

BRB No. 06-0361 BLA

OSCAR L. BRYANT)
)
 Claimant-Petitioner)
)
 v.)
)
 JIM WALTERS RESOURCES,) DATE ISSUED: 10/24/2006
 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 - Denial of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Oscar L. Bryant, Birmingham, Alabama, *pro se*.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order-Denial of Benefits (04-BLA-5039) of Administrative Law Judge Edward Terhune Miller rendered on a subsequent 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

¹ Claimant initially filed a claim for benefits on May 6, 1991, which was denied on January 4, 1994, as claimant failed to establish any required element of entitlement. Director's Exhibit 1. That denial was affirmed by the Board. *Bryant v. Jim Walters Resources, Inc.*, BRB No. 94-0690 BLA (Aug. 22, 1994)(unpub.). Director's Exhibit 1. Claimant filed for benefits again on December 23, 1996, and on February 7, 2000. These

Based on the date of filing, August 22, 2002, Director's Exhibit 5, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, or a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge found, therefore, that a change in an applicable condition of entitlement had not been established pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits.² Employer responds, urging affirmance of the Decision and Order of the administrative law judge denying benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director) 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 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grills 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 prove that he suffers from pneumoconiosis, that the

claims were denied by the district director on September 17, 1997, and May 18, 2000, due to claimant's failure to establish any required element of entitlement. Director's Exhibits 2, 3. Claimant took no further action regarding these claims until filing the present claim for benefits.

² In his January 22, 2006 letter to the Board, claimant refers to evidence that the administrative law judge failed to discuss. This evidence was, however, contained in claimant's previous claims. As the administrative law judge is first required to consider whether the new evidence establishes an element of entitlement previously adjudicated against claimant, before considering whether the record as a whole establishes entitlement, the administrative law judge was not required to consider the evidence to which claimant refers in determining whether claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge noted that the record contained four newly submitted x-ray readings, none of which were interpreted as positive for the existence of pneumoconiosis. He, therefore, found that the preponderance of the newly submitted x-ray evidence failed to establish the existence of coal workers' pneumoconiosis. This was proper. We, therefore, affirm his finding that the x-ray evidence failed to establish the existence of pneumoconiosis. Employer's Exhibits 1, 2; Director's Exhibits 10, 11; Decision and Order-Denial of Benefits at 3-4, 7; *see Brown v. Director, OWCP*, 851 F.2d1569, 11 BLR 2-192 (11th Cir. 1988); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Preston v. Director, OWCP*, 6 BLR 1-229 (1984).³

We also affirm the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(2), (3) as the requirements at Section 718.202(a)(2)-(3) were not met, *i.e.*, the record contained no autopsy or biopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, 718.306 were not applicable in this living miner's claim filed after January 1, 1982, in which there was no evidence of complicated pneumoconiosis. Director's Exhibit 5; Decision and Order-Denying Benefits at 7; 20 C.F.R. §718.202(a)(2), (3). *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to Section 718.202(a) (4), the administrative law judge permissibly found that Dr. Claybon's newly submitted report, diagnosing chronic obstructive pulmonary disease, chronic bronchitis, pulmonary fibrosis and congestive heart disease due to coal dust exposure, was entitled to little weight as it was inadequately explained in light of the objective evidence of record and because Dr. Claybon was not a specialist in pulmonary medicine. This was rational. Claimant's Exhibit 1; Decision and Order-Denying Benefits at 4-8; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Instead, the administrative law judge accorded determinative weight to the opinions of Drs. Hasson, Goldstein, and Hawkins, who found no evidence of pneumoconiosis, based on their qualifications as pulmonary specialists and because their reports were reasoned, and well supported by x-ray readings, objective test results,

³ Because the miner last worked in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 6.

claimant's CT scan, and treatment records. This was rational. Employer's Exhibits 1, 2; Director's Exhibit 10; Decision and Order-Denial of Benefits at 5-8; *Brown*, 851 F.2d 1569, 11 BLR 2-192; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As it is within the discretion of the administrative law judge, as the trier-of-fact, to determine whether a medical report is adequately documented and reasoned, and the administrative law judge has reasonably exercised his discretion in this case, we affirm his finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a). *Trumbo*, 17 BLR 1-85; *Fields*, 10 BLR 1-19.

We also affirm the administrative law judge's finding that the new evidence failed to establish total respiratory disability as the newly submitted pulmonary function and arterial blood gas studies produced non-qualifying values, and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Employer's Exhibits 1, 2; Director's Exhibit 10; Decision and Order-Denial of Benefits at 4, 8-9; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge permissibly found that Dr. Claybon's diagnosis of total respiratory disability was not well reasoned and documented and that Dr. Hawkins's finding, that claimant was unable to perform manual labor due to a mild pulmonary impairment, similarly was inadequately explained in light of the non-qualifying objective tests. Instead, the administrative law judge rationally credited the report of Dr. Hasson, who found no totally disabling respiratory impairment, as well reasoned, and supported by the objective evidence of Dr. Goldstein. Employer's Exhibits 1, 2; Claimant's Exhibit 1; Director's Exhibit 10; Decision and Order-Denial of Benefits at 9-10; *Trumbo*, 17 BLR 1-85; *Fields*, 10 BLR 1-19. We, therefore, affirm the administrative law judge's finding that the newly submitted evidence failed to establish total respiratory disability at Section 718.204(b). *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR 1-19. In addition, we hold that the administrative law judge rationally determined that claimant failed to establish total disability due to pneumoconiosis based on his finding that Dr. Claybon's opinion of totally disabling pneumoconiosis was not sufficiently documented or reasoned, and that the remaining physicians failed to diagnose the existence of pneumoconiosis. Employer's Exhibits 1, 2; Claimant's Exhibit 1; Director's Exhibit 10; Decision and Order-Denial of Benefits at 10; 20 C.F.R. §718.204(c); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); *Fields*, 10 BLR 1-85; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

As the administrative law judge properly found that the newly submitted evidence of record was insufficient to establish any required element of entitlement, we also affirm

the administrative law judge's finding that claimant failed to established a change in an applicable condition of entitlement pursuant to Section 725.309(d). *United States Steel Corp. v. Director, OWCP [Jones]*, 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004); *Allen v. Mead Corp.*, 22 BLR 1-61 (2000). We, therefore, affirm the denial of benefits on this subsequent claim.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge