BRB No. 00-0118 BLA

ARVIL L. ALLEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WELLMORE COAL 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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Arvil L. Allen, Grundy, Virginia, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (99-BLA-0002) of Administrative Law Judge Linda S. Chapman denying benefits in a request for modification of 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). This case is before the Board for a second time. Administrative Law Judge George A. Fath

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

determined that claimant's prior claim was finally denied on February 13, 1980.[2] Judge Fath

[2] Claimant filed his initial claim with the Social Security Administration (SSA) on June 30, 1973. Director's Exhibit 87. SSA denied the claim on August 31, 1973 on the grounds that claimant failed to establish the existence of pneumoconiosis or the presence of a severely disabling chronic lung impairment which could be presumed to be pneumoconiosis. On March 6, 1974, after reconsideration indicating that claimant had not established complicated pneumoconiosis or that he was unable to engage in coal mine employment or comparable and gainful work prior to July 1, 1973, SSA again denied the claim on June 4, 1975 and October 10, 1975. *Id.* Following the 1977 Amendments to the Act, SSA denied the claim as claimant was still working in the mines and had not established complicated pneumoconiosis or a change in his work circumstances. *Id*. SSA referred the claim to the Department of Labor (DOL) where the claim was again denied on February 13, 1980 because the evidence of record did not establish the existence of pneumoconiosis. *Id*. Claimant took no further action until he filed the present claim on February 7, 1994. *Id*. Director's Exhibit 1. The district direct denied the present claim on April 12, 1994 on the grounds that the evidence of record did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment, and was, therefore, insufficient to demonstrate a material change in conditions at 20 C.F.R. §725.309. Director's Exhibit 16.

determined that claimant was a miner under the Act who had worked in coal mining after 1969, and that employer was the responsible operator. Judge Fath found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Thus, Judge Fath found that claimant failed to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309, and denied benefits. On appeal, the Board affirmed the findings of Judge Fath on coal mine employment and responsible operator and at Section 718.202(a)(1) and (4).[3] The Board, however, remanded this case to Judge Fath to determine if claimant established a material change in conditions at 20 C.F.R. §718.204(c), (b). *See Allen v. Wellmore Coal Corp.*, BRB No. 96-0446 BLA (Jan. 17, 1997)(unpub.). On reconsideration, the Board vacated its Decision and Order of January 17, 1997 and affirmed the denial of benefits as the record did not contain any evidence which attributed claimant's disability to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *See Allen v. Wellmore Coal Corp.*, BRB No. 96-0446 BLA (Decision and Order on Recon. Nov. 18, 1997)(unpub.).

The district director also denied this claim for the same reasons after a conference on September 7, 1994. Director's Exhibit 34.

[3] The Board also concluded that any error in Judge Fath's findings at Section 718.202(a)(2) and (3) was harmless.

Claimant timely requested modification which the district director denied on June 17, 1998 on the grounds that claimant had not established a change in conditions. Director's Exhibit 80. Following a hearing on the merits, Administrative Law Judge Linda S. Chapman (the administrative law judge) found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4) and a totally disabling respiratory impairment due to pneumoconiosis at Section 718.204(b), and thus, insufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §718.310. Accordingly, benefits were denied. On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[4]

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 one of these elements precludes entitlement.[5] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987);

[4] We affirm the findings of the administrative law judge that claimant was a miner under the Act, that employer was properly designated responsible operator, and that the request for modification was timely filed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Since the miner's last coal mine employment took place in Virginia, the Board will

Perry v. Director, OWCP, 9 BLR 1-1 (1986)(*en banc*).

apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*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. Initially, the administrative law judge permissibly credited the miner with at least twenty-two years of coal mine employment based the miner's Social Security earnings record, employer's stipulation at the hearing concerning the length of claimant's employment, the previous findings of Judge Fath, and claimant's hearing testimony.[6] *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984); *see generally Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). We, therefore, affirm the findings of the administrative law judge on the length of coal mine employment.

As the instant claim involves a modification of a duplicate claim, the administrative law judge should have determined whether all the evidence submitted since the denial of claimant's prior claim was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant established a basis for modification of Judge Fath's denial of benefits in claimant's 1994 duplicate claim. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998). This error is, however, harmless in view of the administrative law judge's proper determination that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a) and a totally disabling respiratory impairment due to pneumoconiosis at Section 718.204(b). *Id.*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] Although the administrative law judge noted that employer declined to stipulate that claimant's employment with them qualified as coal mine employment under the Act, *see* Hearing Transcript at 7; Decision and Order at 5, footnote 5, the administrative law judge, nevertheless, permissibly concluded based on Judge Fath's previous findings which were based on substantial evidence and supported by the record, the fact that employer did not submit any additional evidence in support of its position that claimant was not a miner, and her own review of the record and applicable case law that claimant was a miner under the Act and that employer was the responsible operator. *See* Decision and Order at p. 4-5.

In finding the newly submitted evidence insufficient to meet claimant's burden of proof, the administrative law judge concluded, at Section 718.202(a)(1), that the record contained five x-rays which were interpreted nineteen times. *See* Director's Exhibits 74, 79, 85, 86; Employer's Exhibits 2, 5; Decision and Order at 6-7. In reviewing this evidence, the administrative law judge properly found that the preponderance of the x-ray evidence was negative for pneumoconiosis as only one x-ray interpretation was positive for pneumoconiosis. *Id*. The administrative law judge permissibly accorded greater weight to the interpretations of the physicians who are Board-certified Radiologists and B-readers. *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Thus, the administrative law judge properly concluded that the preponderance of the x-ray evidence was negative for pneumoconiosis, and therefore, insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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). We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.202(a)(1) as supported by substantial evidence.[7]

In determining whether claimant had met his burden of proving the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge correctly concluded that Dr. Jabour was the only physician of record who diagnosed pneumoconiosis. *See* Decision and Order; Director's Exhibits 9, 27, 29, 32, 50, 51, 66, 73, 79; Employer's Exhibits 1, 4, 6. The administrative law judge permissibly found Dr. Jabour's medical opinion not well-reasoned and entitled to little weight because Dr. Jabour failed to consider or even discuss the role played by claimant's severe coronary problems in his respiratory condition.

[7] The administrative law judge also correctly determined that since the record contained no biopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), and that claimant, a living miner, was not entitled to the presumptions at Section 718.202 (a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306. We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.202(a)(2)-(3) as supported by substantial evidence.

See Director's Exhibits 66, 73. Thus, the administrative law judge rationally concluded that Dr. Jabour did not have an adequate picture of claimant's health problems. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Stark, supra*. As the administrative law judge has provided a proper reason for according little weight to the medical opinion of Dr. Jabour, we need not address her other reasons for finding this report insufficient to establish the existence of pneumoconiosis. *See Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984).

Likewise, the administrative law judge did not err when she found the report of Dr. Jabour insufficient to meet claimant's burden of proving that pneumoconiosis is a contributing cause of his respiratory disability. *See* 20 C.F.R. §718.204(b); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). The administrative law judge rationally found the report of Dr. Jabour unreliable on the issue of causation because Dr. Jabour failed to consider or discuss the affect claimant's significant coronary condition had on his breathing capacity and his conclusion that claimant was totally disabled due to pneumoconiosis. *Trumbo, supra*; *Stark, supra*. Thus, the administrative permissibly concluded that the report of Dr. Jabour was insufficient to establish that pneumoconiosis was a contributing cause of claimant's total disability at Section 718.204(b). *Robinson, supra*. We, therefore, affirm the administrative law judge's credibility findings on the report of Dr. Jabour as it is supported by substantial evidence.

As Dr. Jabour's report is the only evidence of record supportive of claimant's burden of proof on an essential element of entitlement, we affirm the finding of the administrative law judge that claimant failed to establish the existence of pneumoconiosis and pneumoconiosis as a contributing cause of his total disability and we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge