BRB No. 99-0358 BLA

ALBERT J. ESTEP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHADY LANE 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 Molly W. Neal, Administrative Law Judge, United States Department of Labor.

Albert J. Estep, Stockbridge, Georgia, *pro se*.

Samuel J. Bach (Morton & Bach), Henderson, Kentucky, for employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (97-BLA-1554) 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). The instant case involves a duplicate claim filed on March 8, 1996.[1] The administrative law judge found the

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on August 11, 1980. Director's Exhibit 36. The district director denied the claim on April 17, 1981. *Id.* By letter dated June 12,

evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 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 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the

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1981, claimant requested "a little additional time to gather data for [his] claim." *Id.* Claimant also indicated that he was "going to request a hearing and did not realize [his] time limit was so near." *Id.* By letter dated October 23, 1985, the Department of Labor requested additional documents from claimant, including a marriage certificate, birth certificates and proof of coal mine employment. *Id.* The Department of Labor advised claimant that if it did not receive a response within thirty days, it would assume that claimant had abandoned his claim and the claim would remain denied. *Id.* There is no indication that claimant took any further action in regard to his 1980 claim.

Claimant filed a second claim on March 8, 1996. Director's Exhibit 1.

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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1980 claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 36. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a finding of total disability pursuant to 20 C.F.R. §718.204(c).

In determining whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5-6. All of the newly submitted x-ray interpretations rendered by readers with these qualifications are negative for pneumoconiosis.[2] Director's Exhibits 12-15. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision

[2]Dr. Sargent, a B reader and Board-certified radiologist, interpreted claimant's November 13, 1973, November 6, 1975 and July 16, 1979 x-rays as negative for pneumoconiosis. Director's Exhibits 12-14. Dr. Sargent also interpreted claimant's most recent x-ray, a film taken on May 3, 1996, as negative for the disease. Director's Exhibit 15.

and Order at 6. Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306. Consequently, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 6.

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge noted that Dr. Sutherland's treatment notes include diagnoses of pneumoconiosis based upon the physician's positive x-ray interpretations. Decision and Order at 8; Director's Exhibit 9. The administrative law judge properly accorded less weight to Dr. Sutherland's notation of pneumoconiosis in his treatment notes because the x-rays that he interpreted as positive for pneumoconiosis were read by a more qualified physician as negative for pneumoconiosis,[3] thus calling into question the reliability of his opinion. *See Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 8.

The administrative law judge accurately noted that Dr. Masor was the only other physician of record to mention pneumoconiosis.[4] Although Dr. Masor recorded a medical history of pneumoconiosis in a June 16, 1990 report, he subsequently indicated in a May 27, 1997 letter that he had "no knowledge of [claimant's] pneumoconiosis." Director's Exhibit 33. The administrative law judge, therefore, properly found that Dr. Masor's reference to a history of pneumoconiosis was insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5] The administrative law judge, therefore, properly found that the

[3]Dr. Sutherland, who does not possess any special radiological qualifications, interpreted claimant's November 13, 1973, November 6, 1975 and July 16, 1979 x-rays as positive for pneumoconiosis. Director's Exhibit 9. Dr. Sargent, a dually qualified B reader and Board-certified radiologist, interpreted each of these x-rays as negative for pneumoconiosis. Director's Exhibits 12-14.

[4]Dr. Westerman, who examined claimant on May 3, 1996, diagnosed chronic obstructive lung disease attributable to cigarette smoking and possible late onset asthma possibly due to allergies. Director's Exhibit 10.

[5]Dr. Masor also opined that claimant's lung disease was "multifactorial."

newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Inasmuch as there was no evidence of pneumoconiosis submitted in connection with claimant's 1980 claim, *see* Director's Exhibit 36, we hold that the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis is equivalent to a finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.204(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

Director's Exhibit 33. Dr. Masor, however, failed to identify the multiple factors. *Id.*

MALCOLM D. NELSON, Acting
Administrative Appeals Judge