BRB No. 98-0170 BLA

JOSEPH LAROSA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BELLAIRE CORPORATION	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-BLA-945) of Administrative Law Judge Daniel L. Leland denying benefits on a duplicate 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). In his original Decision and Order, the administrative law judge credited claimant with thirty-five and one-quarter years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established a

material change in conditions pursuant to 20 C.F.R. §725.309 and total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. Part 718. Accordingly, benefits were awarded. Employer appealed and in *LaRosa v. Bellaire Corp.*, BRB No. 96-0468 BLA (Apr. 30, 1997) (unpub.), the Board vacated the administrative law judge's findings of a material change in conditions and remanded the case for consideration of the newly submitted evidence pursuant to *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The Board also vacated the administrative law judge's findings of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). On remand, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and, thus, claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In weighing the medical opinions of record, the administrative law judge rationally

concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4).[1] *Perry*, *supra*. In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinions of Drs. Gress and Malhotra, who stated that claimant suffered from pneumoconiosis, were outweighed by the medical opinion of Dr. Solic, who found that claimant's condition was unrelated to coal mine employment, after noting his superior qualifications and finding that his opinion was well-documented and reasoned and supported his conclusions with references to the objective evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985) *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order on Remand at 2-3; Director's Exhibits 8-9, 26. Inasmuch as the administrative law judge weighed all of the newly submitted medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) or a material change in conditions pursuant to Section 725.309 as they are supported by substantial evidence.

[1] The administrative law judge's findings that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Coal Creek Co.*, 6 BLR 1-710 (1983).

In weighing the newly submitted medical opinions of record, the administrative law judge also rationally concluded that this evidence failed to establish total disability by a preponderance of the evidence.[2] In considering the medical opinions pursuant to Section 718.204(c)(4), the administrative law judge permissibly gave greater weight to Dr. Solic's medical opinion, that claimant was not totally disabled from a respiratory standpoint, based on his superior qualifications and since he found Dr. Solic's opinion was better supported by the objective evidence of record. *Clark*, *supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel*, *supra*; Decision and Order on Remand at 3-4. Moreover, the administrative law judge permissibly gave diminished weight to the opinions of Drs. Gress and Malhotra since he found that their diagnoses were not supported by the objective evidence of record and the underlying documentation did not support the physicians' conclusions. *Clark*, *supra*; *Lucostic*, *supra*; *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985); Decision and Order on Remand at 4. Consequently, the administrative law judge properly found that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, we affirm the administrative law judge's finding that the newly submitted evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c). Inasmuch as the administrative law judge properly considered the newly submitted medical evidence and rationally concluded that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and in accordance with law. *Swarrow*, *supra*.

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

SO ORDERED.

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[2] The administrative law judge's findings that the newly submitted evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack*, *supra*.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge