BRB No. 97-1249 BLA

CLAYTON DEEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRIPLE D 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 Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Clayton Deel, Haysi, Virginia, *pro se*[1]

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

[1]Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (95-BLA-2298) of Administrative Law Judge Joan Huddy Rosenzweig (the administrative law judge) 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 adjudicated this duplicate claim[2] pursuant to the 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 pursuant to 20 C.F.R. §718.202(a)(1)-(4), 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, 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 Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to 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).

After 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 stated that the "denial of Claimant's [prior] claim, reflects that Claimant failed to establish any of the elements required to support a finding that he is entitled to benefits." Decision and Order at 2; *see* Director's Exhibits 32, 33. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d).

[2]Claimant filed his initial claim on September 30, 1987. Director's Exhibit 32. On June 11, 1990, Administrative Law Judge E. Earl Thomas issued a Decision and Order denying benefits. *Id*. The bases of Judge Thomas' denial were claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. On July 12, 1991, claimant filed another claim, which was denied by the Department of Labor on December 19, 1991. Director's Exhibit 33. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on May 24, 1994. Director's Exhibit 1.

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).

In finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence which consists of fifteen interpretations of four x-rays.[3] The administrative law judge stated "that only one x-ray reading[, which was provided by Dr. Sutherland of the March 8, 1994 x-ray,] indicated disease presence." Decision and Order at 4; Director's Exhibit 12. The administrative law judge also stated that "[t]wo other physicians, Drs. William Scott and Paul Wheeler, offered interpretations of this same x-ray and classified the film quality as unreadable and 3, respectively."[4] Decision and Order at 4-5. Dr. Fino read the March 8, 1994 x-ray as negative. Employer's Exhibit 17. The administrative law judge properly accorded greater weight to the x-ray readings provided by Drs. Scott and Wheeler of the March 8, 1994 x-ray because of their superior qualifications.[5] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, since thirteen of the fifteen x-ray interpretations of record are negative for pneumoconiosis, substantial evidence supports 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)(1). *See 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).

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[3]Thirteen readings are negative for pneumoconiosis, Director's Exhibits 10, 11; Employer's Exhibits 1-3, 10-12, 16, 17, 19-21, one reading is positive, Director's Exhibit 12, and one x-ray is unreadable, Employer's Exhibit 15. Although the prior claim was denied on December 19, 1991, the administrative law judge also considered x-ray readings of films dated July 10, 1973, December 20, 1988 and September 23, 1991. Employer's Exhibits 4-9, 13, 14, 18. None of these x-ray readings can establish a material change in conditions under 20 C.F.R. §725.309. Moreover, since the administrative law judge provided a proper basis for discrediting the only newly submitted positive x-ray reading of record, any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[4]The administrative law judge stated that "the March 8, 1994 x-ray...is of very poor quality and the interpretations based thereon...[are] unreliable." Decision and Order at 5. Although Dr. Wheeler read the March 8, 1994 x-ray as negative for pneumoconiosis, the doctor listed the quality of the film as 3 and noted that the film was underexposed. Employer's Exhibit 16.

[5]The administrative law judge correctly stated that "Drs. Scott and Wheeler are both Board certified radiologists and B-readers, whereas Dr. Sutherland retains no such certification." Decision and Order at 5. While Dr. Fino is a B-reader, he is not a Board-certified radiologist. Employer's Exhibits 13, 17.

Further, we affirm the administrative law judge's finding that the 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. Additionally, we affirm the administrative law judge's finding that the 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 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 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.

Next, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the relevant newly submitted medical opinions of Drs. Fino, Iosif and Sargent. Drs. Fino, Iosif and Sargent opined that claimant does not suffer from pneumoconiosis. Director's Exhibit 8; Employer's Exhibits 3, 22. Since the administrative law judge properly found that none of these physicians diagnosed pneumoconiosis or any chronic lung disease arising out of coal mine employment, *see Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), 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)(4).

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. Since none of the newly submitted pulmonary function studies or arterial 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) and (c)(2). Director's Exhibits 7, 9; Employer's Exhibit 3. 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).

Finally, we address the administrative law judge's evaluation of the newly submitted medical reports of record. Drs. Fino, Iosif and Sargent opined that claimant does not suffer from a respiratory impairment. Director's Exhibit 8; Employer's Exhibits 3, 22. Therefore, since none of these physicians opined that claimant suffers from a total respiratory

[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).

disability, 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)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter*, *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