BRB No. 99-0624 BLA

PLENNIE SLONE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 Denying Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Plennie Slone, Big Rock, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order (98-BLA-0669) of Administrative Law Judge Thomas M. Burke denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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 seventeen years and five months of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge considered only the later evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard articulated in *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), *cert. denied*, 519 U.S. 1090 (1997). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated 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. *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, are supported by substantial evidence, and are in accordance with 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

[2] Claimant filed his initial claim for benefits on February 6, 1990, which was denied by the district director on July 12, 1990. Decision and Order at 2; Director's Exhibit 24. Claimant filed a petition for modification of the denied claim on June 18, 1991, and in a decision issued June 28, 1994, Administrative Law Judge Charles P. Rippey denied benefits. No further action was taken on that claim. Decision and Order at 2; Director's Exhibit 25. The instant claim was filed on August 27, 1997. Decision and Order at 2; Director's Exhibit 1.

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 one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.[3] In his consideration of the evidence pursuant to Section 718.202(a)(1), the administrative law judge listed the sixteen x-ray readings of three x-rays dated June 28, 1995, September 24, 1997, and April 21, 1998, as well as the qualifications of the readers. Decision and Order at 6-7; Director's Exhibits 11-13; Employer's Exhibits 1-2, 4-6, 8, 10-12. The administrative law judge stated that among these readings there were only two positive readings, one by Dr. Bassali, a Board-certified radiologist and B reader,[4] of the June 28, 1995, x-ray and one by Dr. Forehand, a B reader, of the September 24, 1997, x-ray. The administrative law judge found that the June 1995 x-ray was read negative by five equally qualified readers and therefore did not support a finding of pneumoconiosis. Moreover, contrary to the administrative law judge's finding, the record indicates that Dr. Forehand actually read the September 1997, x-ray as negative. Decision and Order at 6-7; Director's Exhibit 12. Nevertheless, the administrative law judge correctly found that the September 1997 x-ray did not support a finding of pneumoconiosis based on the negative interpretations of five dually-qualified readers. Inasmuch as the administrative law judge's finding that the recently submitted x-ray readings failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of x-ray evidence is supported by substantial evidence, it is affirmed. *Edmiston v. F*

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[3] We will not address the administrative law judge's length of coal mine employment determination inasmuch as we affirm the administrative law judge's findings that claimant has failed to establish a material change in conditions by failing to establish the existence of pneumoconiosis or total disability, *see* 20 C.F.R. §§725.309, 718.202(a) and 718.204(c).

[4] A B reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. §37.51; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Edwards v. Central Coal Co.*, 7 BLR 1-712, 1-717 (1985); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984).

& R Coal Co., 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Additionally, as the record contains no biopsy or autopsy evidence, and as none of the presumptions found at 20 C.F.R. §§718.304, 718.305 and 718.306 are applicable,
claimant cannot establish the existence of pneumoconiosis at Sections 718.202(a)(2) and (a)(3).[5] *See* 20 C.F.R. §718.202(a)(2), (3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Finally, the administrative law judge properly concluded that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis as no physician of record opined that claimant was suffering from pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry, supra*; Decision and Order at 7-9; Director's Exhibit 10; Employer's Exhibits 4, 7, 9, 13. We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus failed to establish a material change in conditions pursuant to Section 725.309, as it is supported by substantial evidence.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant, probative, new evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence failed to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c), the

[5] The presumption at 20 C.F.R. §718.304 requires evidence of complicated pneumoconiosis which is not in the record; the presumption at 20 C.F.R. §718.305 applies to claims filed, unlike the instant one, before January 1, 1982; and the presumption at 20 C.F.R. §718.306 does not apply to claims filed by living miners.

administrative law judge correctly found that the recently submitted evidence contains no qualifying pulmonary function or blood gas studies and that the record contains no evidence of cor pulmonale with right sided congestive heart failure.[6] *See* 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 10-11; Employer's Exhibit 4.

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

With respect to Section 718.204(c)(4), the administrative law judge also rationally determined that the evidence of record was insufficient to establish total disability. The administrative law judge properly concluded that the newly submitted medical opinion evidence was insufficient to establish total disability as no physician of record opined that claimant was suffering from a totally disabling respiratory or pulmonary impairment.[7] *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (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*; Decision and Order at 11; Director's Exhibit 10; Employer's Exhibits 4, 7, 9, 13. 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 medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), we affirm the administrative law judge's finding that claimant failed to demonstrate a material change in conditions pursuant to Section 725.309(d) and we affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law.

[7] As 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), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge