BRB No. 04-0112 BLA

LARRY R. ROWE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTLAND ELKHORN COAL CORPORATION	)	DATE ISSUED: 07/23/2004
	)	
and	)	
	)	
PITTSTON 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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Larry R. Rowe, Steele, Kentucky, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (2002-

[1] Susie Davis, a benefits counselor with the Kentucky Black Lung Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision. The Board acknowledged the instant appeal on October

BLA-5098) of Administrative Law Judge Rudolf L. Jansen 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). In accordance with the parties' stipulation, the administrative law judge found eighteen years of coal mine employment and based on the date of filing, he adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4, 8; Hearing Transcript at 16-17. After determining that the instant claim was a duplicate claim,[2] the administrative law judge noted the proper standard and found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 3, 8-12. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement previously adjudicated against him and denied the claim pursuant to 20 C.F.R. §725.309. Decision and Order at 12. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

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

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27, 2003, stating that the case would be reviewed under the general standard of review.

[2] Claimant filed his initial claim for benefits on August 11, 1998, which was finally denied on December 8, 1998, as claimant failed to establish: the existence of pneumoconiosis, that his disease was caused by coal mine employment and that he was totally disabled by the disease. Director's Exhibit 30. Claimant filed the instant claim on February 1, 2001, which was denied by the district director on October 21, 2001. Director's Exhibits 1, 32.

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*). The United States Court of Appeals for the Sixth Circuit has held that in assessing whether the subsequent claim can be adjudicated pursuant to 20 C.F.R. §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[3] *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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 contains no reversible error. The administrative law judge correctly noted that the previous claim was denied as claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Decision and Order at 8; Director's Exhibit 30. Considering the newly submitted evidence, the administrative law judge noted that of the three x-ray interpretations, two were read as negative for the existence of pneumoconiosis by two B-readers, one of whom was also qualified as a Board-certified radiologist. Decision and Order at 9. The single positive interpretation was by a physician with no special qualifications. Decision and Order at 9. The administrative law judge permissibly concluded that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the preponderance of the newly submitted x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 6, 21; Employer's Exhibit 2; Decision and Order at 9; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach 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*); *Trent*, 11 BLR 1-26; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

The administrative law judge also correctly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) since the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and the

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1-3, 7.

presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 are not applicable to this claim.[4] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 9; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the entirety of the newly submitted medical opinion evidence of record and considered the quality of the evidence: whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 10. The administrative law judge rationally acted within his discretion as fact-finder, in concluding that the opinion of Dr. Hussain was insufficient to meet claimant's burden of proof as he found the physician's opinion to be poorly documented and reasoned: his diagnosis of pneumoconiosis was based upon pulmonary function study results which was subsequently invalidated for failure to apply the correct reference values and upon the doctor's positive x-ray reading of an x-ray which was reread as negative by Dr. Poulos, a highly qualified expert.[5] *See Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Hutchens*, 8 BLR 1-16; *Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); Decision and Order at 10; Director's Exhibit 6.

Moreover, the administrative law judge rationally found that the preponderance of the newly submitted medical opinion evidence did not establish the existence of pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Worhach*, 17 BLR 1-105 ; *Trumbo*, 17 BLR 1-85; *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *Clark*, 12 BLR 1-149; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. The administrative law judge

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[4] 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 this claim was filed 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 nor was it filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[5] Dr. Poulos is a B reader and a Board-certified radiologist. Director's Exhibit 21. The record does not indicate that Dr. Hussain has any special qualifications for the interpretation of x-rays. Director's Exhibit 6.

permissibly found the opinions of Drs. Vuskovich and Broudy, who opined that the miner did not have pneumoconiosis or any condition caused by the inhalation of coal dust, were well-documented and better reasoned than the medical opinion of Dr. Hussain, who opined that the miner suffered from pneumoconiosis. These physicians considered the reliable objective evidence as well as accurate work and smoking histories and fully explained how the x-ray, pulmonary function and blood gas studies supported their finding of no pneumoconiosis or any condition caused by the inhalation of coal dust, and thus the administrative law judge's credibility determination was proper. *See* W*illiams*, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Perry*, 9 BLR 1-1; *Hutchens*, 8 BLR 1-16; Decision and Order at 10; Director's Exhibit 6; Employer's Exhibits 1, 2. The administrative law judge also rationally accorded Dr. Broudy's opinion additional weight because of his qualification as a pulmonary specialist. Decision and Order at 10; *Clark*, 12 BLR 1-149; *Wetzel v. Director. OWCP*, 8 BLR 1-139 (1985). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as they are supported by substantial evidence and in accordance with law.

In considering the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge properly determined that the newly submitted pulmonary function studies and blood gas studies were non-qualifying.[6] *See* 20 C.F.R. §718.204(b)(2)(i), (ii); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Director's Exhibits 6, 30; Employer's Exhibit 2; Decision and Order at 11. The administrative law judge further correctly determined that there is no evidence of cor pulmonale with right sided congestive heart failure in the record pursuant to Section 718.204(b)(2)(iii). *See* 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 11; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

Moreover, the administrative law judge considered the newly submitted medical opinion evidence of record and rationally concluded that the opinions were insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv) as no physician opined that claimant was totally disabled.[7] Decision and Order at 11; Director's Exhibit 6;

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[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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

[7] Dr. Hussain opined that claimant had minimal to no respiratory impairment and had the respiratory capacity to engage in coal mine employment. Director's Exhibit 6. Dr. Broudy opined that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Employer's Exhibit 2. Dr.

Employer's Exhibits 1, 2; *Lafferty*, 12 BLR 1-190; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff=d on recon. en banc*, 9 BLR 1-104 (1986); *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

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 Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). 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* 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(b), is supported by substantial evidence and in accordance with law, claimant has failed to establish any element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309; *Ross*, 42 F.3d 993, 19 BLR 2-10; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Consequently, we affirm the denial of benefits. *See Kirk*, 264 F.3d 602, 22 BLR 2-228; *Ross*, 42 F.3d 993, 19 BLR 2-10.

Vuskovich opined that claimant retains the respiratory capacity to perform the work of a coal miner or to do comparable work in a dust free environment. Employer's Exhibit 1; Joint Exhibit 1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge