifications of B-reader and/or board-certified radiologist.[3] Accordingly, we affirm the administrative law judge's determination that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Staton v. Norfolk & Western Railway 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)*; Tussey v. Island Creek Coal Co.,* 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985).

We further affirm the administrative law judge's determination that claimant is unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3). The record is devoid of any autopsy or biopsy evidence and there is no evidence of complicated pneumoconiosis in this living miner's claim filed subsequent to January 1, 1982. *See* 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

In finding that claimant failed to establish the existence of pneumoconiosis through the newly submitted medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge considered the entirety of newly submitted evidence and permissibly accorded greatest weight to the opinions of Drs. Broudy and Dahhan, both of whom concluded that claimant did not suffer from

[3]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

pneumoconiosis, Director's Exhibit 17; Employer's Exhibit 14, based on his determination that these physicians' opinions are the best-reasoned and documented of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985). Further, the administrative law judge permissibly discredited the only newly submitted opinion diagnosing the existence of pneumoconiosis, that of Dr. Sundaram, Director's Exhibit 14, because the physician failed to fully explain his conclusion. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). Accordingly, we affirm the administrative law judge's determination that claimant has failed to establish the existence of pneumoconiosis through the newly submitted medical opinion evidence at Section 718.202(a)(4), *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and we affirm the determination that claimant failed to establish a material change in conditions by establishing the presence of the disease. *See* 20 C.F.R. §725.309; *Ross, supra*.

Lastly, we affirm the administrative law judge's determination that claimant failed to establish, through newly submitted evidence, the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*. 9 BLR 1-195 (1986). The administrative law judge permissibly concluded that the weight of the newly submitted pulmonary function study and blood gas study evidence, Director's Exhibits 9-11, 17, 18, 49, was non-qualifying and thus failed to demonstrate total disability pursuant to Section 718.204(c)(1) and (2).[4] The administrative law judge further concluded, correctly, that the record is devoid of any evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds,* 933 F.2d 510 15 BLR 2-124 (7th Cir. 1991). Finally, the administrative law judge permissibly concluded that claimant failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4) as he permissibly accorded greatest weight to the opinions of Drs. Broudy and Dahhan,

[4]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. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

that claimant was not totally disabled, based on the fact that these opinions were the best documented and reasoned. *See Clark, supra*; *Peskie, supra*; *Lucostic*, *supra*. Accordingly, we conclude that the administrative law judge rationally found that claimant has failed to establish a material change in conditions by establishing the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c). *See* 20 C.F.R. §725.309; *Ross, supra*. Because claimant failed to establish a material change in conditions in this duplicate claim, we must affirm the adminstrative law judge's denial of benefits. *See Ross, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge