

BRB No. 99-0930 BLA

JOHN A. PRESLEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
U. S. STEEL MINING COMPANY, LLC)	
)	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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

John A. Presley, Anawalt, West Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay Casto & Chaney, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹, without the assistance of counsel,² appeals the Decision and Order (97-BLA-1708) of Administrative Law Judge Stuart A. Levin 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 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)(1)-(4), and thereby insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied the claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v.*

¹Claimant is John A. Presley, the miner, who filed two applications for benefits with the Department of Labor (DOL). The first, filed on October 9, 1984, was denied by Administrative Law Judge James Guill on September 25, 1992. Director's Exhibit 22. The second claim, filed on March 12, 1997, is the instant claim before the Board. Director's Exhibit 1.

²Claimant was represented by counsel at the hearing. H. Tr. at 7. Counsel was disbarred after the hearing, but prior to the issuance of the administrative law judge's Decision and Order. The administrative law judge allowed claimant additional time to secure counsel, but he was unable to do so. Decision and Order at 1, n. 1.

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, Hinchman & Grylls Associates, Inc.*, 380 U.S. §359 (1965). Employer, in response, asserts that the Decision and Order of the administrative law judge is supported by substantial evidence, and accordingly, urges affirmance. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not participate in the instant appeal.³

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 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*).

Initially, the administrative law judge determined that the instant claim is a duplicate claim, and not a petition for modification. Claimant testified at the hearing that he submitted a letter to the Board along with new evidence dated September 22, 1993. Hearing Transcript at 52-58. He testified further that he received Dr. Chithambo's medical report on or about September 17, 1993, and inquired of his counsel whether it had been forwarded to the Department of Labor (DOL) the next day. Hearing Transcript at 60. Claimant stated that he was told that it was sent out "that day." *Id.* As the administrative law judge correctly found, the earliest that the letter in question could have been sent out was September 22, 1993, the date on the cover letter. Decision and Order at 3. The administrative law judge rationally found, therefore, that because there was no documentation of the September 1993 letter or report having been received by the Board, the testimony concerning when the letter was sent was not credible. Decision and Order at 3-4. The administrative law judge properly found that the letter claimant sent to the Board dated February 21, 1994 and marked as being

³We affirm, as unchallenged on appeal, and not adverse to claimant, the administrative law judge's finding that the evidence establishes at least 30 years of qualifying coal mine employment, and that claimant has two dependents for purposes of augmentation. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

received February 24, 1994 was the next correspondence claimant sent to DOL following the administrative law judge's September, 1992 denial of the claim. Accordingly, we affirm the administrative law judge's determination that the claim is properly considered as a duplicate claim pursuant to Section 725.309(d), and thereby, subject to the holding set forth in *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 the instant case.

The administrative law judge next determined that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge considered the seven newly submitted x-ray interpretations of record. He correctly noted that Dr. Subramaniam, an A-reader⁴ and board-certified radiologist⁵, submitted two positive x-ray interpretations for pneumoconiosis, and that Dr. Ahmed, a B-reader and board-certified radiologist, submitted one positive interpretation for pneumoconiosis. Director's Exhibit 19; Claimant's Exhibit 2; Decision and Order at 4, 7-8. The administrative law judge found further that Drs. Vasudevan, Gaziano, Forehand, and Hippensteel, all B-readers, read x-rays as negative for pneumoconiosis. The administrative law judge then found that the evidence was "mixed," but that on balance it was negative for pneumoconiosis. Decision and Order at 8. Inasmuch as the administrative law judge acted within his discretion in finding that the preponderance of the newly submitted interpretations by the highly qualified physicians is negative for the existence of pneumoconiosis, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 8; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

⁴The terms "A reader" and "B-reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successfully completion of an examination established by the National Institute of Safety and Health. See 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 108 S. Ct. 427, 432, n. 16, 11 BLR 2-1, 2-6, n. 16; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1- 211 (1985). A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C).

⁵The administrative law judge considered Dr. Subramaniam's qualifications as an A-reader and a board-certified radiologist and accorded his interpretations the same weight as those submitted by B-readers. Decision and Order at 8.

The administrative law judge correctly found that the record did not contain any newly submitted biopsy evidence with respect to Section 718.202(a)(2). Moreover, the administrative law judge correctly determined that none of the presumptions set forth in Section 718.202(a)(3) are applicable to the instant claim. 20 C.F.R. §§718.304; 718.305; 718.306; Decision and Order at 8. We affirm these findings as consistent with applicable law.

The administrative law judge next considered the newly submitted medical opinion evidence, which consists of the opinions of Drs. Chithambo, Jones, Vasudevan and Hippensteel, pursuant to Section 718.202(a)(4). Drs. Chithambo and Jones diagnosed the existence of pneumoconiosis, while Drs. Vasudevan and Hippensteel determined that claimant does not suffer from pneumoconiosis. Director's Exhibits 10, 19; Claimant's Exhibit 2; Employer's Exhibit 1. The administrative law judge acted within his discretion in according the opinions of Drs. Chithambo and Jones less weight than the contrary opinions of Drs. Vasudevan and Hippensteel because Drs. Chithambo and Jones relied upon positive x-rays when the administrative law judge found that the weight of the x-ray evidence is negative for pneumoconiosis and there is no indication in the reports what factors, other than the x-ray evidence and years of coal mine employment, the diagnosis of pneumoconiosis is based on. Decision and Order at 8-9; *Lafferty, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to support a finding of the existence of pneumoconiosis, as well as the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309, and the denial of benefits.

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