BRB No. 06-0217 BLA

ARTHUR TUTTLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 05/24/2006
	)	
Respondent	)	DECISION and ORDER

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

Arthur Tuttle, Plymouth, Ohio, *pro se*.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denial of Benefits (05-BLA-5856) of Administrative Law Judge Daniel J. Roketenetz 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

[1] Claimant was also unrepresented by counsel when this case was before the administrative law judge. Claimant was, however, made aware of his right to counsel without cost, *See* Letter from Administrative Law Judge to Claimant of June 29, 2005; Hearing Transcript at 4-5, and was given the opportunity to present evidence on his own behalf and to rebut evidence proffered by the Director, *see* Hearing Transcript. Accordingly, the safeguards enunciated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1988) for claimants proceeding without counsel were satisfied.

law judge found that this claim constitutes a subsequent claim under 20 C.F.R. §725.309,[2] and that the previous claim was denied on the basis of claimant having failed to establish any of the elements of entitlement. Decision and Order at 5. The administrative law judge further determined that claimant established a coal mine employment history of six years. Decision and Order at 4. The administrative law judge also found that the newly submitted evidence failed to establish a material change in conditions, *i.e.*, a change in an applicable condition of entitlement, relating to the previous determinations that claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Decision and Order at 5-13. As claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment, and thus a material change in conditions (a change in an applicable condition of entitlement), the administrative law judge, accordingly, denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter brief also urging affirmance of the denial of benefits.

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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he has pneumoconiosis, that he is totally disabled due to pneumoconiosis, and that his pneumoconiosis arose out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[2] Claimant's initial claim for benefits filed on May 8, 1997, was denied by the district director on September 22, 1997, as claimant did not establish any of the elements of entitlement, Director's Exhibit 1. After claimant did not request a hearing within the requisite time period, the claim was administratively closed. Claimant took no further action until the filing of the instant claim on July 6, 2004. Director's Exhibit 3.

After consideration of the administrative law judge's Decision and Order, 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 contains no reversible error.[3]

In addressing the length of coal mine employment, the administrative law judge rationally concluded that claimant established six years of coal mine employment. Decision and Order at 3, 4. Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith*, 7 BLR 1-803; *Miller*, 7 BLR 1-693; *Maggard*, 6 BLR 1-285. In this case, the administrative law judge reasonably relied upon claimant's Social Security Administration and employment records as well as claimant's testimony in determining the length of qualifying coal mine employment. Decision on Remand at 4. We, therefore, affirm the administrative law judge's finding of six years of qualifying coal mine employment as it is reasonable and supported by substantial evidence. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992).

In finding that the newly submitted x-ray evidence, *i.e.*, that evidence submitted since the prior denial, failed to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge correctly found that the November 12, 2004 x-ray was read negative for pneumoconiosis, Director's Exhibits 17, 19, and the August 23, 2004 x-ray, Director's Exhibits, 14, 15, had little probative weight as its film quality was poor.[4] The administrative law judge concluded, therefore, that all of the x-ray evidence was negative for the existence of pneumoconiosis and did not establish a material change in conditions (a change in an applicable condition of

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

[4] This x-ray was interpreted as showing no parenchymal abnormalities consistent with pneumoconiosis. Director's Exhibits 14, 15.

entitlement). Accordingly, we affirm the administrative law judge's finding. 20 C.F.R. §§718.202(a)(1); 725.309; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

We further affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3), as there is no autopsy or biopsy evidence of record and there is no evidence of complicated pneumoconiosis in this living miner's claim filed subsequent to January 1, 1982. Director's Exhibits 1, 3; 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

In concluding that the newly submitted medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge permissibly concluded the newly submitted medical opinion of Dr. Kaufman, that claimant did not suffer from coal workers' pneumoconiosis or an occupational lung disease caused by coal mine employment, was entitled to greater weight than the contrary opinion of Dr. Jump, Director's Exhibit 11; Claimant's Exhibit 1; Decision and Order at 7-8. In a permissible exercise of his discretion, the administrative law judge found that while Dr. Jump was claimant's treating physician, his opinion was not entitled to controlling weight as he failed to cite to any objective testing to support his conclusion and thus did not provide a well-reasoned or well-documented medical report. 20 C.F.R. §718.104(d); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-624 (6th Cir. 2003); *Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002). Further, the administrative law judge rationally accorded superior weight to Dr. Kaufman's opinion as he provided a well-reasoned, well-documented opinion based on various objective tests and examination. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As the administrative law judge permissibly concluded that there was no newly submitted credible medical opinion supportive of a finding of clinical or legal pneumoconiosis, we affirm his determination that the medical opinion evidence failed to establish a material change in conditions, (a change in an applicable condition of entitlement), pursuant to Section 718.202(a)(4). *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1 (1994).

In finding that the newly submitted evidence failed to support a finding of total respiratory disability pursuant to Section 718.204(b), the administrative law judge found that the newly submitted pulmonary function study evidence and the newly submitted blood gas study evidence, Director's Exhibits 12, 13, was non-qualifying[5] and that there

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b),

was no evidence of cor pulmonale with right-sided congestive heart failure. Further, the administrative law judge permissibly found that while the newly submitted opinion of Dr. Jump stated that claimant was unable to return to coal mine employment, the physician's opinion was unreasoned and undocumented and entitled to little weight as the physician did not explain the basis for his conclusion, *see Clark*, 12 BLR 1-149; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. Decision and Order at 12. The administrative law judge also found that Dr. Jump initially stated that claimant was not totally disabled, but then later reached a contrary determination. Thus, the administrative law judge permissibly found the opinion entitled to little weight based on its inconsistency. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984). Moreover, the administrative law judge permissibly concluded that the opinion of Dr. Kaufman, that claimant had the pulmonary capacity to return to his prior coal mine employment, was entitled to greater weight as the best reasoned and best documented. Decision and Order at 12; *see Clark*, 12 BLR 1-149; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. *see generally Ondecko*, 512 U.S. 267, 18 BLR 2A-1. We therefore affirm the administrative law judge's determination that the newly submitted medical evidence of record does not establish a totally disabling respiratory impairment and thus did not establish a material change in conditions (a change in an applicable condition of entitlement) pursuant to Section 718.204(b)(2)(i)-(iv). *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

Lastly, because the administrative law judge has permissibly determined that the newly submitted evidence has not established either the existence of pneumoconiosis or a totally disabling respiratory impairment, claimant cannot establish that pneumoconiosis arose out of coal mine employment or that it is disabling pursuant to 20 C.F.R. §§718.203(a), 718.204(c). We therefore affirm the administrative law judge's determination that claimant failed to establish entitlement pursuant to Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge