BRB No. 97-1443 BLA

RAYMOND ABSHIRE Claimant-Petitioner v. D & L COAL COMPANY GRIFFITH BROTHERS COAL COMPANY C.P.G., INCORPORATED D & A COAL COMPANY, INCORPORATED KENTLAND-ELKHORN COAL CORPORATION c/o THE PITTSTON COAL GROUP and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employers/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Raymond Abshire, Fedscreek, Kentucky, *pro se*.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for D & L Coal Company.

John T. Chafin (Kazee, Kinner & Chafin), Prestonsburg, Kentucky, for Griffith Brothers Coal Company, C.P.G., Incorporated and D & A Coal Company, Incorporated.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for Kentland-Elkhorn Coal Corporation.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-0045) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) 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 administrative law judge credited claimant with sixteen years of coal mine employment and adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed 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 challenges the administrative law judge's denial of benefits. D & L Coal Company, Kentland-Elkhorn Coal Corporation, and Griffith Brothers Coal Company, joined by C. P. G., Incorporated and D & A Coal Company, Incorporated, each separately responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

---

[1]Claimant filed his initial claim on January 21, 1992. Director's Exhibit 52. This claim was denied by the Department of Labor on July 6, 1992 because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Id. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on November 12, 1993. Director's Exhibit 1.

[2]Inasmuch as the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that "[t]he previous claim was denied when it was determined that Claimant did not establish the presence of pneumoconiosis, did not establish the existence of pneumoconiosis arising out of coal mine employment or that he was totally disabled due to pneumoconiosis." Decision and Order at 6; *see* Director's Exhibit 52. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994).

The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Of the thirty-eight newly submitted x-ray interpretations of record, thirty-four readings are negative for pneumoconiosis, Director's Exhibits 11, 12, 17, 18, 38-39, 44, 45, 48, 49; D & L Coal Company's Exhibits 1, 2, 3, 5, 6, 9, 11; Kentland-Elkhorn Coal Corporation's Exhibits 4-7, 18-20, 24-27, 31-35, and four readings are positive, Director's Exhibits 40-42.[3] In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians.[4] *See Woodward v.*

[3]As previously noted, the prior claim was denied on July 6, 1992. Although the administrative law judge stated that "[t]he earliest x-rays, dating from 1979, 1982, 1990 and 1991...are not relevant to the issue of a material change in condition since the last denial of benefits in 1992," he nonetheless considered x-ray readings of films dated April 25, 1992 and May 7, 1992. Decision and Order at 7. None of these x-ray readings can establish a material change in conditions under 20 C.F.R. §725.309. Moreover, since the administrative law judge provided a proper basis for discrediting the newly submitted positive x-ray readings of record, any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[4]The administrative law judge stated that "[t]he December 23, 1993 x-ray was found

Director, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge correctly stated that "the majority of the B-readers and [B]oard certified radiologists consistently found the x-ray evidence to be negative." Decision and Order at 8. Since thirty-four of the thirty-eight newly submitted x-ray interpretations of record are negative for pneumoconiosis, substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Woodward, supra*; *Fitts, supra*.

Further, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Additionally, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no credible evidence of complicated pneumoconiosis in the record. The administrative law judge properly

---

to be negative by Drs. Mettu, Sargent, Halbert, Wiot, Spitz, Wheeler, Scott, and Fino, all of whom, save [Dr.] Mettu, are B-readers, and all of whom, save [Drs.] Mettu and Fino, are [B]oard certified radiologists." Decision and Order at 7. Moreover, Dr. Pendergrass, a B-reader and Board-certified radiologist, read the December 23, 1993 x-ray as negative for pneumoconiosis. Kentland-Elkhorn Coal Corporation's Exhibit 6. The administrative law judge also stated that "Drs. Aycoth and Alexander found that x-ray to be positive." *Id*. Further, the administrative law judge stated that while "[b]oth of these physicians are B-readers, Dr. Alexander [is] also...a [B]oard certified radiologist." *Id*. In addition, whereas Drs. Aycoth and Alexander read the January 26, 1994 x-ray as positive for pneumoconiosis, Drs. Fino, Pendergrass, Sargent, Scott, Spitz, Wiot and Wheeler read the same x-ray as negative. Furthermore, Dr. Barrett, a B-reader and Board-certified radiologist, read the January 26, 1994 x-ray as negative. Director's Exhibit 45.

discredited Dr. Aycoth's x-ray interpretation of complicated pneumoconiosis based on "the fact that of the numerous readings of record, his is the only one to find complicated pneumoconiosis." Decision and Order at 8; *see* Director's Exhibit 42; *Woodward, supra*; *Fitts, supra*. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Next, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the relevant newly submitted medical opinions of record. Whereas Drs. Mettu, Sundaram and Sutherland opined that claimant suffers from pneumoconiosis,[5] Director's Exhibits 7, 51; Claimant's Exhibit 2, Drs. Branscomb, Broudy, Castle, Dahhan and Fino opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 8; D & L Coal Company's Exhibits 1, 2, 4, 7, 9, 10, 13; Kentland-Elkhorn Coal Corporation's Exhibit 18. The administrative law judge properly accorded determinative weight to the opinions of Drs. Branscomb, Broudy, Castle, Dahhan and Fino over the contrary opinions of Drs. Mettu, Sundaram and Sutherland because of their superior qualifications.[6] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb, Broudy, Castle, Dahhan and Fino than to the contrary opinions of Drs. Mettu, Sundaram and Sutherland because they are better reasoned and documented.[7] *See Clark v. Karst-Robbins Coal Co.*,

[5]The administrative law judge stated that "while [Dr. Mettu] does not specifically diagnose pneumoconiosis, [Dr. Mettu] finds a mild pulmonary impairment due to coal mine employment." Decision and Order at 12; Director's Exhibit 7.

[6]The administrative law judge observed that Drs. Broudy, Castle, Dahhan and Fino are "[B]oard certified in internal medicine and pulmonary disease." Decision and Order at 10, 11. The administrative law judge also observed that Dr. Branscomb "is [B]oard certified in internal medicine." Decision and Order at 11. The record does not contain the credentials of Drs. Sundaram and Sutherland.

[7]The administrative law judge stated "that the better-reasoned and better-documented reports of record establish that no evidence of pneumoconiosis, radiographic or otherwise, is present." Decision and Order at 9. The administrative law judge observed that "Dr. Sundaram merely states his opinion in a letter, without any indication as to the medical evidence or findings upon which he relies." *Id.* at 11. Further, the administrative law judge observed that "Dr. Sutherland's opinion is based upon 'positive' chest x-ray readings and 'positive' pulmonary function studies, while none of the pulmonary function studies establish total disability, and the vast majority of the x-ray readings, by the more highly qualified physicians, were negative for the disease." *Id.* at 11-12. In addition, the

12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

---

administrative law judge observed that "in [Dr. Sutherland's] medical records dating from 1976, the first mention of pneumoconiosis is made in relation to the Claimant's ability to qualify for black lung benefits, solely on the basis of his oxygen intake." *Id.* at 12. Moreover, the administrative law judge observed that Dr. Sutherland's "records do not consistently indicate that the Claimant was suffering from, and being treated for, coal worker's pneumoconiosis." *Id*. Lastly, the administrative law judge observed that Dr. Mettu "does not specifically diagnose pneumoconiosis." *Id*.

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. Since none of the newly submitted pulmonary function studies or arterial blood gas studies of record yielded qualifying[8] values, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2).[9] Director's Exhibit 10; Claimant's Exhibit 2; Kentland-Elkhorn Coal Corporation's Exhibits 1, 3, 18, 28, 30; D & L Coal Company's Exhibit 1. Additionally, since the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3).

Finally, we address the administrative law judge's evaluation of the newly submitted medical reports of record. Whereas Dr. Sutherland opined that claimant suffers from a totally disabling respiratory impairment, Director's Exhibit 51, Drs. Branscomb, Broudy, Castle, Dahhan and Fino opined that claimant does not suffer from a respiratory impairment,[10] D & L Coal Company's Exhibits 1, 2, 4, 7, 9, 10, 13; Kentland-Elkhorn Coal Corporation's Exhibit 18. The administrative law judge stated that "Dr. Sundaram made no assessment regarding disability, and Dr. Mettu found only a mild impairment, due in part to coal mine dust exposure." Decision and Order at 14; Director's Exhibit 7; Claimant's Exhibit 2. The administrative law judge properly accorded determinative weight to the opinions of Drs. Branscomb, Broudy, Castle, Dahhan and Fino over the contrary opinion of Dr. Sutherland because they are better supported by the objective evidence of record.[11]

---

[8]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[9]The administrative law judge stated that "[t]he August 16, 1996 [arterial blood gas] study did produce qualifying values." Decision and Order at 13. However, an examination of the record reveals that this study does not produce qualifying values. Claimant's Exhibit 2. Inasmuch as this non-qualifying study supports the administrative law judge's finding at 20 C.F.R. §718.204(c)(2), any error by the administrative law judge in this regard is harmless. *See Larioni, supra*.

[10]Although Dr. Broudy, in his initial report, opined that claimant does not retain the respiratory capacity to perform the work of an underground coal miner, Director's Exhibit 8; D & L Coal Company's Exhibit 1, Dr. Broudy, in a subsequent report, opined that, from a strictly ventilatory standpoint, claimant does retain the respiratory capacity to do such work, D & L Coal Company's Exhibit 1.

[11]The administrative law judge stated that "[t]he opinions of the physicians who do not find total disability due to coal mine dust exposure are supported by the great weight of the objective laboratory data in the record." Decision and Order at 14. As previously noted, none of the newly submitted pulmonary function studies or arterial blood gas studies

See Minnich v. Pagnotti Enterprises, Inc., 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel, supra*; *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Further, as previously noted, the administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb, Broudy, Castle, Dahhan and Fino because of their superior qualifications. *See Martinez, supra*; *Dillon, supra*; *Wetzel, supra*. Therefore, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

Since claimant failed to establish either the existence of pneumoconiosis or total disability, the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *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

REGINA C. McGRANERY

---

of record yielded qualifying values. Director's Exhibits 5, 9, 10; Claimant's Exhibit 2; Kentland-Elkhorn Coal Corporation's Exhibits 1, 3, 18, 28, 30; D & L Coal Company's Exhibit 1.

Administrative Appeals Judge