

BRB No. 02-0610 BLA

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| CARL GIVENS |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS’ |) | DATE ISSUED: |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Carl Givens, Pineville, Kentucky, *pro se*.

Jeffrey S. Goldberg (Howard Radzely , 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, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (01-BLA-0831) of Administrative Law Judge Joseph E. Kane denying benefits on a duplicate¹ 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).² The administrative law judge credited

¹Claimant filed previous claims on April 2, 1974; September 9, 1982; May 7, 1984, and November 2, 1995. Director’s Exhibits 29-32. The instant claim was filed on February 16, 2000, over a year after the 1995 claim was denied by Administrative Law Judge George P. Morin on February 20, 1998. Director’s Exhibits 1, 32-9.

²The Department of Labor has amended the regulations implementing the Federal Coal

claimant with six years of coal mine employment and found that claimant's previous claim was denied on the ground that the evidence was insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. The administrative law judge further found that the newly submitted evidence was also insufficient to establish pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).³ Accordingly, the administrative law judge denied benefits. Claimant appeals, generally challenging the denial of benefits.. The Director, Office of Workers' Compensation Programs responds, urging affirmance of the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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 order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *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*).

After considering the administrative law judge's Decision and Order, the issues on

Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The revisions to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001. 20 C.F.R. §725.2.

appeal and the evidence of record, we conclude that his Decision and Order denying benefits is supported by substantial evidence and that there is no reversible error contained therein. Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held, that in determining whether the change in conditions has been established, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

In considering the evidence regarding the existence of pneumoconiosis the administrative law judge correctly found that none of the newly submitted x-ray readings was positive for the presence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9; Director's Exhibit 7, 9, 16, 17.

Further, the administrative law judge properly concluded that the provisions of Section 718.202(a)(2) and the presumptions enumerated at Section 718.202(a)(3) are inapplicable as the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; claimant filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305; and this is not a survivor's claim. *See* 20 C.F.R. §718.306; Decision and Order at 9.

Moreover, the administrative law judge rationally found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as he found that none of the newly submitted medical opinions were sufficiently reasoned and documented to demonstrate a material change in conditions. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry, supra*; Decision and Order on Remand at 10. The administrative law judge reviewed the three letters of Dr. Uy, diagnosing pneumoconiosis, and the contrary opinions of Drs. Dahhan and Burki, both of whom found that claimant did not suffer from pneumoconiosis. Decision and Order at 10; Director's Exhibits 7, 13, 20, 23, 25. The administrative law judge acted within his discretion as fact-finder in according less weight to Dr. Uy's opinion, despite his status as claimant's treating physician, because Dr. Uy's opinion did not provide documentation or a "reasoned progression of analysis leading to his conclusion" regarding the existence of pneumoconiosis. Decision and Order at 10. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Clark, supra*. Furthermore, because Drs. Dahhan and Fino found that claimant did not suffer from pneumoconiosis, their opinions cannot satisfy claimant's burden of proof.

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge's finding that the weight of the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) is supported by substantial evidence, and thus is affirmed. Consequently, because the newly submitted evidence does not establish the existence of pneumoconiosis, claimant may not demonstrate that his impairment arose out of coal mine employment or caused, in part, his total disability. Thus, the administrative law judge's finding that claimant has failed to establish a material change in conditions pursuant to Section 725.309 (2000) is affirmed.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge