BRB No. 03-0136 BLA

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| DONALD LITTON | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 09/17/2003 |
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| REBEL COAL COMPANY | ) | |
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| and | ) | |
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| AMERICAN BUSINESS & PERSONAL INSURANCE MUTUAL, INCORPORATED | ) | |
| | ) | |
| 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Donald Litton, Meally, Kentucky, *pro se*.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer and carrier.

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

Claimant appeals the Decision and Order (01-BLA-1016) of Administrative Law Judge Joseph E. Kane denying benefits on a duplicate[1] claim filed pursuant to the provisions

[1]Claimant=s initial claim, filed on January 21, 1988, was denied by Administrative Law Judge Rudolf L. Jansen on May 12, 1993. Director=s Exhibit 42. Claimant appealed to

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).[2] After a review of the record, the administrative law judge accepted the parties= stipulation and credited claimant with fourteen years of coal mine employment. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. ''718.202(a) and 718.204(b)(2), the elements previously adjudicated against claimant. Consequently, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. '725.309(d) (2000).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge=s denial of benefits. In response, employer argues that the administrative law judge=s denial of benefits is supported by substantial evidence. The Director, Office of Workers= Compensation Programs, filed a letter indicating that he does not intend to participate in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence.

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the Board, but his appeal was dismissed as abandoned. *Id; Litton v. Rebel Coal Co.,* BRB No. 93-1713 BLA (March 24, 194) (unpublished Order). Subsequently, claimant filed this duplicate claim on June 6, 2000. Director=s Exhibit 1.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are codified at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The revisions to the regulations at 20 C.F.R. '725.309 apply only to claims filed after January 19, 2001.

[4]We affirm, as unchallenged on appeal, the administrative law judge=s finding of fourteen years of coal mine employment as it was stipulated by the parties and not detrimental to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

*Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove 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 to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Additionally, Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. '725.309 (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), that in addressing whether the material change in conditions requirement of Section 725.309(d) (2000) has been satisfied, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner 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).

After consideration of the administrative law judge=s Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge=s finding that claimant failed to establish entitlement to benefits under 20 C.F.R. Part 718. At Section 718.202(a)(1), the administrative law judge found that of the fourteen newly submitted interpretations of four x-rays of record, nine were negative. Decision and Order at 12. The administrative law judge further found that the film dated June 12, 2000 was Athe only x-ray with a preponderance of the evidence positive for pneumoconiosis,@[5] while the remaining three films were either Auniformly@ interpreted as negative for pneumoconiosis, such as the July 17 and July 22, 2000 films, or Asplit down the middle,@ such as the interpretations of the April 22, 2002 film. Decision and Order at 12; Director=s Exhibits 13, 14, 16, 28; Employer=s Exhibits 1; Claimant=s Exhibit 1. In considering the physicians= qualifications, the administrative law judge reasonably found that the April 22, 2002 film was negative for pneumoconiosis, as the two negative interpretations of the film were by B readers, while the two physicians who rendered positive interpretations were not B readers. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989);

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[5]The only two interpretations of record of the June 12, 2000 x-ray are positive for the existence of pneumoconiosis. Director=s Exhibit 24.

Decision and Order at 5, 12. As the administrative law judge reasonably found that the negative readings by Ahighly-qualified physicians@ constituted the majority of the interpretations, we affirm his finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Melnick v. Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

Further, the administrative law judge rationally found that the biopsy evidence, consisting of a biopsy report by Dr. Davis and a pathology consultation report by Dr. Caffrey, failed to establish the existence of pneumoconiosis because the physicians merely cited the presence of anthracotic pigment which is insufficient, by itself, to establish the existence of pneumoconiosis.[6] 20 C.F.R. '718.202(a)(2); *see Hapney v. Peabody Coal Co.*, 22 BLR 1-106 (2001) (*en banc*) (Smith and Dolder, JJ., dissenting in part and concurring in part); Decision and Order at 12. The administrative law judge further found that the presumptions enumerated at Section 718.202(a)(3) are inapplicable as the record contains no evidence of complicated pneumoconiosis, *see* 20 C.F.R. '718.304, claimant filed his claim after January 1, 1982, *see* 20 C.F.R. '718.305, and this is not a survivor=s claim. *See* 20 C.F.R. '718.306; Decision and Order at 12.

Moreover, the administrative law judge rationally found that the newly submitted medical opinions of record failed to establish the existence of pneumoconiosis, as he determined that Dr. Sundarum=s diagnosis of pneumoconiosis was based solely upon positive x-rays and claimant=s history of coal dust exposure and thus did not constitute a Asound medical judgment@ under Section 718.202(a)(4), and the remaining physicians did not diagnose pneumoconiosis. *See* 20 C.F.R. '718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order on Remand at 14. The administrative law judge accurately reviewed the two reports of Dr. Sundaram, the only physician who diagnosed pneumoconiosis, and the contrary opinions of Drs. Dahhan, Branscomb and Fino, that claimant did not suffer from pneumoconiosis or any pulmonary impairment related to dust exposure in coal mine employment. Decision and Order at 13-14; Director=s Exhibits 11, 16, 37; Employer Exhibit 4, 513, 20, 23, 25. The administrative law judge, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), rationally gave no weight to Dr. Sundaram=s opinions, finding that they were based on Aimpermissible grounds for a sound medical judgment@ under Section 718.202(a)(4). Decision and Order at 13.

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[6]Drs. Davis and Caffrey diagnosed anthracotic pigment with no fibrosis, and Dr. Caffrey also opined that claimant did not have pneumoconiosis. Director=s Exhibit 37; Employer=s Exhibit 6.

The administrative law judge found that Dr. Sundaram=s June 2000 opinion reveals that the doctor=s rationale behind his diagnosis rested upon claimant=s coal dust exposure history and positive chest x-ray. On Standard Form 108, part G., Summary of Diagnostic Testing (Coal Workers= Pneumoconiosis), Dr. Sundaram was requested to Acheck the applicable blocks next to any test results which you reviewed and relied upon to base your medical assessments or conclusions,@ and Dr. Sundaram listed claimant=s June 12, 2000 x-ray and June 28, 2000 pulmonary function study. Director=s Exhibit 37. In part J., Cardiopulmonary Diagnosis and Rationale, Dr. Sundaram diagnosed Acoal workers pneumoconiosis due to exposure to coal dust.@ *Id.* Although Dr. Sundaram=s report reflects that the physician examined claimant and that in addition to an x-ray, he obtained a pulmonary function study and claimant=s medical, work and smoking histories, the administrative law judge could reasonably discount the June 2000 report, as the physician did not explain how the pulmonary function study results or examination findings supported a diagnosis of pneumoconiosis. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Clark*, 12 BLR 1-149; Decision and Order 7-8, 13; Director=s Exhibit 37.

Similarly, the administrative law judge permissibly discounted Dr. Sundaram=s July 2000 report because the doctor=s sole explanation for his diagnosis of coal workers= pneumoconiosis was claimant=s history of coal dust exposure. *Groves*, 277 F.3d 829, 22 BLR 2-320; *Cornett*, 227 F.3d 569, 22 BLR 2-107; Decision and Order 8, 13; Director=s Exhibit 11.[7] The administrative law judge acted within his discretion in according full weight to the contrary opinion of Dr. Dahhan, as supported by the opinions of Drs. Branscombe and Fino, as he found that the opinion was well reasoned and documented because Dr. Dahhan performed a standard pulmonary work-up, reported clear results and reached explicit conclusions with identifiable rationales. Decision and Order at 13-14; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Accordingly, we affirm the administrative law judge=s finding that claimant has not demonstrated, by a preponderance of the newly submitted medical opinion evidence, the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as it is supported by substantial evidence.

As the administrative law judge incorporated by reference the previous summary of medical evidence, Decision and Order at 5, which was found to be insufficient to establish pneumoconiosis in a final judgment issued on May 12, 1993, Director=s Exhibit 42-97, and

[7]The administrative law judge further found that Dr. Sundaram was deposed on September 17, 2001 and that his testimony reiterated his previous opinion. Decision and Order at 9; Employer=s Exhibit 3.

the administrative law judge reasonably found that the new evidence was neither substantially more supportive of claimant nor sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), Decision and Order at 12-14, 18-19, benefits are precluded because claimant has failed to establish an essential element of entitlement. *See Anderson*, 12 BLR 1-111. Consequently, we affirm the administrative law judge=s denial of benefits without reaching his findings regarding total respiratory disability pursuant to Section 718.204(b)(2) or a material change in conditions pursuant to Section 725.309 (2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A.GABAUER, JR.
Administrative Appeals Judge