BRB No. 99-0676 BLA

ARCHIE STURGILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KERMIT COAL COMPANY	)	
	)	DATE ISSUED:
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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Archie Sturgill, Delbarton, West Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1359) of Administrative Law Judge Paul H. Teitler 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 six years of coal mine employment and, based on the date of filing, adjudicated this duplicate claim[1] pursuant to the

[1]Claimant filed his initial claim for benefits on February 23, 1987, which was denied by the Department of Labor on May 18, 1987. Director's Exhibit 21. Claimant took no further action until he filed the instant claim on December 22, 1992. Director's Exhibit 1.

regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, 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, 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 found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. 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; Director's Exhibit 21. The United States Court of Appeals for the Fourth Circuit has 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.[2] *See 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).

The administrative law judge, in the instant case, permissibly determined that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the newly submitted x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the preponderance of the x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 10-12, 24, 33-35, 52, 53; Employer's Exhibits 1-8, 25; Decision and Order at 7; *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 (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 record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 7-8. 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 are applicable to the instant claim.[3] *See* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director,*

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the state of West Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no

OWCP, 9 BLR 1-101 (1986); Decision and Order at 8.

---

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.

In weighing the newly submitted medical opinions of record, the administrative law judge also rationally concluded that this evidence was insufficient to establish pneumoconiosis as the administrative law judge permissibly accorded greater weight to the opinion of Dr. Dahhan, finding no pneumoconiosis, than to the contrary opinions of record, in light of Dr. Dahhan's superior qualifications, the objective evidence of record and as his opinion is supported by the opinion of Dr. Fino, who is also a highly qualified pulmonary specialist.[4] Decision and Order at 10; Director's Exhibits 7, 25, 45, 50, 56; Employer's Exhibits 3, 5, 9; Claimant's Exhibits 2-4; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (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*; *King v. Consolidation Coal Co*., 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985)*; Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Piccin, supra*. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law.[5] *Clark*, *supra*; *Perry, supra*.

---

[4]Dr. Dahhan is Board-certified in internal and pulmonary medicine. Director's Exhibit 25. After examining claimant, the physician opined that claimant does not suffer from pneumoconiosis or any disease caused by coal dust exposure and that claimant has the respiratory capacity to perform his coal mine employment. Director's Exhibit 25; Employer's Exhibit 3. Dr. Ranavaya, whose credentials are not in the record, opined that claimant suffered from pneumoconiosis and had a mild pulmonary impairment that would not prevent claimant from performing coal mine employment. Director's Exhibits 7, 50. Dr. Tan, claimant's treating physician, opined that claimant suffered from interstitial lung disease probably related to pneumoconiosis or possible malignancy. Claimant's Exhibits 2-4. Dr. Fino, who is Board-certified in internal and pulmonary medicine, reviewed the evidence of record and opined that claimant does not suffer from pneumoconiosis or any occupationally acquired pulmonary condition and has no respiratory impairment. Employer's Exhibit 5.

[5]Remand to the administrative law judge for reconsideration of the newly submitted evidence under 20 C.F.R. §718.202(a)(1)-(4) in accordance with the Fourth Circuit's recent decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000), is not necessary, as the administrative law judge properly determined that the existence of pneumoconiosis was not established under any of the relevant subsections.

In addressing the etiology of claimant's pneumoconiosis, the administrative law judge fully considered the newly submitted evidence and rationally found that the opinion of Dr. Ranavaya was entitled to little weight as the physician relied on a fifteen year coal mine employment history and the administrative law judge found that claimant established six years of coal mine employment. Decision and Order at 11; Director's Exhibits 7, 50. The discrepancy between the coal mine employment history found by the administrative law judge, and that relied upon by the physicians of record, is a factor affecting the weight given to a medical report, and the administrative law judge may rationally accord less weight to a medical report on this basis. *See Barnes v. Director, OWCP,* 18 BLR 1-71 (1995)(*en banc*); *Smith v. Director, OWCP,* 12 BLR 1-156 (1989); *Addison v. Director, OWCP,* 11 BLR 1-68 (1988). Additionally, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Dahhan and Fino, that claimant has no occupationally acquired pulmonary condition, in light of their superior credentials. Decision and Order at 11; *Dillion, supra*; *Wetzel, supra*; *Piccin, supra*. We, therefore, affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.203 as they are supported by substantial evidence.

With regard to 20 C.F.R. §718.204(c), the administrative law judge properly found the newly submitted evidence insufficient to establish total disability. *Piccin, supra*. Since none of the newly submitted pulmonary function or blood gas studies of record yielded qualifying[6] 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), (2). Director's Exhibits 6, 8, 25, 49, 51; Employer's Exhibit 3; Claimant's Exhibit 3; Decision and Order at 13. Additionally, since 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 13; *Newell v. Freeman United Coal Mining Co.,* 13 BLR 1-37 (1989).

Finally, the administrative law judge considered the newly submitted medical reports of record and properly found that the opinions were insufficient to establish claimant's burden of proof as no physician opined that claimant was totally disabled by a respiratory or pulmonary condition. *See* Decision and Order at 13-14; Director's Exhibits 7, 25, 45, 50, 56; Employer's Exhibits 3, 5, 9; Claimant's Exhibits 2-4;

[6]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).

Budash, supra; *Gee, supra*; *Perry, supra; Piccin, supra*. 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 submitted medical opinion evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.[7]

Since claimant failed to establish either the existence of pneumoconiosis arising out of coal mine employment 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.[8] *See Rutter*, *supra*.

---

[7]Since 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)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

[8]We note claimant's lack of representation by counsel during the proceedings before the administrative law judge. Claimant was specifically informed of his right to have counsel at no charge to him and the issues involved in the case. He was also allowed to testify and present evidence. Hearing Transcript at 2-47. Consequently, the hearing before the administrative law judge was properly adjudicated. *See* 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-703 (1985).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge