BRB No. 99-1317 BLA

DARRELL S. COTTRELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Decision and Order Denying Claimant's Motion For Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Michael E. George, Akron, Ohio, and Joyce J. George (Clark, George & Associates), Akron, Ohio, for claimant.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Decision and Order Denying Claimant's Motion For Reconsideration (99-BLA-0015) 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 administrative law judge found five years of coal mine employment established

[1] Claimant's brief on appeal was submitted on claimant's behalf by Joyce J. George of Clark, George & Associates of Akron, Ohio, who represented claimant at that time. Subsequently, Ms. George withdrew as counsel of record representing claimant and requested that Michael E. George of Akron, Ohio, be substituted as claimant's counsel of

and found that the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309(d) because it was filed more than one year after the denial of claimant's prior claim. *See* Director's Exhibits 1, 18.[2] Thus, the administrative law judge considered whether the evidence submitted since the denial of claimant's prior claim established a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). The administrative law judge considered all of the newly submitted evidence pursuant to 20 C.F.R. Part 718 and found that it was insufficient to establish pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(c) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), elements of entitlement previously adjudicated against claimant, *see* Director's Exhibit 18. Thus, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in denying benefits in light of the fact that the evidence submitted by claimant was not refuted or rebutted by the evidence submitted by the Director, Office of Workers' Compensation Programs (the Director). Claimant also argues that the administrative law judge erred in determining the length of claimant's coal mine employment. In addition, claimant contends that the administrative law judge erred in failing to find pneumoconiosis arising out of coal

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record pursuant to an agreement with claimant.

[2] Claimant originally filed a claim on February 16, 1993, which was denied on December 17, 1993, Director's Exhibit 17. Claimant filed a second claim on February 1, 1995, which was denied by the district director on October 11, 1995, who found that the existence of pneumoconiosis was established, but further found that pneumoconiosis arising out of coal mine employment was not established pursuant to 20 C.F.R. §718.203 and that total disability was not established pursuant to 20 C.F.R. §718.204, Director's Exhibit 18. Claimant filed the instant claim, at issue herein, on October 15, 1997, Director's Exhibit 1.

mine employment established pursuant to Section 718.203(c), total disability due to pneumoconiosis established pursuant to Section 718.204(b), (c) and a material change in conditions established pursuant to Section 725.309(d). Finally, claimant contends that the administrative law judge erred in not finding that the evidence established a basis for modification based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The Director responds, urging that the administrative law judge's denial of benefits be affirmed.

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).

The Fourth Circuit has held that in order to establish a material change in conditions in a duplicate claim pursuant to Section 725.309(d), a claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him," *see Rutter, supra*. In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *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). Moreover, pursuant to Section 718.204(b), claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment, *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Initially, claimant contends that the administrative law judge erred in not finding that the evidence established a basis for modification based on a mistake in a determination of fact in the prior denial pursuant to Section 725.310. However, as there is no indication in the record that claimant sought to take any further action regarding his prior denied claim and the instant claim was filed more than one year after the denial of his prior claim, Director's Exhibits 1, 18, we reject claimant's contention and affirm the administrative law judge's finding that the instant claim is a duplicate claim pursuant to Section 725.309(d).

Next, claimant contends that the administrative law judge erred in not finding nine years of coal mine employment established. However, any error by the administrative law judge in this regard is harmless, inasmuch as the administrative law judge did not rely on his determination as to the length of claimant's coal mine employment when weighing the relevant evidence of record and because nine years of coal mine employment would not entitle claimant to any presumption that his pneumoconiosis arose out of his coal mine employment, *see* 20 C.F.R. §718.203(b), (c), or that he was totally disabled due to pneumoconiosis, *see* 20 C.F.R. §718.305(a); *Larioni v. Director, OWCP*, 6 BLR 1-1276 BLA (1984).

Claimant further contends that the administrative law judge denied claimant due process and a fair hearing by denying benefits despite the fact that the Director did not submit any evidence to refute or rebut the evidence submitted by claimant. Contrary to claimant's contention, claimant bears the burden of proving entitlement even where the party opposing entitlement offers no defense, *see* 20 C.F.R. §725.461; *see generally Young v. Barnes and Tucker Co.*, 11 BLR 1-148, 1-150 (1988). Further, the Board has held that, pursuant to the Federal Rules of Civil Procedure 56, *see also* 20 C.F.R. §725.451(c), an administrative law judge must deny summary judgement if there are genuine unresolved factual issues as to any material fact, *see Montoya v. National King Coal Co.*, 10 BLR 1-59 (1986). Thus, inasmuch as the Director contested entitlement, *see* Director's Exhibit 19, and the issue of whether claimant established entitlement was unresolved at the time of the hearing, *see Young*, *supra*; *Montoya*, *supra*, we reject claimant's contention. With respect to the administrative law judge's findings on the merits, claimant contends that the 1993 opinions of Drs. Katzman and Kirschner, as well as the 1995 opinion of Dr. Koren, support entitlement. Inasmuch as their opinions pre-date the denial of claimant's prior claim, however, the administrative law judge acted properly in not considering them in determining whether claimant established a material change in conditions pursuant to Section 725.309(d), which must be based on medical evidence of claimant's condition after the prior denial, *see Rutter*, *supra*.

Claimant also contends that the opinions of Drs. Fuenning and Vora are sufficient to establish that claimant's pneumoconiosis was due, at least in part, to his coal mine employment pursuant to Section 718.203(c). Section 718.203(c) provides that where the miner has established less than ten years of coal mine employment, as in the instant case, it shall be determined that his pneumoconiosis arose out of that coal mine employment only if competent evidence establishes such a relationship, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Inasmuch as claimant established less than ten years of coal mine employment, claimant bears an affirmative burden of proof at Section 718.203, *see Stark, supra*. However, contrary to claimant's contention that claimant need only prove that his pneumoconiosis was due at least in part to his coal mine employment in this case arising within the Fourth Circuit, the language of 20 C.F.R. §718.201 requiring that pneumoconiosis be "significantly related"

to or "substantially aggravated" by dust exposure in the miner's coal mine employment must be read into the requirements of Section 718.203, *see Shoup v. Director, OWCP*, 11 BLR 1-110 (1987).

In 1997, Dr. Fuenning diagnosed chronic obstructive pulmonary disease, emphysema and dust pneumoconiosis which he attributed to claimant's tobacco addiction and dust - asbestos, noting that claimant had forty-two years of asbestos exposure, Director's Exhibit 5. In 1998, Dr. Fuenning found that claimant had asbestos related pleural disease, Director's Exhibit 11. In 1999, Dr. Fuenning attributed claimant's dust pneumoconiosis to both coal workers' pneumoconiosis and asbestos, Claimant's Exhibit 2, and subsequently, in response to a written question as to whether claimant's pneumoconiosis was caused, at least in part, by his coal mine employment, answered yes, Claimant's Exhibit 3. Similarly, Dr. Vora reviewed Dr. Fuenning's opinion and stated that he agreed with it. Dr. Vora diagnosed coal miner's lung and in response to a written question as to whether claimant's pulmonary problem stemmed, at least in part, from his coal mine employment, Dr. Vora answered yes, Claimant's Exhibit 1A.

Although the administrative law judge did not find Dr. Fuenning's opinions necessarily inconsistent, he found that his 1999 opinion attributing claimant's dust pneumoconiosis, in part, to his coal mine employment was not supported by competent medical evidence and that it was unclear how he derived his conclusion, Decision and Order at 10. Similarly, the administrative law judge found that Dr. Vora's opinion was not corroborated by medical evidence and that it was not clear how he derived his conclusion or whether he was aware of claimant's coal mine employment history, Decision and Order at 11. Thus, as the basis of the opinions of Drs. Fuenning and Vora could not be determined, the administrative law judge found their opinions insufficient to establish pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(c).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Moreover, it is within the administrative law judge's discretion to determine whether opinions are adequately documented, explained and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are supported by substantial evidence, *see 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 pneumoconiosis arising out of coal mine employment was not established by the newly submitted evidence pursuant to Section 718.203(c) as this finding is supported by substantial evidence.

Claimant further contends that the opinion of Dr. Fuenning is sufficient to establish total disability pursuant to Section 718.204. In a March, 1999, opinion, Dr. Fuenning found that claimant suffered from a "significant" respiratory impairment, which he specifically described as a "10 to 25%" mild impairment, Claimant's Exhibit 2. Subsequently, in response to a written question as to whether claimant's breathing impairment prevented him from performing the type of work required in coal mine employment, Dr. Fuenning answered yes, Claimant's Exhibit 3. Similarly, Dr. Vora reviewed Dr. Fuenning's opinion and stated that he agreed with it and in response to a written question as to whether claimant was able to work, Dr. Vora answered no, Claimant's Exhibit 1A. The administrative law judge found that Dr. Fuenning did not provide any explanation for his one word answer that claimant was totally disabled and that Dr. Vora did not submit any evidence to support his similar one word answer, Decision and Order at 9, 11-12.[3]

The administrative law judge further found that the record lacks any description of the exertional requirements of claimant's usual coal mine employment, and that claimant had

[3] Pursuant to Section 718.204(c), the administrative law judge found that the newly submitted pulmonary function study and blood gas study evidence was non-qualifying, *see* 20 C.F.R. §718.204(c)(1)-(2). Inasmuch as the administrative law judge's findings pursuant to Section 718.204(c)(1)-(2) are unchallenged on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. §727.203(a)(2)-(3) or 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §727.203(a)(2)-(3) and 20 C.F.R. §718.204(c)(1), (2).

failed, therefore, to carry his burden of establishing the exertional requirements of his usual coal mine employment. *See* Decision and Order at 11, *see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Cregger v. United States Steel Corp.*, 6 BLR 1-1219 (1984). Likewise, the administrative law judge permissibly found, within his discretion, that Dr. Fuenning's opinion provided an insufficient basis upon which an inference of total disability could be made, *see* 20 C.F.R. §718.204(c)(4); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984)*; Cregger, supra*; *see also Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309 (1984). Additionally, although claimant contends that the lay testimony of claimant's wife and daughter also support a finding of total disability, lay testimony of record, without credible corroborating medical evidence, is insufficient to establish a totally disabling respiratory or pulmonary impairment in a living miner's case, *see Trent*, *supra*; *Fields*, *supra*; *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984).

Moreover, even if claimant established total disability, the administrative law judge found the evidence insufficient to show a causal relationship between total disability and claimant's coal mine employment, *see* 20 C.F.R. §718.204(b). Again, it is within the administrative law judge's discretion to determine whether opinions are adequately documented, explained and reasoned, *see Clark*, *supra*; *Fields*, *supra*; *Lucostic*, *supra*, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are supported by substantial evidence, *see Anderson*, *supra*; *Worley*, *supra*. Consequently, we affirm the administrative law judge's finding that total disability due to pneumoconiosis was not established by the newly submitted evidence pursuant to Section 718.204(b), (c) as supported by substantial evidence.

Finally, claimant contends that Drs. Fuenning's and Vora's opinions, as well as the testimony of claimant's wife and daughter, establish that claimant's condition has worsened. Inasmuch as the administrative law judge's findings: that the newly submitted evidence is insufficient to establish pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(c) or total disability due to pneumoconiosis pursuant to Section 718.204(b), (c), elements of entitlement previously adjudicated against claimant, *see* Director's Exhibit 18, have been affirmed, *supra*, the administrative law judge's finding that claimant has failed to establish a material change in conditions pursuant to Section 725.309(d) in accordance with standard enunciated in *Rutter*, *supra*, is likewise affirmed.

Accordingly, the Decision and Order Denying Benefits and Decision and Order Denying Claimant's Motion For Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge