

BRB No. 97-1085 BLA

KENNETH YATES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
COLEMAN AND YATES COAL COMPANY)	DATE ISSUED:
)	
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 Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Kenneth Yates, Haysi, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant¹, without the assistance of counsel², appeals the Decision and Order (96-BLA-1247) of Administrative Law Judge Frederick D. Neusner, denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

¹ Claimant is Kenneth Yates, the miner, whose first claim for benefits was filed on May 1, 1985 and denied on January 5, 1989 by Administrative Law Judge Giles J. McCarthy. Director's Exhibit 47. Claimant filed the instant claim for benefits on September 18, 1995. Director's Exhibit 1.

² Tim White, a benefits counselor with Stone Mountain Health Services, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. See 20 C.F.R. §§802-211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This claim involves a duplicate claim. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b), and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on 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. *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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. See *Anderson, supra*; *Baumgartner, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'd*, 57 F.3d 402, 19 2-223 (4th Cir. 1995). Claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to Sections 718.202(a) and 718.204(b). Director's Exhibit 47.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. The newly submitted x-ray evidence of record consists of twenty-seven interpretations of ten x-rays, none of which were positive for the existence of pneumoconiosis. Director's Exhibits 24, 25, 39-41; Employer's Exhibits 1-5, 11, 14-26, 28,

29. Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3) inasmuch as the record contains no autopsy or biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. See 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306; Decision and Order at 6; Director's Exhibit 1.

The newly submitted medical opinion evidence consists of opinions by Drs. Robinette, Forehand, Sargent, Fino and Hippenstein. Director's Exhibits 20, 21, 41; Employer's Exhibits 26, 30, 31, 33, 34. Dr. Robinette, in a report dated January 12, 1995, opined that claimant had chronic bronchitis with a history of silicosis in the past with a negative x-ray for pneumoconiosis. Director's Exhibit 41. The administrative law judge rationally found that Dr. Robinette's opinion is not persuasive as a diagnosis of pneumoconiosis because Dr. Robinette related claimant's chronic bronchitis to silicosis based on claimant's history and not on independent observations. Decision and Order at 4; *Wilburn v. Director*, OWCP, 11 BLR 1-135 (1980). Dr. Forehand diagnosed pneumoconiosis, while Drs. Sargent, Hippenstein and Fino opined that claimant does not have pneumoconiosis. Director's Exhibits 20, 21; Employer's Exhibits 26, 30, 31, 33, 34. The administrative law judge acted within his discretion in finding that the preponderance of the medical opinion evidence is negative for the existence of pneumoconiosis. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Perry, supra*.

The administrative law judge is empowered to weigh the 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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson, supra*. Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Further, because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, we also affirm the administrative law judge's findings that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) and thus a material change in conditions pursuant to Section 725.309. *Rutter, supra*. Consequently, we affirm the denial of benefits as it is supported by substantial evidence and in accordance with law.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge