BRB No. 99-0703 BLA

THOMAS V. DeFAZIO, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLLATERAL CONTROL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Denying Benefits of Roger D. Kaplan, Administrative Law Judge, United States Department of Labor.

Lester Krasno, Pottsville, Pennsylvania, for claimant.

John E. Kawczynski (Weber Goldstein Greenberg & Gallagher), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (98-BLA-0519) of Administrative Law Judge Roger D. Kaplan on a duplicate 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 administrative law judge found that the newly submitted medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) and, thus, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's determination that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1) and (4). In addition, claimant asserts that the administrative law judge erred in finding that the newly submitted evidence fails to establish total respiratory disability at Section 718.204(c)(1) and (4) and, thus, fails to establish a material change in conditions at Section 725.309(d). Employer, in response, asserts that the administrative law judge's findings that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a) and total respiratory disability at Section 718.204(c) is supported by substantial evidence and, accordingly, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director), has filed a letter indicating that he will not participate in the instant appeal.[2]

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[1] Claimant is Thomas V. DeFazio, Sr., the miner, who filed three applications for benefits with the Department of Labor (DOL). The first application was filed on February 9, 1981 and denied by the district director on April 29, 1981. Director's Exhibit 34. Claimant filed a second application on March 2, 1983. *Id*. Administrative Law Judge Thomas W. Murrett issued a Decision and Order dated November 24, 1987 denying benefits on the grounds that the evidence failed to establish the existence of pneumoconiosis and total respiratory or pulmonary disability. *Id*. Claimant took no further action on this claim, and the denial became final. Claimant filed the instant duplicate claim on May 1, 1997. Director's Exhibit 1.

[2] We affirm as unchallenged on appeal the administrative law judge's findings that the evidence establishes twenty-one years of qualifying coal mine employment, that claimant has one dependent for purposes of augmentation, that the newly submitted evidence fails to establish the existence of pneumoconiosis

pursuant to 20 C.F.R. §718.202(a)(2) and (3), and that it fails to establish total respiratory disability at 20 C.F.R. §718.204(c)(2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. 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, 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*).

In challenging the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant asserts that the newly submitted positive x-ray interpretations of record are sufficient to establish the existence of pneumoconiosis. We disagree. The administrative judge correctly summarized the relevant x-ray evidence, finding that the record contains eighteen newly submitted x-ray interpretations, of which nine were positive for pneumoconiosis and nine were read as negative for pneumoconiosis. Decision and Order at 6; Director's Exhibits 13-15, 25-29, 31; Claimant's Exhibits 1-3, 5; Employer's Exhibits 1, 2. As his summary and the record both reflect, of the eighteen x-ray interpretations, eight of each of the positive and negative interpretations were by readers who were dually qualified as B-readers and Board-certified radiologists and one each was by a reader without credentials. *Id*. Consequently, the administrative law judge rationally found that the evidence was equally probative and, therefore, claimant failed to meet his burden of establishing the existence of pneumoconiosis at Section 718.202(a)(1).[3] Decision and Order at 6; *see Director, OWCP v. Greenwich Collieries,* 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir.

[3] The administrative law judge additionally found that the three films were essentially contemporaneous as they were all taken within a six month period. Decision and Order at 6. Furthermore, the administrative law judge found that while the majority of the readings of the March 1997 x-ray were positive for pneumoconiosis, a majority of the readings of the two subsequent x-ray films were negative for pneumoconiosis. *Id*.

1993). We, therefore, affirm the administrative law judge's finding that the newly submitted evidence of record fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant also challenges the administrative law judge's determination that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant states that in addition to Dr. Rashid, the reports by Drs. Auerbach and Corazza support a finding of the existence of pneumoconiosis. However, contrary to claimant's contention, Dr. Auerbach's report was submitted as part of the record of the previous case and, thus, cannot support a finding of a material change in condition. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

With respect to the newly submitted medical opinion evidence of record, the administrative law judge accurately found that Dr. Corazza diagnosed a restrictive lung disease, but opined that it was possibly caused by skeletal abnormalities. Decision and Order at 9; Director's Exhibit 10. Therefore, the administrative law judge reasonably found that since Dr. Corazza did not affirmatively state that claimant's restrictive lung disease was due to coal mine employment sources, it was not sufficient to satisfy the legal definition of pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4); Decision and Order at 9; *see Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *see generally Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988). Of the two remaining newly submitted medical opinions, the administrative law judge found that Dr. Rashid diagnosed the existence of pneumoconiosis while Dr. Levinson opined that claimant did not have pneumoconiosis. Decision and Order at 9-10; Director's Exhibits 29, 31; Claimant's Exhibit 4. The administrative law judge permissibly accorded greater weight to Dr. Levinson's opinion, based on his finding that Dr. Rashid did not explain how his diagnosis of pneumoconiosis was supported by his underlying documentation. Decision and Order at 10; *see Morgan v. Bethlehem Steel Corp.,* 7 BLR 1-226 (1984); *see also Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Moreover, the administrative law judge accorded greater weight to the opinion of Dr. Levinson, who is Board-certified in Internal Medicine and Pulmonary Diseases, finding that Dr. Levinson possessed superior qualifications to Dr. Rashid, who is Board-certified in Internal Medicine only. Decision and Order at 10; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Scott v. Mason Coal Co.*, 14 BLR 1- 37 (1990); *Trent, supra*. Inasmuch as the administrative law judge considered all of the relevant evidence of record, we affirm his finding that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Likewise, we affirm the administrative law judge's determination

that since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis, claimant failed to establish a material change in conditions pursuant to Section 725.309(d). 20 C.F.R. §725.309; *Swarrow, supra*.

Moreover, in addressing within his 1987 Decision and Order whether claimant established the existence of pneumoconiosis in his earlier claim, Administrative Law Judge Thomas Murrett found that the relevant evidence of record was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 34. Initially, Judge Murrett correctly found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis inasmuch as the lone acceptable x-ray interpretation, dated April 10, 1981, was negative for pneumoconiosis.[4] 1987 Decision and Order at 6; Director's Exhibit 34; 20 C.F.R. §718.202(a)(1); *Trent, supra*; *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984). Judge Murrett also reasonably found that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) inasmuch as the record does not contain biopsy evidence. 20 C.F.R. §718.202(a). Likewise, he properly found that claimant failed to establish entitlement to the benefit of the presumptions set forth at Section 718.202(a)(3).[5] Lastly, Judge Murrett rationally found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Within a reasonable exercise of his discretion, Judge Murrett found the opinion of Dr. Auerbach, the only opinion supportive of claimant's burden, was unreliable because it was based on evidence not within the record and also because Dr. Auerbach did not otherwise adequately explain his conclusions in light of the underlying documentation.[6] 1987 Decision and Order at 7, 9; Director's Exhibit 34; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Pastva, supra*. Consequently, Judge Murrett rationally found the medical evidence insufficient to establish the existence

[4] The record contains a second x-ray film which was interpreted as being unreadable by Dr. Pitman, a B reader and Board-certified radiologist. 1987 Decision and Order at 6; Director's Exhibit 34.

[5] There is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the duplicate claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e); and the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a). 20 C.F.R. §718.202(a)(3).

[6] The record also contains the April 10, 1981 medical report of Dr. Corazza, in which Dr. Corazza diagnosed chronic bronchitis but opined that it was not due to coal dust exposure in claimant's coal mine employment. Director's Exhibit 34; 20 C.F.R. §718.201; *see Handy v. Director, OWCP*, 16 BLR 1-73 (1990).

of pneumoconiosis pursuant to Section 718.202(a).

Consequently, since there was no evidence contained within the prior claim which could establish the existence of pneumoconiosis, *see* discussion, *supra*, and the administrative law judge herein found that the newly submitted evidence does not establish the existence of pneumoconiosis, claimant has failed to establish an essential element of entitlement under Part 718 and, thus, has not established entitlement to benefits.[7] *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[7] In light of our holding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement, error, if any, in the administrative law judge's finding that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(c) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also* Perry *v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).