BRB No. 99-0773 BLA

JOE NEACE, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TESORO COAL COMPANY	)	DATE ISSUED:_____
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

John D. Maddox (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0763) of Administrative Law Judge Rudolf L. Jansen 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 instant case involves a duplicate claim filed on June 3, 1997.[1] The administrative law judge found the evidence insufficient 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 argues that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board 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).

Section 725.309 provides that a duplicate claim is subject to automatic denial

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[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on June 7, 1984. Director's Exhibit 40. The district director denied the claim by reason of abandonment on November 6, 1984. *Id.* There is no indication that claimant took any further action in regard to his 1984 claim.

Claimant filed a second claim on December 14, 1995. Director's Exhibit 41. The district director denied the claim on May 21, 1996. There is no indication that claimant took any further action in regard to his 1995 claim.

Claimant filed a third claim on June 3, 1997. Director's Exhibit 1.

on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's 1995 claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 41. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a finding of total disability pursuant to 20 C.F.R. §718.204(c).

Claimant argues that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge properly found that none of the newly submitted x-ray interpretations of record are positive for pneumoconiosis. Decision and Order at 8-9; Director's Exhibits 14, 15, 35. We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant argues that the administrative law judge erred in failing to find Dr. Yalamanchi's opinion sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge acted within his discretion in according less weight to Dr. Yalamanchi's opinion because he failed to provide an explanation for his diagnosis of "[b]lack lung." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9-10; Director's Exhibit 39. The administrative law judge also permissibly found that the opinions of Drs. Fino and Branscomb that claimant did not suffer from pneumoconiosis were entitled to additional weight based upon their superior qualifications.[2] *See Dillon v.*

[2]Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease.

Peabody Coal Co., 11 BLR 1-113 (1988); Decision and Order at 10; Employer's Exhibits 1, 2. The administrative law judge also noted that Dr. Baker opined that the claimant does not suffer from an occupational lung disease caused by his coal mine employment. Decision and Order at 7, 9-10; Director's Exhibit 12. Inasmuch as it is supported by substantial evidence, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3), these findings are affirmed. *Skrack*, *supra*.

Employer's Exhibit 1. Dr. Branscomb is Board-certified in Internal Medicine. Employer's Exhibit 2. Dr. Yalamanchi's qualifications are not found in the record.

Claimant, however, argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). In his consideration of the newly submitted medical opinion evidence, the administrative law judge properly found that the opinions of Drs. Baker, Fino and Branscomb support a finding that claimant is not totally disabled from a pulmonary standpoint.[3] Decision and Order at 11. There is no contrary newly submitted medical opinion evidence. Inasmuch as it is supported by substantial evidence, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) is affirmed.

In light of our affirmance of the administrative law judge's findings that the newly submitted medical evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Ross*, *supra*.

[3]In a report dated June 24, 1993, Dr. Baker indicated that claimant retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 12. In a report dated July 6, 1998, Dr. Fino opined that there was no respiratory impairment present. Employer's Exhibit 1. Dr. Fino further opined that from a respiratory standpoint, claimant was neither partially nor totally disabled from returning to his last mining job. *Id.* In a report dated June 29, 1998, Dr. Branscomb opined that claimant did not suffer from "any pulmonary impairment whatsoever." Employer's Exhibit 2. Dr. Branscomb opined that claimant has normal pulmonary function and that "there is no pulmonary reason why he could not continue his previous work." *Id.*

Accordingly, the administrative law judge's Decision and Order 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