BRB No. 03-0192 BLA

GLEN T. GRIMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GAMORGAN COAL CORPORATION	)	
	)	DATE ISSUED: 09/25/2003
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 B Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Glen T. Grimes, East Stone Gap, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order B Denial of Benefits (01-BLA-0734) of Administrative Law Judge Richard T. Stansell-Gamm 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] This case involves a duplicate claim.[2] The administrative law judge determined that, due to the abandonment of the previous claim, claimant has not established any element of entitlement. The administrative law judge considered the evidence developed since the denial of the previous claim and found that the new evidence failed to establish the existence of pneumoconiosis or total respiratory disability. Accordingly, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. '725.309 (2000), and benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his consideration of the evidence. Employer responds, urging affirmance of the decision. The Director, Office of Workers= Compensation Programs, has declined to participate 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. We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 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 (2000). Failure 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)(*en banc*).

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The instant claim was filed on May 4, 1999, and is claimant=s third application for benefits. Director=s Exhibits 1, 34, 35.

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *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), *cert.denied*, 117 S.Ct. 763 (1997), to determine whether claimant demonstrated a material change in conditions at Section 725.309 (2000). In *Rutter*, the court held that in ascertaining whether a claimant established a material change in conditions, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him.

The administrative law judge first considered the x-ray evidence pursuant to Section 718.202(a)(1). He found that five of the eight chest x-rays submitted since the previous denial were uniformly read as negative.[3] Decision and Order at 8; Director=s Exhibits 39-41, 46, 47; Employer=s Exhibits 4-6. With respect to the remaining three x-rays, dated April 30, 1999, July 7, 1999, and January 9, 2001, each x-ray was read as positive by one physician who was qualified as a B reader and Board-certified radiologist, but negative by at least two equally qualified physicians.[4] The administrative law judge rationally found the numerical superiority of the negative interpretations by well-qualified physicians establishes that the preponderance of the x-ray evidence was negative pursuant to Section 718.202(a)(1)(2000). *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F&R Coal Co*, 14 BLR 1-65 (1990). We therefore affirm the administrative law judge=s finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

At Section 718.202(a)(4), the administrative law judge first found that neither Dr. Smith=s opinion, which addressed claimant=s back condition, nor the medical notes from claimant=s 1997 hospitalization provided an opinion regarding the presence of pneumoconiosis. Regarding the remaining five opinions, the administrative law judge found that Drs. Smiddy and Rasmussen concluded that claimant suffered from a coal dust exposure-related lung disease, while Drs. Foster, Fino and McSharry opined that he did not. Decision and Order at 13 B 14.

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[3] The x-rays dated September 5, 1997, Director=s Exhibits 39, 41, 46, May 7, 1998, Director=s Exhibit 41, September 2, 1998, Director=s Exhibits 40, 41, May 3, 2000, Director=s Exhibits 41, 46, 47, and May 11, 2001, Employer=s Exhibits 4-6, were all read negative for the existence of pneumoconiosis.

[4] Dr. Fino, a B reader, also read the April 30, 1999 x-ray as negative. Director=s Exhibit 41. The July 7, 1999 x-ray was read as negative by four Board-certified, B readers. Director=s Exhibits 18, 19, 29. Dr. Dahhan, a B-reader, additionally read the January 9, 2001 x-ray as negative. Employer=s Exhibit 1.

In according less probative weight to the opinions of Drs. Foster and Smiddy, the administrative law judge rationally found that both physicians rendered opinions that were not as well documented as the other medical opinions, which discussed more recent testing that demonstrated contrary results.[5] Decision and Order at 13-14; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge found that Drs. Rasmussen, McSharry and Fino, presented documented and comprehensive opinions, but found that the latter two physicians presented the better reasoned opinions which stated that claimant does not suffer from pneumoconiosis. Decision and Order at 14. In according less weight to Dr. Rasmussen, the administrative law judge found that Dr. Rasmussen did not consider the normal exercise blood gas studies and did not discuss claimant=s thirty to sixty pack year cigarette smoking history as being a causative factor in the miner=s lung disease, as compared with his seventeen years of coal mine dust exposure. Decision and Order at 15. The administrative law judge found that in contrast, Drs. McSharry and Fino presented well reasoned medical opinions, that claimant does not suffer from pneumoconiosis, with Dr. Fino presenting the best documented opinion based on his comprehensive medical record review of evidence dated through September 2001. The administrative law judge found that the opinions of Drs. Fino and McSharry were most consistent with the predominantly negative x-ray evidence, normal chest examinations and pulmonary function studies, and variable blood gas results which were incompatible with an irreversible lung disease like pneumoconiosis. Decision and Order at 16. Furthermore, the administrative law judge noted that Dr. Rasmussen is Board-certified in only internal medicine, whereas Drs. Fino and McSharry are additionally Board-certified in the sub-specialty of pulmonary diseases. Relying on the best-reasoned and documented opinions by expert pulmonologists, the administrative law judge permissibly concluded that the medical opinions fail to establish the existence of pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co v. Akers*, 131 F.3d 438, 21 BLR 2-269(4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Therefore, we affirm the

[5] The administrative law judge additionally found with respect to Dr. Foster=s opinion that the physician considered only his chest x-ray examination of claimant and did not conduct a blood gas study, which appears to be a critical diagnostic tool in this particular case. Decision and Order at 13. With regard to Dr. Smiddy=s opinion, the administrative law judge also accorded less probative weight to the opinion because of the physician=s reliance on a positive x-ray interpretation, which was contrary to the administrative law judge=s determination that the x-ray evidence is negative for pneumoconiosis. Decision and Order at 14.

administrative law judge=s findings pursuant to Section 718.202(a)(4).[6]

[6] We note that the administrative law judge did not make findings pursuant to 20 C.F.R. '718.202(a)(2) and (3). This error does not require remand, however, as the record does not contain evidence which would establish the existence of pneumoconiosis at either subsection. 20 C.F.R. '718.202(a)(2), (3). There is no biopsy evidence. 20 C.F.R. '718.202(a)(2). The presumptions contained at Section 718.202(a)(3) are inapplicable as there is no evidence of complicated pneumoconiosis, the claim was not filed prior to January 1, 1982, and the case involves a living miner=s claim. 20 C.F.R. ''718.304, 305, 306.

Regarding the issue of total disability, the administrative law judge properly concluded that the pulmonary function studies were non-qualifying and therefore failed to establish total disability pursuant to Section 718.204(b)(2)(i). Decision and Order at 18; Director=s Exhibits 11, 40, 41, 64; Employer=s Exhibit 5. The administrative law judge also properly found that because the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure, claimant could not demonstrate total disability pursuant to Section 718.204(b)(2)(iii).

The administrative law judge then considered the blood gas studies and found that they produced conflicting results, with two exercise tests revealing a disabling impairment and two other tests, including the most recent, revealing no impairment. Decision and Order at 19; Director=s Exhibits 16, 61A, 64; Employer=s Exhibit 5. The administrative law judge found that the results were inconclusive and that claimant had failed to meet his burden of establishing total disability by blood gas study evidence. As this finding is supported by the evidence of record, and the administrative law judge has the discretion to determine whether a party has met its burden of proof, we affirm his determination that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(ii). *See Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (987).

Lastly, the administrative law judge considered whether the medical opinions establish total respiratory disability. The administrative law judge accurately found that Drs. Smith and Foster, and the physicians associated with claimant=s 1997 hospitalization, did not express an opinion regarding claimant=s pulmonary impairment. Director=s Exhibits 30, 39, 40. The administrative law judge next permissibly found that Drs. Smiddy=s and Rasmussen=s opinions, that claimant is incapable of returning to his prior coal mine employment based on the abnormal blood gas studies, were not well documented or reasoned as the physicians did not consider the normal blood gas studies contained in the record in arriving at their conclusion. *See Fields*, 10 BLR 1-19. The administrative law judge then found that the two remaining medical opinions, by Drs. McSharry and Fino, were also unreasoned because neither physician addressed whether the variable nature of the exercise blood gas studies might render claimant incapable of returning to steady work as a coal miner. Decision and Order at 20. The administrative law judge rationally concluded that no medical opinion is sufficiently documented or reasoned to support a finding of total respiratory disability. *See Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19. We therefore affirm the administrative law judge=s determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.204(b)(2)(iv).

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*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge=s finding that claimant failed to establish the existence of pneumoconiosis or total respiratory disability, and thus, failed to establish a material change in conditions pursuant to Section 725.309 (2000). Therefore, we affirm the denial of the duplicate claim.

Accordingly, the administrative law judge=s Decision and Order B Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge