BRB No. 07-0443 BLA

R.R.W.	)	
Claimant-Petitioner	)	
v.	)	
BUFFALO MINING COMPANY	)	DATE ISSUED: 02/29/2008
Employer-Respondent	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

R.R.W., Mallory, West Virginia, *pro se*.

Christopher M. Hunter (Jackson Kelly P.L.L.C.), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (2004-BLA-5840) of Administrative Law Judge Richard A. Morgan (the administrative law judge), rendered on a subsequent 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).[1] The administrative law judge credited

[1] Claimant initially filed for benefits on October 25, 1995, and the district director denied the claim on March 4, 1996 for failure to establish any element of entitlement. Director's Exhibit 1. Claimant filed a request for modification on January 20, 1997, but later withdrew his request, and the October 1995 claim was administratively closed.

claimant with 12.80 years of coal mine employment and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits, and employer has responded, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in 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 and is in accordance with law.[2] *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Where a miner 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 "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R.

Director's Exhibit 1. Claimant filed the current application on October 24, 2002. Director's Exhibit 2.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

§725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *see generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, 2-235-237 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-64 (2004)(*en banc*); *Allen v. Mead Corp.*, 22 BLR 1-61, 1-66 (2000); *Church v. Eastern Associated Coal Corp.*, 21 BLR 1-51, 1-53 (1997), *modifying on recon.*, 20 BLR 1-8 (1996).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In his consideration of the newly submitted evidence at Section 718.202(a)(1), the administrative law judge accurately determined that a December 19, 2002 x-ray was interpreted as positive for pneumoconiosis by Dr. Ranavaya, a B reader, and that the more recent March 24, 2004 x-ray was interpreted as negative for pneumoconiosis by both Dr. Zaldivar, a B reader, and Dr. Wiot, a dually qualified Board-certified radiologist and B reader. Decision and Order at 4-5; Director's Exhibit 10; Employer's Exhibits 1, 2. The administrative law judge permissibly concluded that the weight of the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on a numerical preponderance of negative interpretations by qualified readers, and we affirm his findings thereunder as supported by substantial evidence. Decision and Order at 5; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-68 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9-10 (1988).

Further, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2),(3), as the record contains no autopsy or lung biopsy evidence and the presumptions at 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable.[3] Decision and Order at 8; *see Langerud v. Director, OWCP*, 9 BLR 1-101, 1-102 (1986).

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[3] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 2. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

At Section 718.202(a)(4), the administrative law judge properly evaluated the newly submitted medical opinions of record in light of their documentation, reasoning, and the relative qualifications of the physicians, and determined that Dr. Ranavaya, whose pulmonary credentials are not contained in the record, was the only physician who diagnosed pneumoconiosis. Decision and Order at 8; *see Collins v. J&L Steel*, 21 BLR 1-181, 1-189-90 (1999). As Dr. Ranavaya obtained no objective test results, and based his diagnosis primarily upon claimant's history of coal dust exposure and a positive x-ray that the administrative law judge found was outweighed by the negative x-ray interpretations of record, the administrative law judge permissibly accorded Dr. Ranavaya's opinion little weight. Decision and Order at 8; Director's Exhibit 8; *see Anderson*, 12 BLR at 1-113. The administrative law judge acted within his discretion in according greater weight to the contrary opinions of Drs. Zaldivar and Castle, as he found that these physicians possessed superior qualifications as pulmonary experts, and that their analyses were based upon more recent and complete medical data that was more consistent with the preponderance of the negative x-ray evidence and the non-qualifying pulmonary function study and blood gas study evidence of record.[4] Decision and Order at 8-9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge's finding that the newly submitted medical opinions of record were insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) is affirmed, as supported by substantial evidence. Consequently, we affirm his finding that, when weighed together, the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09, 22 BLR 2-162, 2-169-70 (4th Cir. 2000); *Adkins*, 958 F.2d 49, 16 BLR 2-61; *Hicks*, 138 F.3d 524, 533, 21 BLR 2-322, 2-335.

Turning to the issue of total respiratory disability at Section 718.204(b), the administrative law judge found that the newly submitted pulmonary function test and blood gas study of record provided non-qualifying values, and concluded that claimant could not establish total disability at Section 718.204(b)(2)(i), (ii). Decision and Order at 5, 9; Employer's Exhibit 1. Additionally, the administrative law judge found that although the record reflected a history of heart disease, there was no evidence of cor pulmonale with right-sided heart failure, and concluded that claimant could not establish total disability at Section 718.204(b)(2)(iii). Decision and Order at 10. Lastly, the administrative law judge found that claimant could not establish total disability at Section

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part 718, Appendices B, C respectively. A "non-qualifying" study exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

718.203(b)(2)(iv) because Drs. Ranavaya, Castle and Zaldivar all concluded that claimant did not suffer from a totally disabling pulmonary or respiratory impairment. Decision and Order at 10; Director's Exhibit 7; Employer's Exhibits 1, 3, 4; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986)(*en banc*). The administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iv) are supported by substantial evidence and are affirmed. Consequently, we affirm the administrative law judge's finding that no change in an applicable condition of entitlement was demonstrated since the prior denial pursuant to Section 725.309(d), *see Dempsey*, 23 BLR at 1-64, and affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge