BRB No. 00-0344 BLA

EARNEST BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
LEEMIKE COAL COMPANY	)	
	)	
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 - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-0748) of Administrative Law Judge Joseph E. Kane 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 credited claimant with nineteen years and nine months of coal mine employment and adjudicated this duplicate

claim pursuant to 20 C.F.R. Part 718. The administrative law judge considered all of the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus found that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) under *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the recent evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and total disability pursuant to 20 C.F.R. §718.204(c)(4), and thus erred in failing to find a material change in conditions established pursuant to 20 C.F.R. §725.309(d). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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 order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant 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).

After consideration of the administrative law judge's Decision and Order,

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[1] Claimant filed his first claim for black lung benefits in 1973, which was finally denied in 1980. Decision and Order at 3; Director's Exhibit 35. Claimant filed his second claim for benefits in 1987, which was finally denied in 1990. Decision and Order at 3; Director's Exhibit 36. Claimant filed the instant claim on January 30, 1998. Decision and Order at 3; Director's Exhibit 1.

[2] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Initially, we reject claimant's contention that the administrative law judge inappropriately analyzed the evidence in determining whether a material change in conditions was established pursuant to Section 725.309. The administrative law judge properly considered all the newly submitted evidence in order to determine whether claimant had proven at least one of the elements of entitlement previously adjudicated against him. *Ross*, *supra*; Decision and Order at 10.

Claimant also contends that the administrative law judge erred in finding that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by improperly giving greater weight to the numerical superiority of the x-ray readings that were negative. We disagree. In his consideration of the x-ray evidence, the administrative law judge noted that there were nine negative x-ray readings and only one positive x-ray reading submitted with the most recent claim and that all of the negative x-ray readings were by B readers, five of whom were also board-certified radiologists. Decision and Order at 9, 11. The administrative law judge thus reasonably found that the preponderance of the x-ray evidence was negative and rationally accorded greater weight to the preponderance of the x-ray interpretations by the readers with superior qualifications in concluding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent*, *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 11. Inasmuch as the administrative law judge weighed all of the recently submitted x-ray evidence and reasonably concluded that it was insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

We further reject claimant's contention that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to Section 718.202(a)(4). The administrative law judge acted within his discretion as trier-of-fact in determining that the probative value of the opinion of Dr. Baker, diagnosing coal workers' pneumoconiosis, was undermined since the physician relied in part upon his own positive x-ray reading, which the administrative law judge determined was erroneous based on the substantial number of contrary readings by better qualified physicians. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 12. Moreover, while acknowledging Dr. Baker's credentials as a

pulmonary specialist, the administrative law judge reasonably found his opinion outweighed by Drs. Wicker and Dahhan, both of whom are also highly-qualified physicians and whose opinions were found to be better supported by the objective evidence. *Id.* In addition, the administrative law judge acted within his discretion in according diminished weight to opinion of Dr. Varghese, in spite of his status as claimant's treating physician, since the physician did not explain the bases for his conclusion or identify the particular medical studies he relied on in reaching his conclusion. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 12. Inasmuch as the administrative law judge rationally concluded that the recently submitted medical opinion evidence did not establish the existence of pneumoconiosis and his conclusion is supported by substantial evidence, we affirm his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) . *Clark*, *supra*; *Perry, supra*; *Lucostic*, *supra*; *Oggero*; *supra*.

With respect to Section 718.204(c), the administrative law judge also rationally determined that the recently submitted pulmonary function study and blood gas study evidence, along with the medical opinion evidence of record, was insufficient to establish total disability. In considering whether total disability was established by the recently submitted medical opinions of record under Section 718.204(c)(4), the administrative law judge permissibly accorded diminished weight to the opinions of Drs. Baker and Varghese as they were found to be not well-documented or well-reasoned since there was no credible documentation to support the physicians' conclusions. *Clark*, *supra*; *Lucostic*, *supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 14. Moreover, the administrative law judge permissibly gave greater weight to the opinion of Dr. Dahhan, that claimant has no significant pulmonary impairment and is capable of doing his usual coal mine employment from a respiratory standpoint, since he found Dr. Dahhan's opinion supported by the objective evidence. *Clark*, *supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel*, *supra*; Decision and Order at 13-14.

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[3] The administrative law judge noted that Dr. Wicker is board-certified in internal medicine with a subspecialty in pulmonary medicine and that Dr. Dahhan is board-certified in internal medicine and pulmonary medicine. Decision and Order at 8.

[4] The administrative law judge correctly found that all four of the newly submitted pulmonary function studies and all three of the newly submitted arterial blood gas studies yielded non-qualifying results. *See* Decision and Order at 6-7, 13; Director's Exhibits 7-8, 10.

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. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge's finding that the weight of the newly submitted medical opinions of record was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4) is supported by substantial evidence and thus is affirmed. Furthermore, since the administrative law judge found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). As claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), essential elements of entitlement, the administrative law judge correctly found that claimant failed to establish a material change in conditions since the prior denial pursuant to Section 725.309(d). *Ross*; *supra*.

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

MALCOLM D. NELSON
Administrative Appeals Judge