BRB No. 99-0264 BLA

WILLIAM C. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION 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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

William C. Williams, Clear Creek, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, 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 (96-BLA-0366) of Administrative Law Judge Pamela Lakes Wood 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 credited claimant with thirty-eight years of coal mine employment and, based on the date of filing, adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 in accordance with law. 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).

[1]Claimant filed his initial claim for benefits on May 13, 1978, which was denied by the Department of Labor on January 30, 1985. Director's Exhibit 19. Claimant appealed the denial to the Benefits Review Board, but the appeal was dismissed on November 13, 1985 after claimant failed to comply with the Board's filing requirements. Director's Exhibit 19. Claimant took no further action until he filed the instant claim on May 5, 1994. Director's Exhibit 1.

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 of claimant 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)(*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly noted that the previous claim was denied as claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or that he was totally disabled due to pneumoconiosis. Decision and Order at 2, 7-8; Director's Exhibit 19. The United States Court of Appeals for the Fourth Circuit has held that, in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[2] *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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 the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Of the twenty-four newly submitted x-ray interpretations of record, twenty-three readings are negative for pneumoconiosis, Director's Exhibits 11, 21, 22, 24; Employer's Exhibits 1, 3, 4, and one reading is positive. Director's Exhibit 12. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also properly considered the qualifications of the various

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

physicians. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1988)(*en banc*); Decision and Order at 5-6, 8. The administrative law judge properly found that, based upon the qualifications of the physicians who were B-readers and Board certified radiologists, the weight of the evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 5-6, 8. Since the administrative law judge rationally relied on the superior qualifications of the x-ray readers and found that twenty-three of the twenty-four newly submitted x-ray interpretations of record are negative for pneumoconiosis, substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Adkins, supra*; *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark, supra*; *Trent*, *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Further, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 8. Additionally, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim.[3] *See* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 8-9.

[3]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

In weighing the newly submitted medical opinions of record, the administrative law judge also rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Perry, supra; Piccin, supra*. Whereas Dr. Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibit 9, Drs. Zaldivar, Chillag, Fino and Hippensteel opined that claimant does not suffer from pneumoconiosis.[4] Director's Exhibits 23-25; Employer's Exhibits 2, 3, 5-7. The administrative law judge acted within her discretion as fact-finder in concluding that the opinion of Dr. Rasmussen was outweighed by the medical opinions of Drs. Zaldivar, Chillag, Fino and Hippensteel. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Clark*, *supra*; *Perry, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 9. The administrative law judge properly accorded determinative weight to the opinion of Dr. Zaldivar over the contrary opinion of Dr. Rasmussen because his opinion is stated in more definite terms and is supported by the three qualified reviewing physician's opinions of record, *i.e.,* Drs. Chillag, Fino and Hippensteel.[5] *See Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *King v. Consolidation Coal Co.,* 8 BLR 1-262 (1985); *Wetzel, supra*; *Lucostic, supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Inasmuch as the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as it is supported by substantial evidence. *Clark*, *supra*; *Perry, supra*; *Lucostic*, *supra*; *Oggero, supra*.

With regard to 20 C.F.R. §718.204(c), the administrative law judge properly

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[4]The administrative law judge correctly found that Drs. Rasmussen and Zaldivar were examining physicians while Drs. Chillag, Fino and Hippensteel only reviewed the evidence of record. Decision and Order at 6-7, 9; Director's Exhibits 9, 23-25; Employer's Exhibits 2, 3, 5-7.

[5]The administrative law judge properly noted that Dr. Rasmussen's diagnosis of pneumoconiosis was based on claimant's forty years of coal mine employment and Dr. Patel's positive x-ray which was reread as negative by better qualified physicians. *See* Decision and Order at 9; Director's Exhibits 9, 11, 12, 21, 22, 24; Employer's Exhibit 1; *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985); *Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983).

found the newly submitted evidence insufficient to establish total disability. *Piccin, supra*. Since none of the newly submitted pulmonary function studies of record yielded qualifying[6] values, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). Director's Exhibit 7; Decision and Order at 10. Further, the administrative law judge acted within her discretion in finding the April 9, 1997 blood gas study which produced non-qualifying values more probative than the August 15, 1994 blood gas study which produced qualifying values, as it is the most recent study[7] and therefore properly concluded that the newly submitted blood gas study evidence did not satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.204(c)(2). Decision and Order at 10; Director's Exhibit 8; Employer's Exhibit 3; *Sexton v. Southern Ohio Coal Co.,* 7 BLR 1-411 (1984). Additionally, since the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3). Decision and Order at 10; *Newell v. Freeman United Coal Mining Co.,* 13 BLR 1-37 (1989).

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

[7]The administrative law judge additionally noted that, at best, the blood gas study evidence is in equipose and does not, therefore, statisfy the claimant's burden of proof pursuant to *Director, OWCP v. Greenwich Collieries [Ondecko]* 114 S. Ct. 2251, 18 BLR 2A-1 (1994).

Finally, the administrative law judge considered the newly submitted medical reports of record and properly found that the opinions were insufficient to establish claimant's burden of proof as no physician opined that claimant was totally disabled by a respiratory or pulmonary condition. *See* Decision and Order at 11; Director's Exhibits 9, 23-25, 30; Employer's Exhibits 2, 3, 5-7; *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra; Piccin, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw her 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); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.[8]

Since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter*, *supra*.

[8]Since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

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