BRB No. 97-1048 BLA

GEORGE ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WESTMORELAND 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 of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

George Roberts, Dryden, Virginia, *pro se*.[1]

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

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

PER CURIAM:

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, 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).

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1094) of Administrative Law Judge Robert G. Mahony 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). The administrative law judge adjudicated this duplicate claim[2] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law

[2]Claimant filed his initial claim on November 1, 1977. Director's Exhibit 42. On June 7, 1982, Administrative Law Judge William H. Dapper issued a Decision and Order denying benefits. *Id*. The basis of Judge Dapper's denial was claimant's failure to establish a totally disabling respiratory impairment. *Id*. The Board affirmed Judge Dapper's denial of benefits. *Roberts v. Westmoreland Coal Co.*, BRB No. 82-1114 BLA (May 2, 1985)(unpub.). The United States Court of Appeals for the Fourth Circuit remanded the case in light of its then recent decision in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986), *rev'd sub nom. Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Director's Exhibit 42. On May 18, 1987, Administrative Law Judge Edward J. Murty issued a Decision and Order on Remand denying benefits. *Id*. The Board vacated Judge Murty's Decision and Order on Remand, and reinstated Judge Dapper's original Decision and Order in light of the United States Supreme Court's subsequent issuance of *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), which reversed *Stapleton*. *Roberts v. Westmoreland Coal Co.*, BRB No. 87-1595 BLA (June 26, 1989)(unpub.). Claimant filed his most recent claim on October 3, 1994. Director's Exhibit 1.

judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. 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 on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 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).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge stated that "Claimant's prior claim was denied on the basis that the evidence failed to show the Claimant has pneumoconiosis, that the disease arose from his coal mine employment or that it resulted in total disability." Decision and Order at 2; *see* Director's Exhibit 42. The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction over this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See 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).

Initially, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) since each of the six newly submitted x-ray interpretations of record is negative for pneumoconiosis. Director's Exhibits 9, 10, 19, 20, 22, 23. As the record does not contain any biopsy results demonstrating the presence of pneumoconiosis, pneumoconiosis at 20 C.F.R. §718.202(a)(2) cannot be established. Moreover, pneumoconiosis cannot be established at 20 C.F.R. §718.202(a)(3) as none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Next, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Abernathy, Dahhan, Fino and Paranthaman. Whereas Drs. Abernathy, Dahhan and Fino opined that claimant does not suffer from pneumoconiosis, Director's Exhibits 20, 36, 38; Employer's Exhibits 2, 4, 6-8, Dr. Paranthaman opined that claimant suffers from pneumoconiosis,[3] Director's Exhibits 7, 12. The administrative law judge properly discredited Dr. Paranthaman's opinion because it is not supported by the underlying documentation.[4] *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Moreover, since three of the four physicians found no evidence of pneumoconiosis, the administrative law judge's finding is supported by substantial evidence. Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[3]Dr. Paranthaman opined that claimant's chronic bronchitis is related to coal dust exposure. Director's Exhibits 7, 12; *see Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61, 2-66 (4th Cir. 1995); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985).

[4]The administrative law judge observed that "Dr. Paranthaman diagnosed chronic bronchitis which he attributed to the Claimant's coal dust exposure, however, he reported the physical examination as unremarkable and the chest x-ray, spirogram and arterial blood gases as showing no abnormalities whatsoever." Decision and Order at 4.

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the evidence insufficient to establish total disability. The administrative law judge properly found that none of the newly submitted pulmonary function studies or arterial blood gas studies produced qualifying[5] values.[6] Director's Exhibits 6, 8, 20; 20 C.F.R. §718.204(c)(1) and (c)(2). Finally, the administrative law judge properly found that the newly submitted "medical opinion evidence fails to establish...a totally disabling respiratory or pulmonary impairment."[7] Decision and Order at 5; *see Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Consequently, claimant is unable to establish total disability at 20 C.F.R. §718.204(c)(4).

Since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter*, *supra*.

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

[6]Since the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, we hold as a matter of law that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3).

[7]Drs. Abernathy, Dahhan, Fino and Paranthaman opined that claimant does not suffer from a respiratory impairment. Director's Exhibits 7, 12, 20, 36, 38; Employer's Exhibits 2, 4, 6-8.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge