BRB No. 08-0275 BLA

C.E.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C.C. CONLEY & SONS, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 11/20/2008
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order–Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

C.E.F., Rochester, New York, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denying Benefits (2006-BLA-5119) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) 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 found that claimant established twenty-four years of qualifying coal mine employment and adjudicated this claim, filed on April 20, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that the new evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203, 718.204(b)(2)(i)-(iv), 718.204(c). Thus, the administrative law judge determined that claimant failed to establish a change in an applicable condition of entitlement, as he failed to establish any element of entitlement that was previously adjudicated against him pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. In response, employer urges that the administrative law judge's denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs, is not participating 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 rational, supported by substantial evidence and in accordance with law.[2] *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 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, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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[1] Claimant's first claim, filed on April 7, 1993, was denied by the district director on September 16, 1993 for failure to establish any element of entitlement. Director's Exhibits 1, 28. No further action was taken on that claim.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as claimant 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.

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. §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 in order to establish a change in an applicable condition of entitlement and in order to have his new claim considered on the merits. 20 C.F.R. §725.309(d); *see 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).

After consideration of the administrative law judge's decision and the evidence of record, we conclude that the administrative law judge's findings are rational, supported by substantial evidence, and consistent with applicable law. The administrative law judge's decision denying benefits is, therefore, affirmed.

Regarding the issue of whether the newly submitted evidence established the existence of pneumoconiosis, the administrative law judge rationally found that the x-ray evidence of record was insufficient to establish pneumoconiosis at Section 718.202(a)(1). In so finding, the administrative law judge considered the newly submitted x-rays of January 11, 2005 and March 21, 2006. The administrative law judge found that Dr. Alvarez's interpretation of the January 11, 2005 x-ray did not establish pneumoconiosis at Section 718.202(a)(1) because Dr. Alvarez, while noting a Type B large opacity, did not classify the small opacities he saw as required by 20 C.F.R. §§718.102, 718.202(a)(1).[3] Instead, the administrative law judge credited the negative interpretations of the same x-ray by Drs. Meyer and Wiot, who were both dually qualified B readers and Board-certified radiologists.[4] Employer's Exhibits 2, 6. Thus, the administrative law judge rationally found that the x-ray of January 11, 2005, along with the March 21, 2006

[3] The administrative law judge noted that while Dr. Alvarez testified, on deposition, that he found small rounded opacities present on the January 11, 2005 x-ray, he did not report any profusion of small opacities on the ILO classification form. Decision and Order at 4-5; Director's Exhibit 9 at 18; Employer's Exhibit 5 at 17.

[4] The administrative law judge noted that Dr. Alvarez's credentials were ambiguous because, on the one hand, he checked that he was a B reader, but not a Board-certified radiologist and then testified on deposition that he had never been a B reader. Director's Exhibit 9 at 16, 11; Employer's Exhibit 5 at 9.

x-ray, that was only interpreted as negative, failed to establish pneumoconiosis at Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir.1992). As substantial evidence supports the administrative law judge's finding that the x-ray evidence did not establish pneumoconiosis at Section 718.202(a)(1), it is affirmed. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Additionally, we affirm the administrative law judge's findings that pneumoconiosis could not be established at Section 718.202(a)(2) and (3), as the record contains no autopsy or biopsy evidence and the record does not support application of the regulatory presumptions contained at Sections 718.304, 718.305, and 718.306.[5]

Turning to Section 718.202(a)(4), the administrative law judge noted that the new relevant evidence consisted of claimant's treatment records, negative CT scan evidence, and the medical opinions of Drs. Alvarez, Wiener, Utell, and Rosenberg. The administrative law judge correctly noted that claimant's treatment records, from Strong Memorial Hospital, did not establish clinical pneumoconiosis and did not address legal pneumoconiosis.[6] The administrative law judge also correctly noted that the CT scan evidence was negative for clinical pneumoconiosis and did not address the issue of legal pneumoconiosis. Director's Exhibit 9; Employer's Exhibit 12.

Regarding the opinion of Dr. Alvarez, the administrative law judge found it entitled to little weight because the doctor's desposition testimony that claimant's x-ray "was classic for pneumoconiosis" conflicted with his report that did not list pneumoconiosis as one of claimant's conditions and did not discuss the etiology of claimant's lung cancer or bullous emphysema. The administrative law judge therefore

[5] The administrative law judge rationally rejected Dr. Alvarez's interpretation of claimant's January 11, 2005 x-ray, as showing a Category B opacity, as incredible. Decision and Order at 13. There is no evidence in the record that could support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b) or (c). Accordingly, the administrative law judge's finding that there is no credible evidence of complicated pneumoconiosis and that claimant is not entitled to the irrebuttable presumption at Section 718.304 is affirmed.

[6] Specifically, the administrative law judge noted that claimant's hospital records revealed treatment for a left lower lobe lung mass identified as squamous cell carcinoma that required a left lower lobectomy in March 2005. Decision and Order at 6; Employer's Exhibit 3.

rationally found that Dr. Alvarez's opinion was ambiguous and equivocal.[7] *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Additionally, the administrative law judge found that, although Dr. Wiener reported that claimant told her he had "black lung," and that a chest x-ray was consistent with pneumoconiosis, she did not indicate to which x-ray she was referring or how the x-ray was classified. The administrative law judge also found that the x-ray referred to would be inconsistent with the weight of new x-ray evidence of record, which he found to be negative for pneumoconiosis. Further, the administrative law judge noted that Dr. Wiener did not address whether there was any relationship between claimant's respiratory impairment and coal mine employment. Therefore, the administrative law judge properly accorded Dr. Wierner's opinion little weight on the issue of clinical and legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Clark*, 12 BLR at 1-155.

Regarding the opinion of Dr. Utell, the administrative law judge correctly found that it clearly and unequivocally stated that claimant did not have clinical pneumoconiosis and that it was equivocal regarding the issue of legal pneumoconiosis, as Dr. Utell opined that claimant's emphysema may be related to either smoking or coal mine employment. The administrative law judge, therefore, rationally found that it did not establish clinical or legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

Finally, the administrative law judge credited the opinion of Dr. Rosenberg, that claimant did not have either clinical or legal pneumoconiosis, which the administrative law judge found partially buttressed by Dr. Utell's finding that claimant did not have clinical pneumoconiosis. The administrative law judge relied, in part, on the fact that Dr. Rosenberg, a Board-certified pulmonologist, had more experience treating coal miners than did Dr. Alvarez. *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Further, the administrative law judge rationally found that Dr. Rosenberg's opinion, that claimant did not have either clinical or legal pneumoconiosis, was most consistent with the credible, probative clinical data, including the negative x-ray and CT scan evidence. In addition, the administrative law judge found that the results of claimant's pulmonary function studies, as well as claimant's history, and the other findings on his review of claimant's

[7] In his written report, Dr. Alvarez did not mention pneumoconiosis. Dr. Alvarez's report diagnosed "LLL Mass (cavitating) consistent with carcinoma. Needs tissue diagnosis. Mild Bullous Emphysema." Director's Exhibit 6/18, Sec. D6. Dr. Alvarez did not mention claimant's coal mine employment history or the possibility that pneumoconiosis was present, until he was deposed two years after his examination of the claimant. Decision and Order at 8; Director's Exhibit 6.

medical records were inconsistent with the progressive and irreversible nature of pneumoconiosis. *See* 20 C.F.R. §718.201(c). Instead, the administrative law judge noted that Dr. Rosenberg clearly stated that claimant's respiratory impairment was due to lung cancer and bullous emphysema due to smoking, and unrelated to coal mine employment, and that this finding was supported by his underlying documentation. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Clark*, 12 BLR at 1-155. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence did not establish pneumoconiosis at Section 718.202(a)(4).

Finally, weighing the new evidence on the issue of pneumoconiosis together at Section 718.202(a)(1)-(4), the administrative law judge properly found that it did not establish pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-174. Accordingly, the administrative law judge's finding that the new evidence did not establish pneumoconiosis at Section 718.202(a) is affirmed. Likewise, we affirm the administrative law judge's finding that a change in an applicable condition of entitlement was not established at Section 725.309(d), based on a finding of pneumoconiosis. Additionally, as the administrative law judge properly found that the new evidence did not establish pneumoconiosis at Section 718.202(a) and the evidence submitted with claimant's 1993 claim was found not to have established pneumoconiosis, an essential element of entitlement, the record fails to establish pneumoconiosis at Section 718.202(a) in this case.[8]

[8] Because we affirm the administrative law judge's finding that neither the old nor the new evidence established pneumoconiosis at 20 C.F.R. §718.202(a), we need not further consider whether a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309(d) in this case.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge