BRB No. 02-0383 BLA

BERTON HENDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2001-BLA-0861) of Administrative Law Judge Daniel L. Leland 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).[1] The administrative law judge determined the instant case to be a

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

duplicate claim under 20 C.F.R. §725.309 (2000),[2] and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's September 15, 2000 filing date.[3] Initially, the administrative law judge credited claimant with thirty years of coal mine employment. Addressing the merits of the duplicate claim, the administrative law judge noted that the prior claim was denied because claimant failed to establish a totally disabling respiratory impairment. Weighing the newly submitted evidence, the administrative law judge found that a preponderance of the medical evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. In addition, the administrative law judge found that the new medical evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b).[4]

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effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The amendments to the regulations at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

[3] Claimant filed his initial application for benefits on August 21, 1986, which was denied by the district director on November 25, 1986. Director's Exhibits 28-1, 28-14. The district director based his denial on his determination that claimant failed to establish total respiratory disability. Director's Exhibit 28-14. No further action was taken on this claim.

[4] The provision pertaining to total disability, previously set out at 20 C.F.R.

Therefore, the administrative law judge found that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to Section 725.309 (2000). Accordingly, the administrative law judge denied benefits.

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§718.204(c) (2000), is now found at 20 C.F.R. §718.204(b).

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted medical evidence insufficient to establish the existence of complicated pneumoconiosis. Specifically, claimant contends that the administrative law judge erred by merely "counting heads" in finding the preponderance of the x-ray evidence and CT scan evidence insufficient to establish the presence of complicated pneumoconiosis. In response, employer urges affirmance of the administrative law judge's denial of benefits 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.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Third Circuit has held that in determining whether a material change in conditions has been established, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).[6]

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[5] The parties do not challenge the administrative law judge's decision to credit claimant with thirty years of coal mine employment We, therefore, affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibits 2, 28; *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Initially, the administrative law judge correctly stated that the prior claim was denied based on the district director's determination that claimant failed to establish total respiratory disability. Decision and Order at 6; Director's Exhibit 28-14. Consequently, the administrative law judge found that in order to establish a material change in conditions, claimant must establish either the presence of complicated pneumoconiosis pursuant to Section 718.304 or, the presence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b).[7] Decision and Order at 6-7.

In weighing the newly submitted x-ray evidence relevant to the issue of the presence or absence of complicated pneumoconiosis, the administrative law judge set forth the relevant x-ray interpretations as well as the radiological qualifications of each of the physicians who provided the interpretations. Decision and Order at 3-4, 7; Director's Exhibits 11, 12, 22, 25; Claimant's Exhibits 1, 5, 7, 9, 11, 14-18, 22-23, 25; Employer's Exhibits 1-3, 5, 6, 11, 12. The administrative law judge found that of the five physicians who interpreted the x-ray films as positive for the presence of complicated pneumoconiosis, Drs. Mathur, Simone, Harron and Brandon are dually-qualified as B readers and Board-certified radiologists, whereas Dr. Schaaf possesses no special radiological qualifications. Decision and Order at 7. Of the seven physicians who interpreted the x-ray films as negative for the presence of complicated pneumoconiosis, Drs. Wheeler, Scott, Kim and Burnett are dually-qualified, whereas Dr. Fino is a B reader, Dr. Stankiewicz is a Board-certified radiologist and Dr. Spagnolo possesses no special radiological qualifications. *Id*. Based on the interpretations provided by these physicians, the administrative law judge found that a preponderance of the x-ray interpretations does not show the presence of large opacities. Decision and Order at 7; *compare* Director's Exhibits 12, 25; Employer's Exhibits 1-3, 5, 6, 11, 12 with Director's Exhibits 11, 22; Claimant's Exhibits 1, 5, 7, 9, 11, 14-18, 22-23, 25.

We reject claimant's assertion that the existence of complicated pneumoconiosis has been established based on the presence of positive x-ray interpretations in the record. The administrative law judge properly weighed all the newly submitted x-ray evidence to determine if this evidence was sufficient to meet claimant's burden of proof. In finding

[7] The parties do not challenge the administrative law judge's finding that the newly submitted medical evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Therefore, this finding is affirmed. *See Skrack*, *supra*.

the x-ray evidence insufficient to establish the existence of complicated pneumoconiosis, the administrative law judge considered both the qualitative and quantitative weight of the x-ray evidence, and rationally found that a preponderance of the x-ray evidence does not show the presence of complicated pneumoconiosis. Decision and Order at 7; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d. Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see generally Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Likewise, we affirm the administrative law judge's finding that the CT scan evidence fails to establish the presence of complicated pneumoconiosis. Initially, the administrative law judge rationally found that a preponderance of the CT scan evidence did not demonstrate the presence of complicated pneumoconiosis. Decision and Order at 7. However, in finding that the CT scan evidence was insufficient to demonstrate the presence of complicated pneumoconiosis, the administrative law judge specifically credited the opinion of Dr. Wheeler, that the lung scarring present was due to granulomatous disease, based on the physician's qualifications and experience. Decision and Order at 7; Employer's Exhibit 9; *see Worhach v. Director's OWCP*, 17 BLR 1105 (1993); 12 BLR 1-149 (1989)(*en banc*). Consequently, contrary to claimant's contention, the administrative law judge did not rely solely on numerical superiority in weighing the CT scan evidence, but rather, reasonably accorded greater weight to the explanation provided by Dr. Wheeler. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988) *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). As claimant does not otherwise challenge the administrative law judge's finding that the newly submitted evidence does not demonstrate the existence of complicated pneumoconiosis, we affirm the administrative law judge's determination that the irrebuttable presumption of total disability due to pneumoconiosis as set forth at Section 718.304 is not applicable in this case.

Because claimant has failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 or total respiratory disability pursuant to Section 718.204(b), we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish a material change in conditions pursuant

to Section 725.309 (2000) and we affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law. *Swarrow, supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge