BRB No. 97-1271 BLA

DARRELL WILDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WMN COAL COMPANY	)	
	)	
	)	
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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp, Manchester, Kentucky, for claimant.

Stanley S. Dawson (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0699) of Administrative Law Judge Donald W. Mosser 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). Claimant's initial application for benefits was finally denied by the district director on June 10, 1987. Director's Exhibit 51. On September 20, 1991, claimant filed the present application, which is a duplicate claim because it was filed more than one year after the prior denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d). The administrative law judge credited claimant

with twelve and three-quarter years of coal mine employment, determined that employer was the responsible operator, and found that the newly submitted evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). The administrative law judge concluded, therefore, that a material change in conditions was not established pursuant to 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the x-ray evidence pursuant to Section 718.202(a)(1). Claimant further asserts that remand is required because the administrative law judge failed to discuss the lay testimony of record. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

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 into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a claimant 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 there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has established at least one of the elements previously decided against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). If so, claimant has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross, supra*.

The administrative law judge noted that claimant was previously denied benefits because he failed to establish any element of entitlement pursuant to

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and responsible operator status. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Sections 718.202(a) and 718.204. Director's Exhibit 51. The administrative law judge considered the newly submitted evidence to determine whether it established a material change in conditions. Decision and Order at 7, 15-20; *see Ross*, *supra*.

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge failed to provide an adequate rationale for his finding that the new x-ray evidence did not establish the existence of pneumoconiosis. Claimant's Brief at 6. The record contains forty-three readings of twenty-seven x-rays taken since the previous denial of benefits. Twenty readings were negative for pneumoconiosis, six were positive, and seventeen readings of x-rays taken during claimant's several hospitalizations make no mention of pneumoconiosis.[2] All of the negative readings were by physicians who are Board-certified radiologists, B-readers, or both, while three of the positive readings were by similarly qualified physicians.

Contrary to claimant's contention, the administrative law judge provided a valid rationale for his finding pursuant to Section 718.202(a)(1). The administrative law judge first weighed separately the readings of each of the six x-rays that were read positive at least once. The administrative law judge permissibly found four of these six x-rays to be negative for pneumoconiosis based on the weight of the negative readings by qualified readers. Decision and Order at 15-16; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Regarding the other two x-rays that were read positive, the administrative law judge accepted Dr. Lane's reading of the August 29, 1993 x-ray as an uncontradicted positive reading by a B-reader, but noted accurately that the positive reading of the May 17, 1994 x-ray was rendered by a physician lacking any special radiological credentials. Decision and Order at 16. The administrative law judge then weighed together all of the readings by Board-certified radiologists and B-readers and concluded that the weight of the newly submitted x-ray readings was negative for pneumoconiosis. *See Woodward, supra.* Because the administrative law judge properly weighed the x-ray evidence and provided a valid rationale for his finding, we affirm the administrative law judge's

[2] The administrative law judge summarized the readings of only those x-rays taken for the purpose of diagnosing pneumoconiosis. Decision and Order at 8-10.

finding pursuant to Section 718.202(a)(1).[3]

[3] The administrative law judge overlooked Dr. Broudy's negative reading of the November 25, 1994 x-ray, which could only have supported his finding. Director's Exhibit 56.

Claimant asserts that we must remand this case for further proceedings because the administrative law judge failed to discuss the hearing testimony of claimant and his wife regarding claimant's respiratory condition. Claimant's Brief at 4, 7; [1996] Hearing Transcript at 36, 44-45. A finding of the existence of pneumoconiosis or total respiratory disability cannot be based solely on lay testimony in a living miner's claim. 20 C.F.R. §§718.202(c); 718.204(d)(2); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-22 (1987). Because the administrative law judge in this case permissibly declined to credit the medical evidence necessary to corroborate the lay testimony,[4] any error in failing to discuss the lay testimony is harmless. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). Therefore, we reject claimant's contention.

In light of the foregoing, we affirm the administrative law judge's findings that the new evidence failed to establish either the existence of pneumoconiosis or total

[4] The administrative law judge accurately noted that there was no evidence to be considered at Section 718.202(a)(2), that the presumptions listed at Section 718.202(a)(3) are inapplicable to this claim, that all of the new pulmonary function and blood gas studies were non-qualifying under Section 718.204(c)(1) and (2), and that there was no evidence of cor-pulmonale with right-sided congestive heart failure pursuant to Section 718.204(c)(3). Decision and Order at 16, 18-19. Pursuant to Sections 718.202(a)(4) and 718.204(c), the administrative law judge permissibly accorded greater weight to the medical opinions of the more highly qualified physicians who concluded that claimant does not have pneumoconiosis and is not totally disabled. Decision and Order at 17-19; Director's Exhibits 13, 14, 51, 54, 56; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's findings.

respiratory disability, and therefore failed to establish a material change in conditions pursuant to Section 725.309(d). Decision and Order at 19-20; *see Ross, 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

JAMES F. BROWN
Administrative Appeals Judge