BRB No. 99-0192 BLA

GLEN KENDRICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEVIS ENERGY, INC.	)	
	)	
and	)	DATE ISSUED: 10/18/99
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INC.	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Glen Kendrick, Phyllis, Kentucky, *pro se*.

Lama Metcoff Klaus (Arter and Hadden), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-471) of Administrative Law Judge Daniel J. Roketenetz 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 found twenty-four years of coal mine employment and, based on the date of filing, adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. After determining that the instant claim was a duplicate claim,[1] the administrative law judge noted the proper standard and found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, 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 on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 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'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,

[1]Claimant filed his initial claim for benefits on October 15, 1980, which was denied by the Department of Labor on January 27, 1983. Director's Exhibit 62. Claimant did not appeal the denial but subsequently filed a second claim on December 18, 1987, which was finally denied on August 26, 1993, because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 63. Claimant filed his most recent claim on April 17, 1995. Director's Exhibit 1.

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 and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Considering the newly submitted evidence, the administrative law judge rationally found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See generally Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge correctly noted that the previous claim was denied as claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or that he was totally disabled due to pneumoconiosis. Decision and Order at 3, 5; Director's Exhibits 62, 63. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

The administrative law judge, in the instant case, found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge noted that of the twenty newly submitted x-ray interpretations of record, eighteen interpretations were by B-readers and/or Board-certified radiologists. Decision and Order at 6-7. Of these interpretations, twelve readings are negative for pneumoconiosis, Director's Exhibits 12, 48, 49, 53-55, 57-59; Employer's Exhibits 1, 2, and six readings are positive. Director's Exhibits 47, 54, 66. The administrative law judge then concluded that, based upon the number of negative interpretations and the credentials of the physicians rendering these interpretations, the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 7. Since the administrative law judge rationally relied on the preponderance of the x-ray readings by physicians with superior qualifications, substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See* Director's Exhibits 12, 47-49, 53-55, 57-59, 66; Employer's Exhibits 1, 2; Decision and Order at 7; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir.

1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*).

Further, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the lung biopsy performed by Dr. Anderson does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 7; Claimant's Exhibit 2. Additionally, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim.[2] *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 7-8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Next, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the relevant newly submitted medical opinions of record. Whereas Drs. Sundaram and Guberman opined that claimant suffers from pneumoconiosis, Director's Exhibit 54; Claimant's Exhibit 2, Drs. Fino, Fritzhand and Broudy opined that claimant does not suffer from pneumoconiosis. Director's Exhibits 8, 53, 55; Employer's Exhibits 3, 4. The administrative law judge properly accorded determinative weight to the opinions of Drs. Fino, Fritzhand and Broudy over the contrary opinions of Drs. Sundaram and Guberman because their opinions are better reasoned and documented.[3] *See Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v.*

[2]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[3]The administrative law judge permissibly found that the opinions of Drs. Sundaram and Guberman were entitled to less weight as their diagnoses of pneumoconiosis were based only on their x-ray interpretation and not on any other probative medical evidence establishing the existence of pneumoconiosis. Decision and Order at 9-10; Director's Exhibit 54; Claimant's Exhibit 2; *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985); *Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Consolidation Coal Co., 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we affirm the administrative law judge's finding that the preponderance of the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Perry, supra*.

With regard to 20 C.F.R. §718.204(c), the administrative law judge rationally found the newly submitted evidence insufficient to establish total disability. Since none of the newly submitted pulmonary function studies and arterial blood gas studies of record yielded qualifying values, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2).[4] Director's Exhibits 7, 9, 53-55; Claimant's Exhibit 2; Decision and Order at 11. Additionally, as the administrative law judge properly concluded that the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3). Decision and Order at 11; *Newell v. Freeman United Coal Mining Co.,* 13 BLR 1-37 (1989). Moreover, the administrative law judge considered the newly submitted medical opinion evidence of record and permissibly accorded the opinions of Drs. Fino and Broudy, that claimant retains the respiratory capacity to perform his usual coal mine employment, greater weight as they are better supported by the objective evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *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); *Perry, supra*; *Wetzel, supra*; *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 12; Director's Exhibits 8, 53-55; Claimant's Exhibit 2; Employer's Exhibits 3, 4. The administrative law judge is empowered to weigh the medical opinion evidence of record 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 v. Valley Camp of Utah*, 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

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

submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and in accordance with law.

Since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309, and thus entitlement is precluded. *See Ross*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge