BRB No. 97-1473 BLA

HERBERT H. HONAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC COMPANIES	)	
	)	
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 George P. Morin, Administrative Law Judge, United States Department of Labor.

Edwin H. Pancake (Thomas P. Maroney, LC), Charleston, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Fairmont, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-2304) of Administrative Law Judge George P. Morin denying benefits on 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). The administrative law judge found twenty-four years of coal mine employment and based on the date of filing,

adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 3. The administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and thus insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant contends that the evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

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 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 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 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).

Pursuant to Section 718.202(a), 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. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Contrary to claimant's contention, the administrative law judge considered the interpretations by Drs. Patel, Skeens and Francke and rationally found that the evidence of record was insufficient to establish the existence of

[1] Claimant filed his initial claim for benefits on July 11, 1979, which was denied by the district director on June 2, 1980. Director's Exhibit 36. A second claim was filed on August 8, 1984, and was withdrawn by claimant on September 20, 1984. Director's Exhibit 37. The instant claim was filed on November 8, 1994. Director's Exhibit 1.

pneumoconiosis at Section 718.202(a)(1) as the preponderance of the newly submitted x-rays and CT scans were read as negative by physicians with superior qualifications. Director's Exhibits 23, 24, 36; Employer's Exhibits 1, 3; Decision and Order at 8; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Further, the administrative law judge properly concluded that the existence of pneumoconiosis could not be established pursuant to Section 718.202(a)(2) and (3) since there is no biopsy, autopsy or credited evidence of complicated pneumoconiosis in the record and this is a living miners' claim filed after January 1, 1982. *See* 20 C.F.R. §§718.202(a)(2) , (3), 718.304, 718.305, 718.306; Decision and Order at 8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Moreover, the administrative law judge considered the entirety of the newly submitted medical opinion evidence of record and permissibly found the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Contrary to claimant's contention, the administrative law judge permissibly accorded greater weight to Dr. Zaldivar's opinion, that claimant did not suffer from pneumoconiosis, than to Dr. Rasmussen's diagnosis of pneumoconiosis, as the physician's opinion was better supported by the other evidence of record, better reasoned and documented, Dr. Zaldivar had superior qualifications and his opinion was supported by the highly qualified opinion of Dr. Tuteur.[2] Director's Exhibits 15-17, 19, 20, 36; Employer's Exhibits 1, 4, 5; Decision and Order at 11; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985). The administrative law judge is empowered to weigh the medical evidence 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, Inc.*, 12 BLR 1-111 (1989). 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 20 C.F.R. §718.202(a) as it is supported by substantial evidence and is in accordance with law.

The administrative law judge, in the instant case, however, failed to consider claimant's new evidence pursuant to 20 C.F.R. §§718.203 and 718.204, elements that were previously adjudicated against him. We therefore vacate the

[2] The record indicates that Dr. Zaldivar is a specialist in pulmonary disease and internal medicine and board certified in internal medicine. Dr. Rasmussen's credentials are not in the record.

administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309 and remand the case for consideration of the relevant evidence on the remaining elements of entitlement that were 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 Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge