BRB No. 97-0496 BLA

ROBERT W. KOSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PRICE RIVER COAL COMPANY	)	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 James Guill, Administrative Law Judge, United States Department of Labor.

Robert W. Koss, Price, Utah, *pro se*.

James M. Elegante (Parsons, Behle & Latimer), Salt Lake City, Utah, for employer.

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

PER CURIAM:

Claimant appeals, without the aid of counsel, the Decision and Order (96-BLA-0151) of Administrative Law Judge James Guill 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).[1] The administrative law judge noted that employer stipulated to thirty-five years of coal mine employment and reviewed the evidence of record pursuant to 20 C.F.R. Part 718. The administrative law judge further noted that, inasmuch

[1] Although claimant also was not represented by counsel during the proceedings before the administrative law judge, inasmuch as the administrative law judge complied with the guidelines enunciated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), in order to conduct a full and fair hearing, *see* Hearing Transcript at 5-8, there was a valid waiver of representation by claimant, *see* 20 C.F.R. §725.362(b), and, therefore, the hearing before the administrative law judge was properly conducted.

as the instant claim was a duplicate claim, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d),[2] in accordance with the standard enunciated by the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F. 3d 1502, 20 BLR 2-302 (10th Cir. 1996).[3] The administrative law judge found that the newly submitted evidence did not support a finding of a material change in conditions pursuant to Section 725.309(d) and that the preponderance of the evidence of record as a whole did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant's appeal, herein, followed. Employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp*., 12 BLR 1-176 (1985). 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).[4]

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[2] Claimant, who originally filed a claim on December 7, 1981, which was denied on February 8, 1982, Director's Exhibit 51, filed a second claim on February 9, 1984, which was denied on May 3, 1984, Director's Exhibit 50, and filed a third claim on April 22, 1985, Director's Exhibit 50, which was denied on October 3, 1985, Director's Exhibit 49. Claimant filed the instant, duplicate claim on February 26, 1988, Director's Exhibit 1, more than a year after the denial of his previous claim, which was ultimately denied on October 3, 1995, inasmuch as claimant failed to establish the existence of pneumoconiosis, pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis, Director's Exhibit 47.

[3] Inasmuch as claimant's coal mine employment occurred in Utah, the instant case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] Employer contends in its response brief that, inasmuch as claimant's letter to the Board following the administrative law judge's Decision and Order denying benefits does not mention the administrative law judge's decision or evidence an intention to appeal, it should not be construed as an appeal. Alternatively, employer contends that claimant's appeal was untimely filed.

We reject employer's contentions. The Board has discretion under Sections 802.211(e) and 802.220 of the Benefits Review Board's Rules of Practice and Procedure, 20 C.F.R. §§802.211(e), 802.220, to prescribe an informal procedure to be followed when a party to an appeal is not represented by counsel, *see McFall v. Jewell Ridge Coal Corp.*, 12

BLR 1-176 (1989). Moreover, pursuant to 20 C.F.R. §802 208(b), any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, such as claimant's letter, herein, shall be sufficient notice of an appeal for purposes of 20 C.F.R. §802.205. Finally, the Tenth Circuit court has held that the statutory language plainly requires the service of a Decision and Order by certified mail for the thirty-day appeal period to begin, *see Big Horn Coal Co. v. Director, OWCP*, [*Madia*], 55 F.3d 545, 19 BLR 2-209 (10th Cir. 1995). In any event, if a notice of appeal to the Board is sent by mail, and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, it will be considered to have been filed as of the date of mailing, *see* 20 C.F.R. §802.206(b); *see* 20 C.F.R. §802.220(b); *see also* 20 C.F.R. §725.303(b); *Tobery v. Director, OWCP*, 7 BLR 1-407 (1984). Thus, inasmuch as the administrative law judge's Decision and Order was issued on November 19, 1996, and claimant's letter was mailed December 17, 1996, claimant's *pro se* appeal was timely filed.

The Tenth Circuit has held that, in order to bring a duplicate claim pursuant to Section 725.309(d), a claimant must prove for each element that actually was decided adversely to claimant in the prior denial that there has been a material change in that condition since the prior claim was denied, *see Brandolino, supra*.[5] The court held that the administrative law judge must compare the "evidence obtained after [the] prior denial to evidence considered in or available at the time of [the] prior claim..." to determine if claimant's condition in these elements has "worsened materially since the time of his earlier denial," *id*.

Claimant's prior claim was denied, in part, inasmuch as claimant failed to establish the existence of pneumoconiosis, *see* Director's Exhibit 49. The administrative law judge found that the newly submitted evidence and the evidence as a whole failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.*

[5] The instant claim cannot be considered a request for modification under 20 C.F.R. §725.310, inasmuch as it was filed more than a year after the denial of claimant's prior claim. *See* 20 C.F.R. §725.310; Director's Exhibits 1, 49.

The administrative law judge properly found that all of the x-ray evidence of record, including the newly submitted x-ray evidence, Director's Exhibits 14, 28, 30, 46, 49-51; Employer's Exhibits 8-9, was negative and/or failed to establish the existence of pneumoconiosis in accordance with the applicable quality standards, *see* 20 C.F.R. §§718.102; 718.202(a)(1). Decision and Order at 8-9. In addition, the administrative law judge properly noted that there is no relevant autopsy or biopsy evidence of record pursuant to 20 C.F.R. §718.202(a)(2), Decision and Order at 8, n. 4, *see* 20 C.F.R. §718.202(a)(2), and that none of the available presumptions under 20 C.F.R. §718.202(a)(3) are applicable, *see* 20 C.F.R. §718.202(a)(3), *id*.[6]

Finally, the administrative law judge considered all of the relevant medical opinion evidence and found that it was not sufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(4). Initially, the administrative law judge properly noted that the newly submitted opinion of Dr. Potter, Director's Exhibits 27, 30, 37, does not address whether claimant suffers from coal workers' pneumoconiosis or any pulmonary condition arising out of claimant's coal mine employment, Decision and Order at 12.[7] Next, the

[6] Inasmuch as there is no evidence of complicated pneumoconiosis in the record, the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is inapplicable, *see* 20 C.F.R. §§718.205(c)(3), 718.304. The presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to this claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1. Finally, the presumption at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, is also inapplicable in this living miner's claim.

[7] The administrative law judge also considered the previously submitted opinions of Dr. Hellems, who diagnosed mild bronchitis which he stated "may" represent industrial bronchitis arising from claimant's coal dust exposure, Director's Exhibit 51, and Dr. Marvel,

administrative law judge considered the newly submitted opinion of Dr. Lincoln, who found claimant to have severe airways obstruction resulting from his coal dust exposure, despite a negative x-ray, normal blood gas study and an inadequate pulmonary function study, Director's Exhibits 12, 44, 48; Claimant's Exhibit 1; *see also* Director's Exhibit 49, and the contrary newly submitted opinion from Dr. Farney, who found no evidence of coal workers' pneumoconiosis, Director's Exhibits 28, 46; Hearing Transcript at 40-69.

The administrative law judge, within his discretion, found that Dr. Farney's opinion was better supported by the objective evidence of record, including the negative x-ray evidence of record, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and found the opinion of Dr. Lincoln internally inconsistent, without sufficient reasoning, with the negative x-ray upon which Dr. Lincoln based his opinion, in part, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984). In addition, the administrative law judge, within his discretion, found that Dr. Farney, who also reviewed all of the evidence of record, had a broader medical basis for his opinion than did Dr. Lincoln, Decision and Order at 13. An administrative law judge may give less weight to a physician's opinion which is supported by limited medical data and may give more weight to a physician's opinion which is supported by extensive documentation, *see Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), and a more thorough examination and/or review of the evidence of record, *see Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Finally, the administrative law judge found that Dr. Lincoln did not adequately discuss the fact that claimant's pulmonary function study results showed reversibility after the administration of a bronchodilator, which Dr. Farney found was inconsistent with pneumoconiosis. Nor did Dr. Lincoln perform the blood and sputum tests conducted by Dr. Farney, whose results Dr. Farney found indicative of asthma, but had merely noted that claimant did not have asthma as a child.

Inasmuch as it is for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987)*; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if his findings are rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that the newly submitted medical opinion

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who diagnosed chronic bronchitis due to coal dust "and/or" smoking, Director's Exhibit 50. The administrative law judge, within his discretion, found the opinions of Drs. Hellems and Marvel equivocal and, therefore, entitled to little weight, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718 that actually was decided adversely to the claimant in the prior denial, *see Brandolino, supra; see also Trent, supra; Perry, supra*, as rational and supported by substantial evidence. Consequently, the administrative law judge's finding that claimant failed to establish a material change in condition pursuant to Section 725.309(d) is affirmed, *see Brandolino, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge