BRB Nos. 08-0149 BLA
and 08-0149 BLA-A

W.W.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TERRY GLENN COAL COMPANY	)	DATE ISSUED: 09/22/2008
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

W.W., St. Charles, Virginia, *pro se*.[1]

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, filed an appeal on behalf of claimant, but Mr. Carson is not representing him on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals and employer cross-appeals the Decision and Order (06-BLA-5504) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) denying benefits on a subsequent claim[2] 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 "14.84 years of qualifying coal mine employment," Decision and Order at 8, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203 or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge also found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge concluded that the previously submitted evidence established total disability, and that it "was not treated as a separate element in the prior denial." Decision and Order at 18. Consequently, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as total disability pursuant to 20 C.F.R. §718.204(b) was not an element of entitlement previously adjudicated against claimant. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer argues that the administrative law judge erred in failing to dismiss it as the properly designated responsible operator because subsequent

[2] Claimant filed his first claim on March 6, 2000. Director's Exhibit 1. On May 2, 2000, a claims examiner denied benefits, on the grounds that the evidence did not establish that claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, or that he was totally disabled by the disease. *Id*. Claimant filed several requests for modification, which were denied by the district director. *Id*. Claimant's last request for modification was denied by the district director on March 12, 2004. *Id*. Because claimant did not pursue the claim any further, this denial became final. Claimant filed this claim on March 25, 2006. Director's Exhibit 3.

coal mine operators employed claimant for at least one year.[3] The Director, Office of Workers' Compensation Programs, filed a limited response, urging the Board to reject employer's assertion that the administrative law judge erred in finding that employer was liable for the payment of benefits in this case as the responsible operator.

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. *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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

CHANGE IN AN APPLICABLE CONDITION OF ENTITLEMENT
Section 725.309

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

The administrative law judge stated that "[t]he following elements were decided against [c]laimant in the prior denial: (1) presence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; and (3) total disability due to pneumoconiosis." Decision and Order at 16. The administrative law judge also found that "[total disability] was not treated as a separate element of entitlement in the prior denial." *Id.* at 18. The administrative law judge therefore concluded that "[a]lthough

[3] Employer filed a brief in reply to the Director's response letter, reiterating its prior contentions with regard to the responsible operator issue.

[c]laimant has established the presence of [ ] total disability, proof of this element is insufficient to establish a change in condition for purposes of §725.309(d) as the previously submitted evidence established such a finding." *Id*.

This finding was in error as the element of total disability was adjudicated against claimant in the prior denial. As discussed, *supra*, a claims examiner denied benefits on May 2, 2000, on the grounds that the evidence did not establish that claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that claimant was totally disabled by the disease. Director's Exhibit 1. Although the administrative law judge erred in finding that the new evidence did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, *White v. New White Coal Co*., 23 BLR 1-1 (2004), such error was harmless, in view of our disposition of the case on the merits at 20 C.F.R. §718.202(a)(1)-(4). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

EXISTENCE OF PNEUMOCONIOSIS
Section 718.202(a)(1)

The administrative law judge found that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The new x-ray evidence consists of ten interpretations of five x-rays dated September 1, 2004, May 16, 2005, June 3, 2005, August 16, 2005, and August 16, 2006.[4] Of these ten new x-ray interpretations, five readings were negative for pneumoconiosis, Director's Exhibits 32, 35, 37; Employer's Exhibits 2, 3, and five readings were positive for pneumoconiosis. Director's Exhibits 13, 36; Claimant's Exhibits 1, 2. Dr. Scatarige, who is dually qualified as a B reader and a Board-certified radiologist, read the September 1, 2004 x-ray as negative for pneumoconiosis, Director's Exhibit 37, while Dr. Alexander, who is also dually qualified, read this x-ray as positive for pneumoconiosis. Director's Exhibit 36. Whereas Dr. Baker, who is a B reader, read the May 16, 2005 x-ray as positive for pneumoconiosis, Director's Exhibit 13, Dr. Wiot, who is dually qualified, read this x-ray as negative for pneumoconiosis. Director's Exhibit 32. Dr. Scott, who is dually qualified, read the June 3, 2005 x-ray as negative for pneumoconiosis, Director's Exhibit 37, while Dr. Miller, who is also dually qualified, read this x-ray as positive for pneumoconiosis. Director's Exhibit 36. Whereas Dr. Dahhan, who is a B reader, read the August 16, 2005 x-ray as negative for pneumoconiosis, Director's Exhibit 35, Dr. Alexander, who is dually qualified, read this x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Lastly, Dr. Kendall, who is dually qualified, read the August 16, 2006 x-ray as negative for

[4] Dr. Barrett, who is dually qualified as a B reader and a Board-certified radiologist, read the May 16, 2005 x-ray for quality only. Director's Exhibit 14.

pneumoconiosis, Employer's Exhibits 2, 3, while Dr. Alexander, who is also dually qualified, read this x-ray as positive for pneumoconiosis. Claimant's Exhibit 2.

As required by Section 718.202(a)(1), the administrative law judge considered the B reader and Board-certified status of the readers of the x-rays. 20 C.F.R. §718.202(a)(1). In so doing, the administrative law judge properly accorded greater weight to the x-ray readings that were provided by physicians who were dually qualified as B readers and Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Specifically, the administrative law judge found that the x-rays dated September 1, 2004, June 3, 2005, and August 16, 2006 were in equipoise, because each of them was read by one dually qualified physician as negative for pneumoconiosis and one similarly qualified physician as positive for pneumoconiosis. Decision and Order at 16-17. The administrative law judge also found that the May 16, 2005 x-ray was negative for pneumoconiosis, because he accorded slightly more weight to the negative reading by the dually qualified physician than to the positive reading by the B reader. *Id*. at 16. Further, the administrative law judge found that the August 16, 2005 x-rays was positive for pneumoconiosis, because he accorded slightly more weight to the positive reading by the dually qualified physician than to the negative reading by the B reader. *Id*. at 16-17. Thus, the administrative law judge permissibly determined that "[a]t best the chest x-ray evidence is inconclusive, and a preponderance of the chest x-ray evidence does not support a positive finding of pneumoconiosis." *Id*. at 17; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Section 718.202(a)(2)

We also affirm the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) because the record does not contain any biopsy or autopsy evidence.

Section 718.202(a)(3)

Additionally, we affirm the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) because none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record.

Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed 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.

Section 718.202(a)(4)

Finally, the administrative law judge properly found that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the new opinions of Drs. Baker, Smiddy, Dahhan, and Rosenberg. Dr. Baker diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease related to coal dust exposure, and chronic bronchitis related to coal dust exposure. Director's Exhibits 13, 17. Dr. Smiddy diagnosed coal workers' pneumoconiosis.[5] Claimant's Exhibits 6, 7. By contrast, Dr. Dahhan opined that claimant does not have coal workers' pneumoconiosis or any chronic lung disease or impairment related to coal dust exposure. Director's Exhibit 35; Employer's Exhibit 4. Lastly, Dr. Rosenberg opined that claimant does not have clinical or legal coal workers' pneumoconiosis. Employer's Exhibit 1.

The administrative law judge permissibly discredited the opinions of Drs. Baker and Smiddy, that claimant has clinical pneumoconiosis based on x-rays, because he found that the new x-ray evidence was inconclusive. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In addition, the administrative law judge permissibly found that Dr. Baker's opinion, that claimant has legal pneumoconiosis, was outweighed by the contrary opinions of Drs. Dahhan and Rosenberg, based on the administrative law judge's consideration of the comparative credentials of the respective physicians, his consideration of the documentation underlying their medical judgments, and his finding that the opinions of Drs. Dahhan and Rosenberg corroborate each other.[6] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th

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[5] Although Dr. Smiddy diagnosed chronic obstructive pulmonary disease, he did not render an opinion regarding the cause of this condition. Claimant's Exhibits 6, 7.

[6] The administrative law judge stated that "[t]hese three physicians are all [B]oard-certified in Pulmonary Disease, but there is no reason to give Dr. Baker's opinion controlling weight since Dr. Dahhan and Dr. Rosenberg relied on objective data to arrive at their respective opinions just as Dr. Baker did, and those two doctors produced two separate evaluations which tend to corroborate each other." Decision and Order at 17.

Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Furthermore, the medical evidence submitted in the prior claim was also found insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Thus, because the evidence as a whole is insufficient to establish the existence of pneumoconiosis on the merits, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.202(a)(1)-(4). Consequently, we affirm the administrative law judge's denial of benefits.[7] *Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7] In view of our disposition of the case on the merits at 20 C.F.R. §718.202(a), we decline to address employer's contention, on cross-appeal, that the administrative law judge erred in failing to dismiss it as the properly designated responsible operator.