BRB No. 98-1307 BLA

JAMES M. MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J & D COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE CO.,	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

James M. Mullins, Deltona, Florida, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (97-BLA-1547) of Administrative Law Judge Lawrence P. Donnelly 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).

Claimant originally applied for benefits in 1981. Director's Exhibit 29. In 1990,

following a hearing, the claim was denied by an administrative law judge on the basis that the record evidence failed to establish the presence of pneumoconiosis. Claimant filed an appeal to the Board. On December 30, 1992, the Board affirmed the administrative law judge's denial of benefits. *Mullins v. J & D Coal Co.*, BRB No. 91-0767 BLA (Dec. 30, 1992)(unpub.). The claim was not pursued further.

Claimant filed a second claim on May 22, 1994. Director's Exhibit 1. Administrative Law Judge Lawrence P. Donnelly credited claimant with twenty-four years of coal mine employment and found that the claim was a duplicate claim subject to adjudication pursuant to the standard enunciated in *Lisa Lee Mines v. Director, OWCP*, [*Rutter*] 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc).* Decision and Order at 6. He found that the newly submitted evidence was insufficient to establish a material change in conditions, as the evidence failed to establish that claimant suffers from pneumoconiosis pursuant to 20 C.F.R §718.202(a), the basis upon which his prior claim was denied. Claimant filed the instant appeal. Employer responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this 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. *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 the 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).

In order to establish entitlement to benefits under 20 C.F.R Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R §§718.3, 718.202, 718.203, 718.204; *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*). Failure to establish any one of these elements precludes entitlement. *Id*. Further, in order to have a duplicate claim fully adjudicated on the merits, pursuant to 20 C.F.R. §725.309(d), the newly submitted evidence must be sufficient to establish a material change in conditions; that is, the evidence must establish at least one of the elements of entitlement previously adjudicated against claimant. *Rutter, supra.*

In his Decision and Order, pursuant to 20 C.F.R. §718.202(a)(1) the administrative law judge found that of the nineteen newly submitted x-ray interpretations, none was read as positive for pneumoconiosis. Decision and Order at 7. The administrative law judge assessed the newly submitted medical reports, rendered by Drs. Duke and Galgon, pursuant to 20 C.F.R §718.202(a)(4). He noted that Dr. Duke diagnosed mild obstructive lung disease due to cigarette smoking and "suspected" claimant had "some changes consistent with silica

exposure." Employer's Exhibit 1; *Id.* With respect to Dr. Galgon, the administrative law judge noted his diagnosis that claimant "does not have coal worker's pneumoconiosis and has neither impairment or disability due to coal worker's pneumoconiosis." Employer's Exhibit 27, Deposition at p. 14; *Id*. Therefore, the administrative law judge concluded that neither the newly submitted x-ray nor the medical report evidence of record established the presence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1) and (a)(4).[1] We agree.

With respect to the newly submitted x-ray evidence, the administrative law judge correctly listed the x-ray evidence submitted since the previous denial of the claim.[2] Director's Exhibits 14, 15, 33; Employer's Exhibits 2, 4, 6, 7, 8, 12, 13, 14, 18, 19, 21, 24, 25. He correctly found that none of the x-ray evidence was positive for pneumoconiosis.[3] Turning to the medical report evidence, the administrative law judge pointed out that Dr. Duke's diagnosis was speculative in nature, and therefore, he properly declined to credit the opinion on this basis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also correctly noted that Dr. Galgon provided a reasoned explanation for his diagnosis, and that the objective evidence supported his finding of no pneumoconiosis. *See Trumbo v. Reading Anthracite Company*, 17 BLR 1-85 (1993); *Oggero v. Director, OWCP*, 7 BLR 1-820 (1985); *York v. Jewell Ridge Coal Co.*, 7 BLR 1-766 (1985). Therefore, we affirm the administrative law judge's findings that the x-ray and medical report evidence of record do not establish the presence of pneumoconiosis pursuant to 20 C.F.R § 718.202 (a)(1) and (a)(4), and that therefore, the newly submitted evidence fails to establish a material change in conditions therein, pursuant to 20 C.F.R §725.309(d).[4] *See Rutter, supra.*

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[1]The administrative law judge correctly noted that there is no biopsy evidence in the record and that, therefore, 20 C.F.R. §718.202(a)(2) is inapplicable. He also correctly stated that none of the presumptions set forth in 20 C.F.R. §718.202(a)(3) is applicable.

[2]The administrative law judge failed to consider the six readings of the August 30, 1994 x-ray rendered by Drs. Ciotola, Wheeler, Scott, Robinson, Duncan and Soble. Director's Exhibits 35, 36. However, inasmuch as the interpretations by these physicians, all of whom are B-readers, were negative for pneumoconiosis, and would not alter the final disposition of the case, we deem the administrative law judge's omission harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3]The administrative law judge noted that Dr. Sherban's finding of interstitial changes on x-ray, Director's Exhibit 15, does not constitute a finding of pneumoconiosis. Dr. Sherban's x-ray report also states that there is "no active process evident," and noted no profusion. Therefore, we affirm the administrative law judge's finding.

[4] On claimant's appeal of the administrative law judge's denial of benefits in the original claim, the Board affirmed the administrative law judge's finding the pneumoconiosis was not established. The Board noted that of the thirty-six x-ray interpretations of record, only three were rendered as positive for pneumoconiosis. *Mullins v. J & D Coal Co.*, BRB No. 91-0767 BLA (Dec. 30, 1992)(unpub.). The Board concluded that "the overwhelming preponderance of interpretations by qualified readers [is] negative for pneumoconiosis." *Id*. at 2. Likewise, with respect to the evidence at Section 718.202(a)(4), the Board held that the administrative law

judge properly exercised his discretion in crediting the medical report evidence which found that claimant does not suffer from pneumoconiosis. *Id*. at 3. As in the instant appeal, the Board held in the previous appeal that the administrative law judge correctly noted that pneumoconiosis could not be established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), as these provisions are inapplicable to the instant claim. *See* fn. 1, *supra.* Therefore, inasmuch as neither the previously submitted evidence nor the evidence submitted with claimant's duplicate claim establishes the existence of pneumoconiosis, entitlement is further precluded in the merits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge