BRB No. 97-0399 BLA

CHARLES ALLEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
SVEDELA INDUSTRIES	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Charles Allen, Martin, Kentucky, *pro se.*

Patricia T. Gonsalves (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (95-BLA-0920) of Administrative Law Judge Paul H. Teitler 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). Claimant's initial application for benefits filed on January 15, 1986 was finally denied on October 22, 1986. Director's Exhibit 46 at 53, 184. On September 17, 1993, claimant filed the present application, which is a duplicate claim because it was filed more than one year after the prior denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d). The administrative law judge credited claimant with fourteen years of coal mine employment, found that the newly-submitted evidence failed to establish either the existence of pneumoconiosis or total respiratory

disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c), and concluded that a material change in conditions was not established pursuant to 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

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. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). 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 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), 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. *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). If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter, supra*.

The administrative law judge noted that claimant was previously denied benefits because he failed to establish the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis pursuant to Sections 718.202(a) and 718.204. Decision and Order

[1] The administrative law judge's finding of fourteen years of coal mine employment is affirmed as unchallenged on appeal as it is not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

at 5; Director's Exhibit 46. The administrative law judge then considered the newly submitted evidence to determine whether it established a material change in conditions. *See Rutter*, *supra*.

Pursuant to Section 718.202(a)(1), the administrative law judge considered all nine readings of the three x-rays taken since the 1986 denial. Six of these readings were negative for pneumoconiosis and three were positive. Director's Exhibits 13, 15, 16-20, 45; Employer's Exhibits 2, 3. Five of the negative readings were rendered by physicians who are Board-certified radiologists, B-readers, or both, while the positive readings were rendered by physicians lacking radiological credentials. The administrative law judge permissibly found that "[g]iven the preponderance of negative readings by the more highly qualified physicians," the newly submitted x-rays failed to establish the existence of pneumoconiosis. Decision and Order at 8; *see 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). Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 8; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted examination reports of Drs. Sundaram and Dahhan. Dr. Sundaram, whose credentials are not of record, diagnosed coal workers' pneumoconiosis based on his examination, a positive x-ray, and objective testing. Director's Exhibits 11, 45. Dr. Dahhan, who the record indicates is Board-certified in internal and pulmonary medicine, reported a normal chest examination, negative x-ray, normal blood gas study, and a mild reduction in spirometry due to moderate obesity. Director's Exhibit 10. Based on these factors, Dr. Dahhan concluded that there was insufficient objective evidence to diagnose pneumoconiosis. *Id*.

In finding that the existence of pneumoconiosis was not established, the administrative law judge permissibly relied on the superior qualifications of Dr. Dahhan and acted within his discretion as fact-finder in finding Dr. Dahhan's report to be "more persuasive, well-reasoned and well-documented, supported as it is by the overwhelming weight of the objective laboratory data . . . ." Decision and Order at 9; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Sections 718.204(c)(1)-(3), the administrative law judge correctly noted

that all of the newly submitted objective tests yielded non-qualifying values,[2] Director's Exhibits 8, 10, 12, 13, and that there was no evidence in the record of cor pulmonale with right-sided congestive heart failure. We therefore affirm these findings.

Pursuant to Section 718.204(c)(4), the administrative law judge considered Dr. Sundaram's opinion that claimant has a "Class III AMA Guidelines" respiratory impairment, and Dr. Dahhan's opinion that the examination and objective test results indicated that claimant suffers no significant impairment in his respiratory capacity. Director's Exhibits 10, 11, 45. The administrative law judge permissibly accorded greater weight to Dr. Dahhan's opinion based on his superior qualifications and his opinion's consistency with the objective medical evidence. Decision and Order at 10; *see Clark, supra*; *Wetzel, supra*. Therefore, we affirm his finding pursuant to Section 718.204(c)(4).

Because the administrative law judge properly considered this duplicate claim under the applicable legal standard, we affirm his finding that the newly submitted evidence failed to establish any element of entitlement previously adjudicated against claimant and thus, failed to establish a material change in conditions pursuant to Section 725.309(d). *See Rutter*, *supra*.

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

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

NANCY S. DOLDER
Administrative Appeals Judge