BRB No. 99-0212 BLA

OLIVER E. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
THE PITTSTON COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
and	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Oliver E. Hill, Hays, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law

Benefits (97-BLA-1740) of Administrative Law Judge Richard A. Morgan 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 that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) because it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). As these were the elements of entitlement upon which the previous denial was based, and the administrative law judge correctly cited the standard set forth in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*) as being applicable, the administrative law judge denied the claim.

In an appeal by a claimant filed 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). 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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a brief in the instant case.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 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)(*en banc*).

With respect to the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge correctly cited the standard set forth in *Rutter*, *supra*, and indicated that he had to determine whether the evidence developed since the prior

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judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

denial establishes at least one of the elements previously adjudicated against claimant. He found that the newly submitted evidence consisted of fourteen readings of four x-rays and concluded that all the interpretations were negative for pneumoconiosis. Decision and Order at 11. Thus, he properly found that this evidence was insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trent*, *supra*. Inasmuch as the administrative law judge's finding that all of the newly submitted x-rays are negative is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray interpretation evidence fails to establish a material change in conditions pursuant to Section 725.309(d), insofar as it fails to establish the existence of pneumoconiosis at Section 718.202(a)(1).

At Section 718.202(a)(2), the administrative law judge correctly concluded that the record did not contain any autopsy or biopsy evidence, and thus that the existence of pneumoconiosis pursuant to Section 718.202(a)(2) could not be established. Moreover, the administrative law judge correctly concluded that none of the presumptions contained in Section 718.202(a)(3), specifically those found at 20 C.F.R. §§718.304, 718.305, or 718.306 were applicable. Accordingly, we affirm the administrative law judge's findings that the existence of pneumoconiosis cannot be established at Section 718.202(a)(2), (3). 20 C.F.R. §718.202(a)(2)-(3).

In addition, the administrative law judge concluded that the medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge correctly noted that both Dr. Forehand, Director's Exhibits 9, 21 and Dr. Hippensteel, Employer's Exhibit 15, submitted opinions that opined that claimant did not suffer from either clinical pneumoconiosis or pneumoconiosis as defined by the Act. Decision and Order at 11-12. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish a material change in conditions pursuant to Section 725.309(d) as it fails to establish the existence of pneumoconiosis at Section 718.202(a)(4). *Rutter*, *supra*; *Perry*, *supra*.[2]

[2] Because the administrative law judge found that the existence of pneumoconiosis was not established, he found that consideration under Section 718.203 was rendered moot. Decision and Order at 12.

With respect to Section 718.204(c), the administrative law judge found that the newly submitted evidence also failed to establish a totally disabling respiratory disability pursuant to Section 718.204(c) and thus failed to establish a material change in conditions. At Section 718.204(c)(1), the administrative law judge correctly found that neither of the two newly submitted pulmonary function studies of record produced qualifying values. Director's Exhibits 7; Employer's Exhibit 15. They are therefore, insufficient to establish a material change in conditions pursuant to Section 718.309(d), and we affirm the administrative law judge's finding at Sections 718.204(c)(1) and 725.309(d).

Next, the administrative law judge also correctly found that none of the three newly submitted blood gas studies of record produced qualifying values. Director's Exhibit 10; Employer's Exhibits 5, 15. These studies are insufficient to establish a material change in conditions pursuant to Section 718.309(d) as they are insufficient to establish total disability pursuant to Section 718.204(c)(2), and accordingly, we affirm this finding. 20 C.F.R. §§718.204(c)(2); 725.309(d).

With respect to the administrative law judge's finding at Section 718.204(c)(3), the administrative law judge correctly found that the record contains no newly submitted evidence of cor pulmonale with right-sided congestive heart disease. Accordingly, we affirm the administrative law judge's finding that Section 718.204(c)(3) is not applicable in this case. *See Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987).

Finally, the administrative law judge also found that the newly submitted medical opinions of record were insufficient to establish a material change in conditions pursuant to Section 718.309(d) as they were insufficient to establish total respiratory disability at Section 718.204(c)(4). The administrative law judge correctly concluded that Dr. Forehand, Director's Exhibits 9, 21 and Dr. Hippensteel, Employer's Exhibit 15, opined that claimant could continue to work his regular job in the mines from a respiratory standpoint. Decision and Order at 13. As the administrative law judge's finding that these opinions are legally insufficient to sustain claimant's burden of establishing total respiratory disability at Section 718.204(c)(4) is supported by substantial evidence, we affirm this finding. *See Scott v. Mason Coal Corp.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grounds*, 14 BLR 1-37 (1990)(*en banc*); *Street v. Jewell Smokeless Coal Corp.*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish a material change in conditions pursuant to Section 725.309(d), as it fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and fails to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c). As these findings preclude entitlement pursuant to the Part 718 regulations, *see Trent*, *supra*; *Perry*, *supra*, we affirm the administrative law judge's denial of benefits in the instant duplicate

claim.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge