BRB No. 97-0376 BLA

CLINARD BENTLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTUCKY CARBON CORPORATION	)	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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Clinard Bentley, Shelbiana, Kentucky, *pro se.*

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

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

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order (95-BLA-2159) of Administrative Law Judge Paul H. Teitler 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). This claim involves a duplicate claim. The administrative law judge found that employer stipulated that claimant has at least eighteen years of qualifying coal mine employment. Considering the newly submitted evidence of record, the administrative law judge concluded that claimant failed to establish

[1] Claimant is Clinard Bentley, the miner, whose first claim for benefits was filed on July 11, 1985 and denied on September 28, 1988 because claimant failed to establish the existence of pneumoconiosis and that his total disability was due to pneumoconiosis. Director's Exhibit 30. Claimant filed the instant claim for benefits on October 2, 1994. Director's Exhibit 1.

the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, thus, a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on 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 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1995). In the instant claim, because claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and that his total disability was due to pneumoconiosis, the evidence developed subsequent to the prior denial must establish either that claimant has pneumoconiosis or that his pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.204; Director's Exhibit 30; *Ross, supra; Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. In the instant claim, the administrative law judge first considered the newly submitted x-ray evidence of record, which consists of five interpretations of two x-rays. Decision and Order at 4-5; Director's Exhibits 12, 16, 17, 19, 20. Dr. Mettu, whose qualifications are not in the record, interpreted a film dated December 1, 1994 as positive for the existence of pneumoconiosis. Director's Exhibit 12. The remaining interpretations were negative for the existence of pneumoconiosis. Director's Exhibits 16, 17, 19, 20. The administrative law judge rationally assigned greater weight to the negative interpretations of Drs. Halbert and Sargent, both B readers and Board-certified radiologists, based on their superior qualifications. Decision and Order at 5; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v.*

Clayton Coal Co., 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge's finding that the newly submitted x-ray evidence does not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

We affirm the administrative law judge's findings that Section 718.202(a)(2)-(3) is unavailable to claimant inasmuch as the record contains no autopsy or biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306; Decision and Order at 3; Director's Exhibit 1.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of five physicians. Decision and Order at 5. Dr. Mettu, in opinions dated December 1, 1994 and January 24, 1995, opined that claimant has pneumoconiosis. Director's Exhibits 12, 13. None of the remaining physicians, Drs. Dahhan, Castle and Selby, opined that claimant has pneumoconiosis.[2] Director's Exhibits 10, 11; Employer's Exhibits 3-6. The administrative law judge permissibly found that the preponderance of the medical opinion evidence is negative for the existence of pneumoconiosis. Decision and Order at 6-7; *Lafferty, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Thus, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence does not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[3]

The administrative law judge is empowered to weigh the 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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)*(en banc); Anderson*, *supra.*

[2] Dr. Narayan examined claimant for a pre-operative medical evaluation prior to surgery on both of his ears. There was no indication that the physician examined claimant for the presence or absence of coal workers' pneumoconiosis. Thus, the administrative law judge rationally determined that Dr. Narayan's opinion was not probative on the existence of pneumoconiosis. Decision and Order at 5.

[3] Although the administrative law judge does not make an explicit finding at 20 C.F.R. §718.204(b), he does find the opinions of Drs. Dahhan and Castle well reasoned, comprehensive and supported by the other evidence of record, as well as entitled to greater weight due to their credentials, in determining that these opinions rule out any contribution of coal dust exposure to claimant's impairment. Decision and Order at 7. Thus, based on the administrative law judge's permissible weighing of the newly submitted evidence, claimant can not establish that his total disability is due to pneumoconiosis. *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211 (6th Cir. 1996); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Consequently, we affirm the administrative law judge's finding that the newly submitted evidence does not support a finding of a material change in conditions pursuant to Section 725.309 as it is supported by substantial evidence and in accordance with law. *Ross, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge