BRB No. 98-1504 BLA

DELMAR T. WOODS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATED COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Delmar T. Woods, Morgantown, West Virginia, *pro se.*

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denying Benefits (96-BLA-1023) of Administrative Law Judge Daniel L. Leland 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). Initially, the administrative law judge determined the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309(d), filed on October 20, 1994.[2] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with fourteen years of coal mine employment, based on employer's concession. The administrative law judge further found the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Therefore, the administrative law judge found the newly submitted evidence of record insufficient to establish a material change in conditions pursuant to Section 725.309(d). Accordingly, the administrative law judge denied benefits. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board

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[1] Claimant was not represented by counsel at the hearing before the administrative law judge. The administrative law judge, however, questioned claimant regarding his intention to proceed without an attorney, and afforded him the opportunity to submit evidence on his own behalf, testify, provide statements and question witnesses. Consequently, there was a valid waiver of claimant's right to representation and the hearing before the administrative law judge was properly conducted. 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

[2] Claimant filed his initial claim for benefits on April 5, 1983. Director's Exhibit 33. This claim was denied by the district director on September 9, 1983, who found that claimant failed to establish the existence of pneumoconiosis or a disease arising out of claimant's coal mine employment. However, the district director found that claimant established a total respiratory disability. *Id*. No appeal was taken.

[3] The parties do not challenge the administrative law judge's decision to credit claimant with fourteen years of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that in considering whether claimant has established a material change in conditions, the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has proven at least one element of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

In determining whether the newly submitted evidence of record is sufficient to establish a material change in conditions pursuant to Section 725.309(d), the administrative law judge correctly found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis inasmuch as none of the x-ray interpretations submitted with the new claim was read as positive for the existence of pneumoconiosis. Decision and Order at 3, 7; Director's Exhibits 12, 13, 21-23, 28; Employer's Exhibit 1; 20 C.F.R. §718.202(a)(1); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), *aff'd*, 806 F.2d 258 (4th Cir. 1986)(table). Moreover, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(2) as there is no biopsy evidence of record. Decision and Order at 7; 20 C.F.R. §718.202(a)(2). Likewise, the

administrative law judge properly found that claimant was not entitled to any of the presumptions set forth under 20 C.F.R. §718.202(a)(3) inasmuch as there is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e); and the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a). Decision and Order at 7; 20 C.F.R. §718.202(a)(2), (a)(3).

The administrative law judge also properly found that the newly submitted medical evidence of record is insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4). Having correctly set forth all of the relevant medical opinion evidence of record, the administrative law judge reasonably exercised his discretion as trier-of-fact in according greater weight to the opinion of Dr. Renn, that claimant is not suffering from pneumoconiosis and that claimant's asthma is not caused by, contributed to, or aggravated by claimant's coal mine employment, based on Dr. Renn's superior professional qualifications and his familiarity with claimant's condition as his treating physician since 1983.[4] Decision and Order at 8; Director's Exhibits 21, 22, 23; Employer's Exhibit 3; 20 C.F.R. §§718.201, 718.202(a)(4); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Perry, supra*; *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-277 (4th Cir. 1997). The administrative law judge also reasonably found Dr. Renn's opinion supported by the opinions of Drs. Fino and Harper, both of whom reviewed the medical evidence and opined that the objective evidence was insufficient to justify a diagnosis of coal workers' pneumoconiosis or an occupationally acquired pulmonary condition. Decision and Order at 8; Employer's Exhibits 3, 4; *Nance, supra; Handy, supra; Perry, supra*; *see generally Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986).

Moreover, the administrative law judge reasonably exercised his discretion in finding Dr. Manchin's opinion insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4) inasmuch as the physician diagnosed a moderate to severe loss in respiratory capacity, but did not give an etiology for this condition. Decision

[4]The record indicates that Drs. Renn, Devabhaktuni and Fino are all Board certified in Internal Medicine and Pulmonary Diseases. Dr. Harper is a Board Certified Medical Examiner and certified by the American Board of Preventive Medicine - Occupational Medicine. the qualifications of the remaining physicians are not in the record.

and Order at 8; Director's Exhibit 28; 20 C.F.R. §§718.201, 718.202(a)(4); *see Perry, supra*; *see also Nance, supra*; *Handy, supra*. Similarly, the administrative law judge reasonably found that the opinion of Dr. Devabhaktuni does not constitute a diagnosis of pneumoconiosis under Section 718.202(a)(4) inasmuch as the physician did not state that claimant's diagnosed lung condition was substantially aggravated by or significantly related to claimant's coal mine employment. Decision and Order at 8; Director's Exhibits 10, 24; 20 C.F.R. §§718.201, 718.202(a)(4); *see Perry, supra*; *see also Nance, supra; Handy, supra*.

In addition, the administrative law judge reasonably found the decision of the West Virginia Occupational Pneumoconiosis Board (WV Board) entitled to little weight inasmuch as the WV Board's finding of pneumoconiosis was not supported by its underlying documentation, particularly, the medical report of Drs. McCallum and Leef, whose report was the principal basis for the WV Board's conclusions.[5] Decision and Order at 8; Director's Exhibits 21, 28; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Inasmuch as the administrative law judge considered all of the relevant evidence of record, we affirm his finding that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 10; *see* 20 C.F.R. §§718.201, 718.202(a)(4); *Perry, supra; see also Nance, supra; Handy, supra*.

Since claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), the element of entitlement previously adjudicated against him, we affirm the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish a material change in conditions. 20 C.F.R. §725.309(d); *Rutter, supra*.

[5] In a report dated March 19, 1986, Drs. McCallum and Leef set forth the findings from a physical examination and objective studies of claimant and opined that there was no evidence of occupational pneumoconiosis. Director's Exhibit 21.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge