BRB No. 95-2196 BLA

KELLY R. MATNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
EASTERN COAL CORPORATION	)	
	)	
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 Edith Barnett, Administrative Law Judge, United States Department of Labor.

Kelly R. Matney, Lick Creek, Kentucky, *pro se*.

Billy R. Shelton (Baird, Baird, Baird & Jones), Pikeville, Kentucky, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

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

[1] Claimant is Kelly R. Matney, the miner, whose initial application for benefits filed on April 4, 1988 was finally denied on November 14, 1990. Director's Exhibit 32. Claimant filed the present claim on January 12, 1993. Director's Exhibit 1. Susie Davis, a benefits counselor with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See*

(94-BLA-0991) of Administrative Law Judge Edith Barnett 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 found this claim to be a duplicate claim

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Shelton v. Claude V. Keen Trucking Co., 19 BLR 1-88 (1995)(Order).

pursuant to 20 C.F.R. §725.309(d) and credited claimant with "at least" twenty-five years of coal mine employment. Decision and Order at 1, 3. The administrative law judge found that the newly submitted evidence failed to establish a material change in conditions pursuant to Section 725.309(d) and, accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant 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 there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all the newly submitted evidence, favorable and unfavorable, and determine whether claimant has established at least one of the elements previously decided against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). If so, claimant has

[2] We affirm as unchallenged on appeal the administrative law judge's finding regarding length of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross*, *supra*.

The administrative law judge noted that claimant was previously denied benefits because he failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to Sections 718.202(a) and 718.204(c). Decision and Order at 7, 9; Director's Exhibit 32. The administrative law judge then considered the newly submitted evidence to determine whether it established a material change in conditions. *See Ross*, *supra*.

Pursuant to Section 718.202(a)(1), the administrative law judge considered nine readings of three x-rays taken since the 1990 denial. Eight of these readings were negative for pneumoconiosis while one was positive. Director's Exhibits 12, 13, 28-30, 35; Claimant's Exhibit 1; Employer's Exhibits 11, 12. The administrative law judge considered both the quantity and quality of the x-ray interpretations, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), and concluded that the weight of the newly submitted x-ray evidence, viewed in light of the readers' qualifications, was negative for the existence of pneumoconiosis. Decision and Order at 8-9. We affirm as supported by substantial evidence the administrative law judge's finding that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Sections 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 8; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinion evidence. Drs. Mettu and Broudy examined and tested claimant and concluded that he did not have pneumoconiosis. Director's Exhibits 10, 28. Drs. Lane, Anderson, and Fino reviewed claimant's entire medical record, including the newly developed medical evidence, and opined that claimant did not have pneumoconiosis. Employer's Exhibits 2, 3, 10. Dr. Myers did not address the existence of the disease. Employer's Exhibit 7. Dr. Wright reviewed his 1987 examination report and a new pulmonary function study and opined that "despite my previous diagnosis of pneumoconiosis," claimant has "no significant pulmonary impairment relating to that disease." Employer's Exhibit 9.

The administrative law judge found that because neither examining physician diagnosed pneumoconiosis, and "none of the new consultative reports . . . concluded that claimant now has pneumoconiosis . . . . claimant has failed to prove by a preponderance of the medical opinion evidence" the existence of pneumoconiosis. Decision and Order at 9. Substantial evidence supports the administrative law judge's finding, which we therefore affirm.[3]

Pursuant to Sections 718.204(c)(1)-(3), the administrative law judge correctly noted that all the newly submitted objective tests yielded non-qualifying values,[4] Director's Exhibits 9, 11, 28, 32, and there was no evidence in the record of cor pulmonale with right-sided congestive heart failure. We therefore affirm these findings.

Pursuant to Section 718.204(c)(4), the administrative law found that no physician opined that claimant was totally disabled. Substantial evidence supports the administrative law judge's finding, as all the physicians found no impairment in claimant's respiratory system. Director's Exhibits 10, 28; Employer's Exhibits 2, 3, 7, 9, 10. Therefore, we affirm the administrative law judge's finding pursuant to 718.204(c)(4), and her overall finding pursuant to 718.204(c) that the newly submitted evidence failed to establish total respiratory disability.

We therefore affirm the administrative law judge's finding that the newly

[3] We note that Dr. Wright merely referred to his 1987 diagnosis of pneumoconiosis but did not review any of the newly accrued evidence relevant to the existence of pneumoconiosis. Employer's Exhibit 9; *see Ross*, *supra*; *see also Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987)(pulmonary function studies generally not relevant to existence of pneumoconiosis).

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

submitted evidence failed to establish any element of entitlement previously adjudicated against claimant and thus did not establish a material change in conditions pursuant to Section 725.309(d). *See Ross*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge