BRB No. 02-0286 BLA

DONALD LEE ADDISON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEWELL RIDGE COAL COMPANY	)	
SEA "B" MINING COMPANY	)	
	)	
and	)	
	)	
ACORDAI EMPLOYERS SERVICES CORPORATION	)	
	)	DATE ISSUED:
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Donald Lee Addison, Cedar Bluff, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (2000-BLA-700) of Administrative Law Judge Edward Terhune Miller denying benefits on a claim

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law

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).[2] The administrative law judge, after determining that the instant case was a duplicate claim, noted the proper standard and found a material change in conditions established pursuant to 20 C.F.R. §725.309 (2000) as the newly submitted evidence of record established the existence of a totally disabling respiratory impairment.[3] Decision and Order at 3, 6, 9, 13. The administrative law judge found, and the

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judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[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 found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The record indicates that claimant filed his initial claim for benefits on October 23, 1978, which was finally denied on October 4, 1984. Director's Exhibit 30. Claimant took no further action until he filed a second claim on February 1, 1996, which was denied on April 11, 1996. Director's Exhibit 31. Claimant again took no further action until he filed a third application for benefits on July 7, 1999, which is the subject of the instant appeal. Director's Exhibit 1. Consequently, the present claim constitutes a duplicate claim pursuant to 20

parties stipulated to, at least twenty-six years of coal mine employment and, based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4, 13. Considering the evidence of record *de novo*, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 14-15. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

C.F.R.§725.309 (2000). *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).

[4]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§725.309 and 718.204(b) are favorable to claimant and unchallenged on appeal, and therefore are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.[5] The administrative law judge, in the instant case, permissibly acted within his discretion in concluding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the preponderance of the x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 16, 17, 30, 31; Employer's Exhibits 1, 2, 4-7, 17-42; Decision and Order at 14; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Warhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Further, we affirm the administrative law judge's finding that the claimant failed 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. Decision and Order at 14. Additionally, we affirm the administrative law judge's finding that the evidence of record 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 are applicable to the instant

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director' s Exhibits 2, 6; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

claim.[6] *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 14; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

[6]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. 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.

With respect to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the entirety of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained, and acted within his discretion as fact-finder, in according greater weight to the opinions of Drs. Iosif and Fino, than to the remaining medical opinion evidence, as these physicians most thoroughly and directly addressed the issue of pneumoconiosis and in light of their superior qualifications. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985)*; Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kuchwara, supra*; Decision and Order at 14; Director's Exhibits 12-14, 31; Claimant's Exhibits 3, 4; Employer's Exhibits 3, 8-11, 14-16, 43, 48-50. The administrative law judge, in this instance, permissibly accorded greatest weight to the opinion of Dr. Fino, that the miner did not suffer from pneumoconiosis and that his impairment is unrelated to coal mine dust exposure, as his opinion is reasoned, documented, unequivocal and supported by the objective evidence of record. *See Worhach, supra*; *Clark, supra*; *Dillon, supra*; *Gee, supra*; *Perry, supra*; *Wetzel, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 15; Employer's Exhibit 3. Moreover, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion by Dr. Iosif, with respect to the existence of pneumoconiosis, was equivocal and entitled to diminished weight. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Decision and Order at 14-15; Director's Exhibits 12, 14; Employer's Exhibits 11, 14, 15. Although, as the administrative law judge found and the record indicates, Drs. Claustro and Iosif are claimant's treating physicians, the administrative law judge has provided valid reasons for finding these opinions entitled to less weight. *See Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark, supra*; *Hall, supra*; *Wetzel, supra*; *Kuchwara, supra*; Decision and Order at 9-12, 14-15; Director's Exhibits 12, 14; Claimant's Exhibit 3; Employer's Exhibits 9, 11, 14, 15. Moreover, remand to the administrative law judge for reconsideration of the evidence under 20 C.F.R. §718.202(a)(1)-(4) in accordance with the decision by the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), is not necessary, as the administrative law judge

properly determined that the existence of pneumoconiosis was not established under any of the relevant subsections.[7]

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally considered all the evidence of record and properly determined that it was insufficient to establish that the miner suffered from pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Clark, supra*; *Trent, supra*; *Perry, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Furthermore, since the determination of whether claimant had pneumoconiosis is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's finding. 20 C.F.R. §718.202(a)(4); *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) as it is supported by substantial evidence and is in accordance with law. Decision and Order at 13-15; *Compton, supra*; *Trent, supra*; *Perry, supra*.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a living miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Compton, supra*; *Trent, supra; Perry, supra.*

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

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[7]The United States Court of Appeals for the Fourth Circuit held that although 20 C.F.R. §718.202(a) (2000) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge