BRB No. 01-0155 BLA

JOSEPH R. FOSTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTINENTAL AUGERING,	)	DATE ISSUED:
	)	
INCORPORATED	)	
	)	
and	)	
	)	
JOHNSTOWN COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
	)	
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph R. Foster, Belva, West Virginia, *pro se*.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (99-BLA-223) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits in a duplicate 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). Based on the filing date of February 25, 1998, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. At the hearing, the parties stipulated to the following facts: that claimant had worked nineteen and one-half years in coal mine employment; that Continental Augering, Incorporated was the responsible operator; that claimant had post-1969 coal mine employment; and that claimant's wife was a dependent. In this duplicate claim, the

[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 effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant contends that the finding of 19 ½ years of coal mine employment by the administrative law judge is wrong because he worked 26 ½ years in the coal mines. As claimant agreed, at the hearing, that he worked 19 ½ years in the coal mines, *see* Hearing Transcript at 16, the administrative law judge properly relied on this stipulation when deciding the length of claimant's coal mine employment. *See Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). Likewise, the administrative law judge correctly found Continental Augering, Incorporated to be the responsible operator as the parties stipulated to this fact at the hearing. *Id*.; *see* Hearing Transcript at 17-18. While claimant's statement that he had post-1966 coal mine employment is supported by his Social Security earnings statement; under the Act, the decision as to whether the Black Lung Trust Fund or an employer is responsible for payment benefits is determined by whether claimant worked in the coal mines after 1969. *See* 30 U.S.C. §901, *et seq*.; 20 C.F.R. §725.490. Thus,

administrative law judge reviewed the new evidence submitted since the denial of claimant's prior claim and found this evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b)(2000). Thus, the administrative law judge found that claimant failed to meet his burden of demonstrating a material change in conditions since the denial of his prior claim pursuant to 20 C.F.R. §725.309 (1999). Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge on the existence of pneumoconiosis and material change in conditions. Employer/ insurer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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. *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). We must affirm the administrative law judge's Decision and Order if the findings of fact and

---

the administrative law judge did not err when he concluded that claimant had post-1969 coal mine employment. Finally, claimant's statement that he stopped coal mining in 1995, not 1992 as indicated by the administrative law judge, is supported by his Social Security earnings record. *See* Director's Exhibits 3, 32. However, when claimant stopped working in the coal mines does not impact the findings of the administrative law judge in this case.

[3] Claimant filed his initial application for benefits on November 11, 1974 which was denied on July 2, 1976 and after review under the 1977 amendments to the Act on July 16, 1979. *See* Director's Exhibit 32. This claim was finally denied on the grounds that claimant failed to establish the existence of pneumoconiosis on August 19, 1980. *Id*. Claimant took no further action until he filed the present claim on February 25, 1998. *See* Director's Exhibit 1; Claimant's Exhibit G.

[4] Claimant contends that the administrative law judge made mistakes in the determination of fact. Allegations of mistakes in the determination of fact cannot be raised before the Board in a duplicate claim. *See* 20 C.F.R. §§725.309, 725.310. Notwithstanding, the Board will treat claimant's allegations of mistakes as challenges to the findings of the administrative law judge. *See generally Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Mansfield v. Director, OWCP*, 8 BLR 1-445 (986). Claimant notes that in identifying the issues in this case, the administrative law judge incorrectly references the claimant's name as "Joseph S. Foster". *See* Decision and Order at 2. The record reflects claimant signed his name on his claim "Joseph R. Foster" and all other references to claimant's name are "Joseph R. Foster." Director's Exhibit 1.

conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 (2001). 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*).

As this case arises within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997) for deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Rutter*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In the instant case, the administrative law judge properly concluded that claimant's prior claim was finally denied in August 1980 on the grounds that claimant failed to establish the existence of pneumoconiosis. *Id*.; Director's Exhibit 32-11; Decision and Order at 3. Thus, the administrative law judge correctly reviewed the newly submitted evidence to determine if it was sufficient to meet claimant's burden of proving the existence of pneumoconiosis. *Id*.

In challenging the administrative law judge's weighing of the x-ray evidence, claimant contends that Drs. Wiot, Spitz, and Shipley are not B-readers and that Drs. McFarland and Cole are not Board-certified Radiologists and B-readers. Thus, claimant asserts that since these physicians are not qualified readers, the administrative law judge erred when he relied on the x-ray interpretations of these physicians to find the weight of the x-ray evidence negative for pneumoconiosis. We reject these contentions as claimant has not provided any support for these allegations of error, and because the record does not contain any evidence which supports the allegations. Likewise, claimant's contentions regarding the bias of employer's doctors in interpreting x-rays obtained by employer is rejected as the record

[5] Claimant contends that he has become totally disabled from respiratory problems since the denial of his prior claim in 1980. In denying the initial claim, the district director found the evidence insufficient only on the issue of the existence of pneumoconiosis. *See* Director's Exhibit 32-11. Thus, in the present claim, claimant must establish the existence of pneumoconiosis in order to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309.

contains no evidence which reflects that the interpretations by employer's doctors are biased. *See Hodges v. Bethenergy, Mines, Inc.*, 18 BLR 1-84 (1994); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). In concluding that the weight of the newly submitted x-ray evidence was negative for the existence of pneumoconiosis, the administrative law judge properly found the weight of the x-ray evidence negative for the existence of pneumoconiosis based on the doctors' qualifications which were contained in the record or based on the judicial notice he took of these qualifications. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Maddaleni v. The Pittsburg & Midway Mining Co.*, 14 BLR 1-135 (1990). We, therefore, affirm the finding of the administrative law judge that the x-ray evidence did not establish the existence of pneumoconiosis. *See* 20 C.F.R.§718.202(a)(1).

We cannot, however, affirm the findings of the administrative law judge regarding the medical opinion evidence at Section 718.202(a)(4). In crediting the medical opinion of Dr. Zaldivar, the administrative law judge did not address fully Dr. Zaldivar's explanation for why claimant's emphysema was not aggravated by coal dust exposure, *see Island Creek Coal Company v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000), while finding Dr. Rasmussen's opinion unreasoned and undocumented because Dr. Rasmussen failed to explain his medical basis for linking claimant's obstructive pulmonary impairment to coal dust. This was inconsistent. *Id.*; *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987). We, therefore, vacate the findings of the administrative law judge at Section 718.202(a)(4) and remand this case for further findings. If, on remand, the administrative law judge finds the medical opinion evidence sufficient to establish the presence of pneumoconiosis, he must weigh all the evidence regarding the existence of pneumoconiosis to determine if claimant has established a material change in conditions pursuant to Section 725.309. *See Compton*, *supra*; *Rutter*, *supra*.

[6] Dr. Zaldivar examined claimant on behalf of employer. Dr. Zaldivar diagnosed a severe respiratory impairment which he said was not related to coal mine employment, but was typical of asthma. *See* Employer's Exhibit 4. Dr. Zaldivar concluded that claimant did not have pneumoconiosis because his x-ray was interpreted as negative for the existence of pneumoconiosis, and that the dust burden in the lung, if any, was not sufficient to produce a pulmonary impairment or airways dysfunction. *Id.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge