BRB No. 99-1106 BLA

CARL E. DUFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Carl E. Duff, Eastern, Kentucky, *pro se*.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (99-BLA-0356) of Administrative Law Judge Thomas F. Phalen, Jr. 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 the initial Decision and Order, Administrative Law Judge Charles W. Campbell found, after crediting claimant with five years and eleven months of coal mine employment, that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Judge Campbell found, however, that the evidence was insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, Judge Campbell denied benefits. By Decision and Order dated November 21, 1994, the Board

affirmed Judge Campbell's finding that the evidence was insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c).[1] *Duff v. Director, OWCP*, BRB No. 93-0815 BLA (Nov. 21, 1994) (unpublished). The Board, therefore, affirmed Judge Campbell's denial of benefits.

Claimant filed a second claim on January 12, 1995. Since claimant's 1995 claim was filed within one year of the issuance of the last denial of his 1991 claim, the 1995 claim constituted a timely request for modification of the 1991 claim pursuant to 20 C.F.R. §725.310. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, the administrative law judge denied benefits.

Claimant filed a third claim on July 21, 1997. Since claimant's 1997 claim was filed within one year of the issuance of the last denial of his 1995 claim, the 1997 claim constituted a timely request for modification of the 1995 claim pursuant to 20 C.F.R. §725.310. *See Stanley, supra*. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c), and total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge further found that there was no mistake in a determination of fact under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification. On appeal, claimant generally contends that the administrative law judge erred in denying his request for modification. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers

[1]The Board also vacated Judge Campbell's finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) since it was based upon the invalidated "true doubt" rule. *Duff v. Director, OWCP*, BRB No. 93-0815 BLA (Nov. 21, 1994) (unpublished).

the issue 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In determining whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); 1999 Decision and Order at 9. All of the newly submitted x-ray interpretations rendered by readers with these qualifications are negative for pneumoconiosis. Director's Exhibit 76. Inasmuch as it is supported by substantial evidence, we 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).

The administrative law judge also noted that the "older x-rays predominantly were interpreted as negative for pneumoconiosis, by highly qualified radiologists." 1999 Decision and Order at 9. In his 1997 Decision and Order, the administrative law judge, in determining whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts*, *supra*; 1997 Decision and Order at 5-6. While Dr. Lenhart, a B reader and Board-certified radiologist, interpreted claimant's January 24, 1991 x-ray as positive for pneumoconiosis, two equally qualified physicians, Drs. Thorley and Sammons, interpreted this x-ray as negative for pneumoconiosis.[2] Director's Exhibits 14-16. Dr. Dahhan, a B reader, interpreted claimant's June 15, 1991 x-ray as negative for pneumoconiosis. Director's Exhibit 40. Drs. West and Sargent, each dually qualified as a B reader and Board-certified radiologist, interpreted claimant's May 31, 1996 x-ray as negative for pneumoconiosis. Director's Exhibit 61. The administrative law judge found that the preponderance of the x-ray evidence, as reviewed by several B readers, failed to establish the existence of pneumoconiosis under Section 718.202(a)(1). 1997 Decision and Order at 6. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the previously submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

[2]Although Dr. Sundaram rendered a positive interpretation of claimant's December 28, 1990 x-ray, Dr. Sundaram's radiological qualifications are not found in the record.

Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306. Consequently, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). 1999 Decision and Order at 10.

The record contains one newly submitted medical opinion. In a report dated May 20, 1998, Dr. Westerfield diagnosed "Coal Workers' Pneumoconiosis, Category 1/1" attributable to the inhalation of coal dust. Director's Exhibit 76. Dr. Westerfield also diagnosed chronic obstructive pulmonary disease attributable to claimant's cigarette smoking. *Id.* The administrative law judge acted within his discretion in discrediting Dr. Westerfield's opinion because he failed to provide an explanation for his diagnosis of coal workers' pneumoconiosis. *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); 1999 Decision and Order at 10; Director's Exhibit 76. The administrative law judge also reasonably found that Dr. Westerfield's diagnosis of pneumoconiosis was merely a restatement of his x-ray interpretation. *See generally Anderson v. Valley Camp of Utah,* Inc., 12 BLR 1-111 (1989). We, therefore, affirm the administrative law judge's finding that Dr. Westerfield's opinion is insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also found that the previously submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). While Drs. May and Sundaram opined that claimant suffered from pneumoconiosis, Drs. Fritzhand, Vuskovich and Dahhan opined that claimant did not suffer from the disease. Director's Exhibits 10, 11, 22, 24, 40, 61. In his 1997 Decision and Order, the administrative law judge discredited the opinions of Drs. Sundaram and May because they were "contrary to the great weight of objective evidence contained in the record" and because neither physician "provided any documentation in support of their respective conclusions." 1997 Decision and Order at 10. In the most recent Decision and Order, the administrative law judge credited the opinions of Drs. Vuskovich and Dahhan that claimant did not suffer from pneumoconiosis over the contrary opinions of Drs. May and Sundaram because he found that the opinions of Drs. Vuskovich and Dahhan were better supported by the objective medical data of record. 1999 Decision and Order at 11. The administrative law judge properly accorded greater weight to the opinions of Drs. Vuskovich and Dahhan that claimant did not suffer from pneumoconiosis because he found that their

opinions were better supported by the objective evidence. *See Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); 1999 Decision and Order at 11; Director's Exhibits 11, 40. The administrative law judge also properly discredited the opinions of Drs. May and Sundaram because he found that they failed to provide any documentation in support of their respective conclusions. 1997 Decision and Order at 10. Inasmuch as it is supported by substantial evidence, the administrative law judge's finding that the previously submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

In light of our affirmance of the findings of the administrative law judge that the previously submitted evidence and the newly submitted evidence are insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), claimant has failed to establish the existence of pneumoconiosis, a necessary element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address the administrative law judge's findings that the newly submitted medical opinion evidence is insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c) or total disability pursuant to 20 C.F.R. §718.204(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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