BRB No. 03-0126 BLA

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| ARCHIE GLENN ELKINS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 07/21/2003 |
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| WEBSTER COUNTY COAL CORPORATION | ) | |
| | ) | |
| 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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Archie Glen Elkins, Sullivan, Kentucky, *pro se*.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL, and GABAUER Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (1999-BLA-0516) of Administrative Law Judge Rudolf L. Jansen 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).[1] This case is before the Board for a

[1]The Department of Labor has amended the regulations implementing the Federal Coal 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

second time.[2] Based on the date of filing, the administrative law judge adjudicated this

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed an application for benefits on August 25, 1986, which was denied by the district director on January 26, 1987, due to claimant=s failure to establish the existence of pneumoconiosis or total respiratory disability. Director=s Exhibit 23. Claimant filed a second claim on October 29, 1987, which was denied on the same grounds by the district director on December 14, 1987. Director=s Exhibit 23. Claimant filed the present claim for benefits on February 9, 1998, which was denied by the administrative law judge in a Decision and Order issued on February 29, 2000, due to claimant=s failure to establish the existence of pneumoconiosis, total respiratory disability, or a material change in conditions Director=s Exhibit 1. On appeal, the Board vacated the denial of benefits, and remanded the claim for the administrative law judge to consider whether Dr. Houser was claimant=s treating physician, and whether his opinion

duplicate claim pursuant to 20 C.F.R Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(2)-(4), or total respiratory disability pursuant to 20 C.F.R. '718.204(b)(2)(iv).[3] Thus, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. '725.309. Accordingly, benefits were denied.

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was entitled to more weight on that basis. The Board affirmed however, the administrative law judge=s acceptance of the parties= stipulation that claimant established thirty-one years of coal mine employment, the finding that the x-ray evidence of record failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1), and that the objective tests of record were insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. '718.204(c)(1),(2) (2000), as unchallenged on appeal. *Elkins v. Webster County Coal Corp.*, BRB No. 00-0625 BLA (April 10, 2001).

[3]The provision pertaining to total disability, previously set out at 20 C.F.R '718.204(c), is now found at 20 C.F.R. '718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. '718.204(b), is now found at 20 C.F.R. '718.204(c).

On appeal, claimant generally challenges the administrative law judge=s denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence on the merits, and also argues that the instant claim was untimely filed pursuant to the holding in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).[4] The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 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)(*en banc*).

After consideration of the administrative law judge=s Decision and Order and the evidence of record, we conclude that the administrative law judge=s determination that the evidence is insufficient to establish the existence of pneumoconiosis is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.202(a)(2), the administrative law judge weighed the medical opinions regarding the results of the miner=s lung biopsy and noted that Drs. Fino and Broudy, both pulmonary specialists, found no evidence of pneumoconiosis. Decision and Order on Remand at 6; Employer=s Exhibits 3, 4, 6, 7. Dr. Bockelman=s diagnosis of Abenign pulmonary parenchyma with anthracotic pigment,@ was properly found insufficient to establish the existence of pneumoconiosis, since anthracotic pigment does not satisfy the regulatory definition of pneumoconiosis. Decision and Order on Remand at 5; Claimant=s Exhibit 2; 20 C.F.R. '718.202(a) (2). Dr. Hatfield=s conclusion that the biopsy revealed Anonspecific@ findings that Amay be seen in mixed dust pneumoconiosis or uncomplicated coal workers= pneumoconiosis,@ was

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because claimant=s coal mine employment occurred in the Commonwealth of Kentucky. Director=s Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

rationally found to be equivocal and not supportive of a diagnosis of pneumoconiosis. Decision and Order on Remand at 6; Claimant=s Exhibit 1; *Griffith v. Director, OWCP,* 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988); *Campbell v. Director, OWCP,* 11 BLR 1-16 (1987).

The administrative law judge found that Dr. Houser diagnosed progressive massive fibrosis, examined or treated claimant on three occasions from 1986 to 1997, and performed the miner=s lung biopsy in 1997. However, the administrative law judge determined that the record did not support claimant=s testimony that he saw Dr. Houser every few months. The administrative law judge further determined that Dr. Houser did not conduct the most recent examination of claimant.[5] Accordingly, the administrative law judge rationally determined that although Dr. Houser=s opinion was reasoned, it should not be accorded greater weight solely on the basis that he was claimant=s treating physician. Decision and Order on Remand at 6-7; Claimant=s Exhibit 2; Director=s Exhibits 19; *Jericol Mining, Inc. v. Napier,* 301 F.3d 703, BLR 2- (6th Cir. 2002); *Peabody Coal Co. v. Groves,* 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.,* 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994). The administrative law judge reasonably accorded determinative weight to the reports of Drs. Caffrey, Hutchins, and Naeye, who found no evidence of pneumoconiosis, due to their specialization in the area of pathology, and their well documented and reasoned reports.[6] Decision and Order on Remand at 5-7; Employer=s Exhibits 8; 9; Director=s Exhibit 20; *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988) .

Pursuant to Section 718.202(a)(3), the administrative law judge correctly determined that the presumptions contained at 20 C.F.R. ''718.305, 718.306 are inapplicable in this living miner=s claim which was filed after January 1, 1982. Decision and Order on Remand at 7-8; Director=s Exhibit 1; *Langerud v. Director, OWCP,* 9 BLR 1-101 (1986). In considering whether the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. '718.304, the administrative law judge properly considered the x-ray evidence of record, noted that the Board previously affirmed the finding that this evidence did not establish the existence of simple pneumoconiosis, and rationally again assigned little

[5]The administrative law judge found that Dr. Broudy=s February 1998 examination was more recent than Dr. Houser=s November 1997 report. Decision and Order on Remand at 7. Further, we reject claimant=s suggestion that we obtain Dr. Houser=s treatment records, as it was claimant=s burden to introduce evidence supporting his claim. *White v. Director, OWCP,* 6 BLR 1-368 (1983).

[6]Drs. Caffrey and Hutchens are Board-certified pathologists. Employer=s Exhibits 8; 9. Dr. Naeye is a professor of pathology. Director=s Exhibit 20. Dr. Houser is a Board-certified pulmonologist. Director=s Exhibit 23.

weight to the two films which diagnosed Type A opacities as Athey are outweighed by several other negative interpretations by equally qualified readers.@ Decision and Order on Remand at 8; Employer=s Exhibits 1, 6; Claimant=s Exhibit 2; Director=s Exhibits 10, 19, 21, 21A, 23.

The administrative law judge also considered the biopsy and medical opinion evidence of record and again determined that Dr. Houser=s opinion, the only newly submitted medical report of record which diagnosed the presence of complicated pneumoconiosis, should not be accorded greater weight based on Dr. Houser=s alleged status as claimant=s treating physician as the record did not indicate that he was particularly familiar with claimant=s condition. Decision and Order on Remand at 9; Claimant=s Exhibit 2; *Napier,* 301 F.3d 703, *Tussey,* 982 F.2d 1036, 17 BLR 2-16; *Tedesco,* 18 BLR 1-103. Consequently, the administrative law judge credited the reports of Drs. Naeye, Hutchins, Caffrey and Broudy, all of whom found no evidence of complicated pneumoconiosis, and rationally determined that the weight of the evidence did not establish that claimant was entitled to the presumption of total disability due to complicated pneumoconiosis, or the existence of pneumoconiosis pursuant to Section 718.202(a)(3). Decision and Order on Remand at 9; Employer=s Exhibits 1-4, 6-9, Director=s Exhibit 20; 30 U.S.C. ' 921(c)(3); *Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge rationally accorded little weight to Dr. Simpao=s newly submitted diagnosis of pneumoconiosis since he did not provide a rationale for his findings, and to the opinions of Drs. Hatfield and Bockelman, which he again found were equivocal. Decision and Order on Remand at 9; Claimant=s Exhibits 1, 2; Director=s Exhibits 10, 23; *Griffith,* 49 F.3d 184, 19 BLR 2-111; *Clark,* 12 BLR 1-149*; Justice,* 11 BLR 1-91; *Fuller v. Gibralter Corp.,* 6 BLR 1-1292 (1984). The administrative law judge also acted within his discretion in according equal weight to the opinion of Dr. Houser diagnosing the presence of pneumoconiosis, and to each of the contrary opinions of Drs. Broudy, Fino, Naeye, Hutchins and Caffrey, who are all specialists in either pulmonary diseases or pathology. Accordingly, it was rational for the administrative law judge to find that the weight of the medical opinion evidence did not satisfy claimant=s burden to establish the existence of pneumoconiosis, or a material change in conditions. Decision and Order on Remand at 9-10; Employer=s Exhibits 1- 4, 6-9, Claimant=s Exhibit 2; Director=s Exhibits 19, 20; *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994); *Sharondale Corp. v. Ross,* 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). We therefore affirm the administrative law judge=s findings pursuant to Section 718.202(a).

We also hold that substantial evidence supports the administrative law judge=s findings pursuant to Section 718.204(b)(2)(iv). The administrative law judge considered the relevant medical reports and rationally credited the opinions of Drs. Fino and Broudy, who

concluded that claimant did not have a totally disabling respiratory impairment, since he found these reports well documented and reasoned, and the physicians were both Board-certified pulmonologists. Decision and Order on Remand at 11-12; Employer=s Exhibits 1-4, 6, 7; *Trumbo,* 17 BLR 1-85*; Dillon*, 11 BLR1-113. Dr. Simpao=s diagnosis of totally disabling pneumoconiosis was permissibly accorded less weight as his qualifications were not contained in the record, and thus he appeared less qualified than the aforementioned physicians. Decision and Order on Remand at 11-12; Director=s Exhibits 10, 23; *Dillon,* 11 BLR 1-113. Dr. Houser=s opinion was also rationally accorded less weight since, although he diagnosed the presence of complicated pneumoconiosis, he did not specifically address the issue of total disability. Decision and Order on Remand at 11; Claimant=s Exhibit 2. Because we find no error in the administrative law judge=s findings at Section 718.204(b)(2)(iv), they are affirmed as supported by substantial evidence. We also affirm the finding that claimant has not established a material change in conditions pursuant to Section 725.309, and that an award of benefits is precluded. Thus, we affirm the administrative law judge=s denial of the instant duplicate claim.[7]

[7]In light of our holding, we decline to address employer=s remaining arguments.

Accordingly, the Decision and Order of the administrative law judge 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