BRB No. 99-0447 BLA

WALTER T. WELDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RICH MOUNTAIN COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED:
GATLIFF COAL COMPANY	)	
	)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Walter T. Welden, LaFollette, Tennessee, *pro se*.

W.M. Cox, Jr., Williamsburg, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the aid of counsel, the Decision and Order (97-BLA-1309) of Administrative Law Judge Jeffrey Tureck 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 noted that employer stipulated that claimant had at least fifteen years of coal mine employment and that, inasmuch as the instant claim was a duplicate claim, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), *i.e.*, whether the newly submitted evidence established the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.204(c)(1)-(4), the elements of entitlement previously adjudicated against claimant.[1] The administrative law judge considered the newly submitted evidence pursuant to 20 C.F.R. Part 718 and found it 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). Thus, the administrative law judge found that a material change in conditions was not established, *see* 20 C.F.R. §725.309. Accordingly, benefits were denied. Claimant's appeal, herein, followed. Employer responds, urging that the Decision and Order of the administrative law judge's denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to this appeal.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp*., 12 BLR 1-176 (1985). 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

[1]Claimant originally filed a claim on February 7, 1991, which was denied because claimant failed to establish any element of entitlement, *see* Director's Exhibits 20, 21, and was ultimately denied after reconsideration on modification on October 27, 1993, when claimant took no further action on the claim, Director's Exhibit 21. Claimant filed the instant, duplicate claim on June 27, 1996, Director's Exhibit 1, which is at issue herein.

binding upon this Board and may not be disturbed. 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).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that in order to determine whether a material change in conditions is established under 20 C.F.R. §725.309(d), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him, *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). If claimant establishes the existence of that element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits, *id*.

In the instant case, the administrative law judge considered all of the relevant, newly submitted evidence pursuant to Part 718 and found it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or total disability pursuant to Section 718.204(c)(1)-(4). In order to establish entitlement to benefits under Part 718 in a living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986).

Pursuant to Section 718.202(a)(1), the administrative law judge properly found that all of the x-ray evidence accrued since the denial of claimant's previous claim did not diagnose pneumoconiosis, *see* Director's Exhibits 8-9, 16, and that there is no relevant biopsy or autopsy evidence of record pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 3-4. In addition, none of the available presumptions under 20 C.F.R. §718.202(a)(3) are applicable, *see* 20 C.F.R. §718.202(a)(3). Inasmuch as there is no evidence of complicated pneumoconiosis,

the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is inapplicable, *see* 20 C.F.R. §718.304, and the administrative law judge properly found that the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to this claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1; Decision and Order at 5, and, finally, the presumption at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, is also inapplicable in this living miner's claim. Thus, inasmuch as the administrative law judge's findings that the existence of pneumoconiosis was not established by the evidence accrued since the denial of claimant's previous claim under Section 718.202(a)(1)-(3) are supported by substantial evidence, they are affirmed.

In addition, the administrative law judge properly found that none of the newly accrued evidence established total disability pursuant to Section 718.204(c)(1)-(4). The administrative law judge properly found that the newly accrued pulmonary function study and blood gas study evidence, Director's Exhibits 5-6, 16, were non-qualifying, *see* 20 C.F.R. §718.204(c)(1)-(2),[2] and that there was no evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3), Decision and Order at 5. Finally, pursuant to Section 718.204(c)(4), the administrative law judge considered all of the relevant newly submitted medical opinion evidence of record, which includes the opinion of Dr. Hudson, Director's Exhibit 6, and treatment notes from Dr. Wood, and properly found that they do not diagnose a totally disabling pulmonary or respiratory impairment. Thus, we affirm the administrative law judge's findings under Section 718.204(c)(1)-(4) as supported by substantial evidence.

However, pursuant to Section 718.202(a)(4), the administrative law judge

[2]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), (2).

considered the only relevant newly accrued medical opinion of record from Dr. Hudson, who administered a negative x-ray, but diagnosed chronic bronchitis which he attributed to claimant's coal mine employment, because he found claimant's smoking history was negligible and no other causes were elucidated from claimant, Director's Exhibit 6. Dr. Hudson also found "0% pulmonary impairment," *id*. The administrative law judge found Dr. Hudson's opinion insufficient to establish the existence of pneumoconiosis as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201, because chronic bronchitis is not one of the conditions specifically listed as being "pneumoconiosis" under Section 718.201 and, although chronic pulmonary diseases other than the ones listed can be found to be pneumoconiosis, they must result in respiratory of pulmonary impairment, which Dr. Hudson did not find. Decision and Order at 4. Contrary to the administrative law judge's finding, the Board has held that proof of impairment is not required to prove the existence of pneumoconiosis and that absence of impairment does not establish the non-existence of pneumoconiosis, *see Borgeson v. Kaiser Steel Corp.*, 7 BLR 1-655, 1-658 n. 5 (1983), *rev'd on other grounds*, 8 BLR 1-312 (1985)(*en banc*) and 12 BLR 1-169 (1989); *Sainz v. Kaiser Steel Corp.*, 5 BLR 1-758 (1983), *aff'd sub nom*. *Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). Thus, chronic bronchitis arising out of coal mine employment, as diagnosed by Dr. Hudson, is sufficient to establish the existence of pneumoconiosis as more broadly defined in Section 718.201, even if impairment is absent. Consequently, we reverse the administrative law judge's finding that Dr. Hudson did not diagnose pneumoconiosis. Moreover, we remand this case in order for the administrative law judge to determine whether claimant has demonstrated a material change in conditions pursuant to the standard enunciated in *Ross, supra*, and, if necessary, consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits, *see Ross, supra*.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge