BRB No. 00-0160 BLA

WILLIAM T. RUSSELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY, INCORPORATED	)	
	)	
	)	
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 Thomas P. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William T. Russell, Marion, Virginia, *pro se*.

Kathy L. Snyder (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order (1999-BLA-0634) of Administrative Law Judge Thomas P. Phalen, Jr., 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 3.96 years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[1]

[1] Claimant filed his initial claim for benefits on January 14, 1981, which was

The administrative law judge considered all of the 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) or total disability pursuant to 20 C.F.R. §718.204(c)(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(d) under *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[2] Accordingly, benefits were denied. On

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denied by the district director on July 17, 1981. Decision and Order at 3; Director's Exhibit 39-1, 39-13. No further action was taken on that claim. *Id*. Claimant filed his second claim for benefits on February 21, 1993, which was denied by the district director on October 22, 1993. Decision and Order at 3; Director's Exhibits 40-20, 40-29. No further action was taken on that claim. *Id*. The instant claim was filed on February 10, 1997. Decision and Order at 3; Director's Exhibit 1.

[2] Although the administrative law judge stated that claimant last worked as a coal miner in the Commonwealth of Kentucky, a review of the record indicates that claimant actually worked in the Commonwealth of Virginia and therefore 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*). Decision and Order at 16; Employer's Brief at 13 n. 3; Hearing Transcript at 29-30. Inasmuch as the standard articulated in *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) is in accordance with

appeal, claimant generally contends that the administrative law judge erred in failing to award 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); *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).

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. In his consideration of the evidence pursuant to Section 718.202(a)(1), the administrative law judge listed the forty-seven interpretations of the twelve new x-rays and five CT scans taken between March 26, 1997 and December 2, 1998, as well as the qualifications of the readers. Decision and Order at 5-11; Director's Exhibits 12-14, 16, 18, 34; Employer's Exhibits 1-3, 5. The administrative law initially found that the positive reading by Dr. Navani, a dually qualified B reader and Board-certified radiologist, of the March 26, 1997, x-ray was read as negative by Drs. Forehand and Cole, B readers. Decision and Order at 5, 18; Director's Exhibits 12-14. The administrative law judge implicitly assigned diminished weight to the May 14, 1998, x-ray interpretation by Dr. Garzon since the doctor possessed no special radiological qualifications and did not state an unequivocal diagnosis of pneumoconiosis.

Sharondale Corp. v. Ross, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) this error is harmless.

Decision and Order at 5, 18; Director's Exhibit 18. The administrative law judge further discussed the remaining x-rays and CT scan interpretations and found that there were no other positive readings of pneumoconiosis. Relying on the greater number of dually qualified B readers and Board certified radiologists, the administrative law judge reasonably found that the clear preponderance of the x-ray interpretations by the readers with superior qualifications was negative. *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); Decision and Order at 19.

Further, the administrative law judge properly concluded that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) as there was no biopsy evidence in the record. *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 19. In addition, the administrative law judge properly found that the presumptions enumerated at Section 718.202(a)(3) are inapplicable to this claim as the record contains no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; claimant filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305; and this is not a survivor's claim. *See* 20 C.F.R. §718.306; Decision and Order at 19.

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*. In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion of Dr. Garzon, stating that claimant suffered from pneumoconiosis, was outweighed by the contrary medical opinions of Drs. Forehand, Castle, Jarboe and Fino, whose conclusions that claimant did not have an impairment related to coal mine employment were substantiated by the objective medical evidence. *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 11-16, 20-21. 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). 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)(1)-(4) as it is supported by substantial evidence and in accordance with law. *Anderson*, *supra*; *Trent*, *supra*.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant, probative, new evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9

BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence failed to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c), the administrative law judge correctly found that the recently submitted evidence contains no valid qualifying pulmonary function or blood gas studies[3] and that the record contains no evidence of cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(1)-(3); Decision and Order at 10-11, 22; Director's Exhibits 9, 11, 18, 34, 39-40.

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

With respect to Section 718.204(c)(4), the administrative law judge also rationally determined that the evidence of record was insufficient to establish that claimant suffered from a total respiratory disability. The administrative law judge permissibly concluded that the newly submitted medical opinion evidence was insufficient to establish total disability since, in spite of his status as a treating physician, Dr. Garzon's diagnosis of total disability was not supported by his medical documentation. *Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-324 (4th Cir. 1998), *Sterling smokeless Coal Co. v. Akers,* 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In addition, the administrative law judge rationally found that the contrary opinions of Drs. Castle, Forehand, Jarboe and Fino, stating that claimant was not suffering from a disabling respiratory or pulmonary impairment, were found to be supported by the objective data and, thus, were well-reasoned.[4] *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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)(*en banc*); *Perry*, *supra*; Decision and Order at 23. 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*, *supra*. Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), we affirm the administrative law judge's finding that the evidence was insufficient to establish a material change in conditions pursuant to Section 725.309 and we affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law. *Rutter*, *supra*.

[4] As 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), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

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

REGINA C. McGRANERY
Administrative Appeals Judge