

BRB No. 01-0224 BLA

TONY McCULLOUGH)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
KEY MINING, INCORPORATED)	
)	
and)	
)	
AMERICAN MINING INSURANCE)	
COMPANY)	
)	
Employer/Carrier)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,))	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Tony McCullough, Jellico, Tennessee, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (1999-BLA-0181) of Administrative Law Judge Mollie W. Neal 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 After determining that the instant case

¹The Department of Labor has amended the regulations implementing the Federal

was a duplicate claim, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718 (2000) based on the date of filing, and found that the record supported employer's stipulation of ten years of coal mine employment.² Decision and Order at 3. The

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, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CVO3086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

²The record indicates that claimant filed his initial claim for benefits on November 16, 1992, which was denied by the district director on March 1, 1993, and on November 3, 1993, due to claimant's failure to establish any element necessary for entitlement.

administrative law judge further found the newly submitted evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), since the evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000), or the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer has not participated in the instant appeal. The Director, Office of Workers' Compensation Programs (the Director), 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).

Director's Exhibits 48-1; 48-12, 48-26. Claimant took no further action until he filed a second claim on August 15, 1997, the subject of the instant appeal. Director's Exhibit 1. Consequently, the present claim constitutes a duplicate claim pursuant to 20 C.F.R. §725.309 (2000). *See Sharondale Coal Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718 (2001), 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 (2001). Failure to establish any one of these elements precludes entitlement. *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).³

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 a material change in conditions. 20 C.F.R. §725.309(d) (2001). The United States Court of Appeals for the Sixth Circuit has held that in determining whether a material 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 Coal Co. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

³Since the miner's last coal mine employment took place in the State of Tennessee, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 addressing the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000), the administrative law judge weighed the conflicting interpretations of the x-ray readings of record submitted since the previous denial of benefits, and rationally accorded determinative weight to the greater number of negative readings performed by physicians who are either B-readers or board-certified radiologists, or who are dually qualified in the field of radiology.⁴ Decision and Order at 4-7; Employer's Exhibits 1, 6-8, 11, 15; Director's Exhibits 14, 15, 17, 19-21, 39-41, 43; *see Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We also affirm the administrative law judge's findings that the requirements of Section 718.202(a)(2)-(3) (2000) were not met since the record contains no biopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 (2000) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 4; Director's Exhibit 1; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

In addition, the administrative law judge considered all of the newly submitted medical reports and rationally accorded greater weight to the opinions of Drs. Broudy, Dahhan, Repsher and Jarboe, that claimant does not have pneumoconiosis, based upon their superior qualifications as Board-certified physicians in internal medicine and pulmonary diseases. Decision and Order at 7-11; Employer's Exhibits 3, 4, 7, 9, 10, 12; Director's Exhibits 14, 15, 20, 21, 23, 39; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Accordingly, we affirm the administrative law

⁴A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2001); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

judge's finding that claimant failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a) (2001).

In finding that claimant failed to establish a material change in conditions,⁵ the administrative law judge properly found that claimant failed to demonstrate a totally disabling respiratory impairment under Section 718.204(c)(1),(2) (2000), as all of the pulmonary function studies and arterial blood gas studies submitted in support of the duplicate claim produced non-qualifying results. Decision and Order at 11; Employer's Exhibit 7; Director's Exhibits 16, 20-22, 39, 41; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). We also affirm the administrative law judge's findings at Section 718.204(c)(3) (2000), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 11; *see generally Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991).

The administrative law judge then considered the relevant medical reports of record pursuant to Section 718.204(c)(4) (2000), and rationally accorded less weight to Dr. Bushey's diagnosis of a totally disabling respiratory impairment since this physician "did not state the findings or rationale upon which he based his opinion," and thus his report was not well reasoned. Decision and Order at 12; Director's Exhibits 20, 23; *see Tennessee Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also rationally accorded little weight to Dr. Sargent's opinion as his findings were equivocal since he concluded that claimant may be disabled by his heart disease. Decision and Order at 12; Director's Exhibit 15; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

We also hold that substantial evidence supports the administrative law judge's reliance on the opinions of Drs. Broudy, Dahhan, Jarboe and Repsher that claimant did not demonstrate a totally disabling respiratory impairment, as well documented and reasoned, and based on their status as pulmonary specialists.⁶ Decision and Order at 12; Employer's

⁵The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) (2001), while the provision pertaining to disability causation previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) (2001).

⁶The record reveals that Drs. Broudy, Dahhan, Repsher and Jarboe are board-certified in internal medicine with a sub-specialty in pulmonary diseases. Employer's

Exhibits 3, 4, 7, 10, 12; Director's Exhibit 9; *Trumbo, supra*; *Clark, supra*; *Dillon, supra*. Thus, the administrative law judge rationally found that claimant failed to satisfy his affirmative burden of proof to establish that he suffered from a totally disabling respiratory impairment. *See Ondecko, supra*. The administrative law judge also rationally determined that since claimant was unable to demonstrate the presence of pneumoconiosis, he was precluded from establishing total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000). Decision and Order at 12; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis as they are supported by substantial evidence. We also affirm the administrative law judge's finding that claimant failed to establish a material change in conditions, which precluded an award of benefits. 20 C.F.R. §725.309 (2000); *Ross, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

Exhibits 3, 4, 7, 10, 12; Director's Exhibit 9.

NANCY S. DOLDER
Administrative Appeals Judge