BRB No. 99-0273 BLA

DONNIE E. ELLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/ AMHERST 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 Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Donnie E. Ellis, Man, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order Denying Benefits (98-BLA-544) of Administrative Law Judge Daniel F. Sutton 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). In the previous Decision and Order, Administrative Law Judge Richard E. Huddleston credited claimant with seven years of coal mine employment based on a stipulation

by the parties and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[1] He found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 46. Claimant appealed the denial of benefits to the Board and in *Ellis v. Arch of West Virginia*, BRB No. 95-0448 BLA (July 18, 1995) (unpub.), the Board affirmed the administrative law judge's finding with respect to the length of coal mine employment, his findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4) and his denial of benefits. Employer's Exhibit 5. Claimant filed the instant claim on February 20, 1997. Director's Exhibit 1. Administrative Law Judge Sutton considered only the later medical evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge thus found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.[2] In the instant 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 not participated 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. *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, are 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);

[1] Claimant filed his initial claim for benefits on May 6, 1985 which was finally denied on November 27, 1985. No further action was taken on that claim. Director's Exhibit 47.

[2] The record shows that the administrative law judge's actions at the hearing below complied with the requirements delineated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

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 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, 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.[3] In evaluating the newly submitted x-ray evidence, the administrative law judge considered thirty-eight x-ray readings of nine x-rays, the qualifications of the readers and the fact that nine readings classified films as unreadable. Decision and Order at 8-10. The administrative law stated that among the remaining twenty-nine x-ray readings, only the three x-ray readings of the x-rays taken on June 4, 1995, March 11, 1996 and March 21, 1997 by Dr. Gaziano, a B-reader, were positive, but that these x-rays were interpreted as negative by more qualified readers and that Dr. Gaziano had interpreted the more recent x-rays of April 24, 1997 and May 1, 1997 as completely negative. Decision and Order at 10; Director's Exhibits 16, 31-32, 35, 37. The administrative law judge thus found that the clear preponderance of the x-ray evidence was negative. Decision and Order at 10. As a result, the administrative law judge properly weighed the x-ray evidence and rationally accorded greater weight to the preponderance of x-ray interpretations by the readers with superior qualifications. *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We, therefore, affirm the administrative law judge's finding that the x-ray evidence

[3] Because we affirm the administrative law judge's findings that claimant has failed to establish a material change in conditions by failing to establish the existence of pneumoconiosis, *see* 20 C.F.R. §§725.309, 718.202, we need not address the administrative law judge's length of coal mine employment determination.

was insufficient to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Additionally, as the record contains no biopsy or autopsy evidence, and as none of the presumptions found at 20 C.F.R. §§718.304, 718.305 and 718.306 are applicable,[4] the administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(2) and (3). *See* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 7.

In weighing the 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*. As none of the physicians of record diagnosed pneumoconiosis or diagnosed claimant as suffering from any pulmonary or respiratory condition arising out of coal mine employment, the administrative law judge properly concluded that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the medical opinion evidence. *Clark*, *supra*; *Perry*, *supra*; *Winters v. Director, OWCP*, 6 BLR 1-877 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order at 10-11. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as the administrative law judge properly weighed all of the newly submitted medical opinions of record and rationally concluded that the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4). *Clark*, *supra*; *Perry*, *supra*. Consequently, we affirm the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and in accordance with law. *Anderson*, *supra*; *Trent*, *supra*. As the administrative law judge weighed all of the newly submitted medical evidence and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), we affirm his finding

[4] The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305 applies to claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

that the evidence is insufficient to establish a material change in conditions pursuant to Section 725.309. *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), *cert. denied*, 519 U.S. 1090 (1997).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM C. NELSON, Acting
Administrative Appeals Judge