BRB No. 00-0447 BLA

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| HARRY THOMAS AYERS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| WESTMORELAND 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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

Harry Thomas Ayers, Beaver, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (98-BLA-0176) of Administrative Law Judge John C. Holmes 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). In this duplicate claim, the administrative law judge found that claimant's prior claim was denied on June 15, 1993, because he failed to establish the existence of pneumoconiosis and total disability. After an appeal to the Board and a subsequent motion for reconsideration, the claim was finally denied on May 16, 1995. *See Harry T. Ayers v. Westmoreland Coal Company*, BRB No. 93-

[1] Claimant filed his first claim with the Department of Labor (DOL) on January 30,

2002 BLA (Order on Motion for Reconsideration)(unpub.). Claimant filed a duplicate claim on October 4, 1996. In this claim, the administrative law judge considered the newly submitted evidence and the evidence from the prior claim, and again found it insufficient to establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a)(1)-(4); 718.204(c)(1)-(4). Claimant appeals, generally challenging the denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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, supported by substantial evidence, and 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). In his earlier Decision and Order, the administrative law judge found that only one of the fifteen x-ray readings by B-readers resulted in a positive x-ray reading. *Ayers v. Westmoreland Coal Co.*, No. 92-BLA-1657 (June 15, 1993).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally

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1986. Director's Exhibit 24. That claim was finally denied on May 23, 1986. Director's Exhibit 41. Claimant took no further action until he filed a claim on November 15, 1991, which was denied, and a third claim on October 4, 1996, which is the subject of this appeal.

[2] The administrative law judge erred in not first determining whether a material change in conditions was established based solely on the evidence submitted with the duplicate claim before weighing all the evidence at Section 718.202(a) and Section 718.204(c). *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). However, inasmuch as the administrative law judge's weighing of all the evidence at Section 718.202(a) and his finding that it does not establish the existence of pneumoconiosis is affirmable, his error in failing to make a material change determination based solely on the new evidence, before weighing all the evidence, is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

At Section 718.202(a)(1), the administrative law judge noted that the newly submitted x-ray evidence consisted of one positive and fourteen negative readings which when added to the prior evidence produced twenty-four negative readings and two positive readings. Finding the x-ray evidence overwhelmingly negative, the administrative law judge permissibly found no basis for changing his prior decision. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Perry*, *supra*; *see Adkins v. Director, OWCP*, 889 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

At Section 718.202(a)(4) the administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion diagnosing pneumoconiosis, based on one x-ray reading and a coal mine employment history, was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), when weighed against the medical reports by reviewing physicians, Drs. Morgan, Castle, Fino Zaldivar and Spagnolo, who opined that claimant does not have pneumoconiosis. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). 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 when the administrative law judge's findings are 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). Consequently, as the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, benefits are precluded. 20 C.F.R. §718.202(a)(1), (4).

[3] In his earlier Decision and Order considering the evidence submitted with the prior claim, Judge Holmes found that all the x-ray readings were read by B-readers and only one of the 15 readings was positive.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge