BRB No. 99-0868 BLA

ROBERT R. MATNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL 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 of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Robert R. Matney, Keen Mountain, Virginia, *pro se*.

Natalie D. Brown (Jackson & Kelly, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-00664) of Administrative Law Judge Lawrence P. Donnelly 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 twenty-three and one-half years of coal mine employment and, based on the date of filing, adjudicated this duplicate claim[1] pursuant to the regulations contained in 20

[1]Claimant filed his initial claim for benefits on February 11, 1991, which was denied by the Department of Labor on July 12, 1991. Director's Exhibit 22. Claimant filed a second claim on June 20, 1994, which was denied on November 22, 1994. Director's Exhibit 23. Claimant took no further action until he filed the instant claim on September 2, 1997.

C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, 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 on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 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 conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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)(*en banc*).

Director's Exhibit 1.

After consideration of the administrative law judge's Decision and Order 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 therein. Considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. 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 2, 6; Director's Exhibits 22, 23. The United States Court of Appeals for the Fourth Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions 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.[2] *See 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).

The administrative law judge, in the instant case, permissibly determined that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as all of the x-ray readings were negative. Director's Exhibits 13, 14; Employer's Exhibits 1, 3, 4, 6, 8, 9; Decision and Order at 4, 7; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1988)(*en banc*).

Further, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 7. Additionally, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein are applicable to the instant claim.[3] *See* 20 C.F.R. §§718.304,

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[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]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 he filed his claim after January 1, 1982. *See* 20 C.F.R.

718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 7.

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§718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

In weighing the newly submitted medical opinions of record, the administrative law judge also rationally concluded that this evidence was insufficient to establish pneumoconiosis as no physician opined that claimant suffered from pneumoconiosis or that coal dust contributed to any impairment.[4] Decision and Order at 7; Director's Exhibit 10; Employer's Exhibits 2, 3, 5, 7, 10; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113

[4]Dr. Hippensteel is Board-certified in internal, pulmonary and critical care medicine and examined claimant on April 21, 1998. Employer's Exhibits 2, 3. The physician opined that claimant does not suffer from pneumoconiosis or any disease caused by coal dust exposure and that claimant could return to his former coal mine employment from a pulmonary standpoint. Employer's Exhibits 3, 10. Dr. Forehand, whose credentials are not in the record, diagnosed chronic bronchitis due to cigarette smoking and opined that there was no evidence of coal workers' pneumoconiosis and that claimant had a mild impairment but could return to his last coal mining job. Director's Exhibit 10. Dr. Jarboe, who is Board-certified in internal and pulmonary medicine, opined that claimant did not have coal workers' pneumoconiosis but suffered from a mild impairment due to asthma due to smoking cigarettes. He further opined that claimant was not disabled from his former coal mine employment. Employer's Exhibit 5. The record also contains several summaries from Clinch Valley Medical Center in 1995 and 1996 which do not diagnose pneumoconiosis or any condition due to coal dust exposure. Employer's Exhibit 7.

(1988); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry*, *supra*; *King v. Consolidation Coal Co*., 8 BLR 1-262 (1985). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law.[5] *Clark, supra*; *Perry, supra*.

[5]Remand to the administrative law judge for reconsideration of the newly submitted evidence under 20 C.F.R. §718.202(a)(1)-(4) in accordance with the Fourth Circuit's recent decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000), is not necessary, as the administrative law judge properly determined that the existence of pneumoconiosis was not established under any of the relevant subsections.

With regard to 20 C.F.R. §718.204(c), the administrative law judge properly found the newly submitted evidence insufficient to establish total disability. *Piccin, supra*. Since none of the newly submitted pulmonary function studies of record yielded qualifying[6] values, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). Director's Exhibit 9; Employer's Exhibit 3; Decision and Order at 4, 5, 7. Further, the administrative law judge acted within his discretion in finding the preponderance of the blood gas studies which produced non-qualifying values more probative then the September 25, 1997 blood gas study which produced qualifying values and therefore properly concluded that the newly submitted blood gas study evidence did not satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.204(c)(2). Decision and Order at 7-8; Director's Exhibits 11, 12; Employer's Exhibit 3; *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984). Additionally, since the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3). Decision and Order at 8; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

Finally, the administrative law judge considered the newly submitted medical reports of record and properly found that the opinions were insufficient to establish claimant's burden of proof as no physician opined that claimant was totally disabled by a respiratory or pulmonary condition. *See* Decision and Order at 8; Director's Exhibit 10; Employer's Exhibits 3, 5, 7, 10; *Budash, supra*; *Gee, supra*; *Perry, supra; Piccin, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record 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 v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley*

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

v. Blue Diamond Coal Co., 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.[7]

Since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[7]Since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge