BRB No. 99-0311 BLA

HAROLD J. CHURCH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COMPTON COAL CORPORATION,	)	DATE ISSUED:
Q&G COAL COMPANY,	)	
CLINTEAGLE MINING,	)	
ROOKIE COAL COMPANY and	)	
BLACK HOLE MINING, INCORPORATED	)	
	)	
Employers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Harold J. Church, Cedar Bluff, Virginia, *pro se*.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, and Robert R. Kaplan, Jr. (Arter & Hadden), Washington, D.C., for employers.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order (97-BLA-1855) of Administrative Law Judge Edward Terhune Miller 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 credited claimant with fifteen and one-half years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge considered only the later evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with *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), *cert. denied*, 519 U.S. 1090 (1997). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employers respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

---

[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 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] Claimant filed his initial claim for benefits on February 25, 1981, which he withdrew on March 23, 1981. Claimant filed another claim on August 6, 1985, which was denied by the district director on February 6, 1986. No further action was taken on that claim. Decision and Order at 2; Director's Exhibit 99. The instant claim was filed on May 6, 1996. Director's Exhibit 1.

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. *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, are supported by substantial evidence, and are in accordance with 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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. In his consideration of the x-ray evidence, the administrative law judge listed the eleven x-ray readings of the three x-rays dated May 30, 1996, October 16, 1996 and January 7, 1997 which were submitted with the most recent claim. Decision and Order at 4; Director's Exhibits 29-30, 52, 60, 72, 76, 78, 94. The administrative law judge correctly found that as all of these readings were negative, claimant failed to establish a material change in conditions by establishing the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and a material change in conditions pursuant to Section 725.309(d). 20 C.F.R. §§718.102, 718.202(a)(1). *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Additionally, as the record contains no biopsy or autopsy evidence, and as none of the presumptions found at 20 C.F.R. §§718.304, 718.305 and 718.306 are applicable,[3] the

[3] The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305 applies to claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis at Sections 718.202(a)(2) and (3), *see* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 8, and we affirm his findings thereunder.

Finally, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as the weight of the more comprehensive and more credible medical opinions did not establish the existence of 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); *Perry*, *supra*. The administrative law judge permissibly found Dr. Forehand's diagnosis of pneumoconiosis outweighed by the opinions of Drs. Broudy, Castle and Fino, who found that claimant did not suffer from pneumoconiosis, based on their superior qualifications. *Clark*, *supra*; *Stark, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 8; Director's Exhibits 23-25, 52, 72; Employer's Exhibit 2. In addition, the administrative law permissibly accorded great weight to the opinion of Dr. Castle as it was based on the most recent examination of claimant, a detailed review of claimant's extensive medical records, and specific objective medical evidence. *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 8; Director's Exhibit 72. The administrative law judge reasonably accorded diminished weight to the opinion of Dr. Modi in light of the evidence submitted by employer that Dr. Modi had pleaded guilty to a charge of filing a false and fraudulent Federal income tax return based in part upon a scheme to obtain money fraudulently from the U.S. Department of Labor, in violation of Title 26, United States Code, Section 7201, Employer's Exhibit 4, and because Dr. Modi failed to offer an explanation for his diagnosis of pneumoconiosis which was listed with several other diagnoses. *Clark*, *supra*; Decision and Order at 8; Director's Exhibit 63; Employer's Exhibit 3. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and thus failed to establish a material change in conditions pursuant to Section 725.309(d), as it is supported by substantial evidence.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant, probative, new evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence failed to establish total disability pursuant to Section 718.204(c) and therefore a material change in conditions pursuant to Section 725.309(d). *Piccin, supra*. In considering whether total disability was established under Section 718.204(c), the administrative law judge initially found that as the recently submitted evidence contained no qualifying pulmonary function studies, total disability was not established pursuant to

Section 718.204(c)(1).[4] In considering whether total disability was established under Section 718.204(c)(2), the administrative law judge rationally found that inasmuch as the majority of the blood gas studies administered since the previous denial, including the two most recent studies, were non-qualifying, total disability was not established pursuant to subsection (c)(2). *See* Decision and Order at 9; Director's Exhibits 18, 52, 72. In addition, the administrative law judge found that as the record contained no evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3), total disability was not established by this method.

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge permissibly credited the opinion of Dr. Broudy, that claimant was not totally disabled from a respiratory standpoint, over Dr. Forehand, based on his superior credentials and because his report was well-reasoned and supported by the objective evidence. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King*, *supra*; *Wetzel*, *supra*; Decision and Order at 17-19. Moreover, the administrative law judge rationally found that Dr. Castle's opinion lacked sufficient certitude to provide a reliable basis for concluding that claimant was totally disabled, and that Dr. Fino's opinion failed to provide any rationale for the conclusion that claimant was unable to perform his usual coal mine employment. *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, *supra*; Decision and Order at 9; Director's Exhibit 72; Employer's Exhibit 2.

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*, *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge properly found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). *Clark*, *supra*; *Lucostic*, *supra*. Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish total disability pursuant to Section

[4] 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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

718.204(c)(4). Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), we affirm the administrative law judge's finding that claimant failed to demonstrate a material change in conditions pursuant to Section 725.309(d) and we affirm the denial of benefits. *Rutter*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge