BRB No. 00-0348 BLA

CLARENCE E. SIZEMORE Claimant-Petitioner v. EASTERN ASSOCIATED COAL CORPORATION Employer-Respondent 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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love, P.L.L.C.), Fairmont, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-0776) of Administrative Law Judge Jeffrey Tureck 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). In this duplicate claim, the administrative law judge found that claimant's prior claim had been finally denied. The administrative law judge credited claimant with five

[1]Claimant filed his initial application for benefits on October 1, 1974 which the district director denied on April 10, 1975 and again on August 13, 1980. *See* Director's Exhibit 27. Following a hearing on the merits, Administrative law Judge John C. Holmes

years of coal mine employment. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment at 20 C.F.R. §§718.202(a)(1)-(4), 718.204(c)(1)-(4), and thus, insufficient to demonstrate a material change in conditions at 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant challenges the findings of the administrative law judge on the existence of complicated pneumoconiosis and on the length of coal mine employment. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 prove 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 to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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found the evidence of record insufficient to establish the existence of pneumoconiosis or a disabling respiratory impairment under 20 C.F.R. Part 410, Subpart D. *Id.* On appeal the Board affirmed the denial of benefits by Judge Holmes. *Id.*; *Sizemore v. Eastern Associated Coal Co.*, BRB No. 87-3758 BLA (Mar. 30, 1990)(unpub.). Claimant filed his second application for benefits on March 2, 1995 which the district director denied on August 8, 1995 on the grounds that the newly submitted evidence did not establish the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis, and was thus, insufficient to demonstrate a material change in conditions at 20 C.F.R. §725.309. *See* Director's Exhibit 28. Claimant took no further action until he filed the present claim on April 17, 1998. *See* Director's Exhibit 1.

[2] We affirm the findings of the administrative law judge that claimant failed to establish the presence of simple pneumoconiosis at 20 C.F.R. §§718.202(a)(1), (2), (4), and a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Since the miner's last coal mine employment took place in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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. Initially, the administrative law judge permissibly credited claimant with five years of coal mine employment based on claimant's Social Security earnings record, the affidavit of Howard Sizemore, and claimant's hearing testimony. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984). We, therefore, affirm the findings of the administrative law judge on the length of coal mine employment.

As this case arises within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997) for deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Rutter*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In the instant case, the administrative law judge correctly concluded that, in his prior claim, claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment or the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.203(b), 718204(c), (b). *See* Decision and Order at 3; *Rutter*, *supra*. The administrative law judge also properly reviewed only the evidence submitted following the denial of claimant's prior claim. *Rutter*, *supra*.

In reviewing the newly submitted evidence regarding the presence of complicated pneumoconiosis, the administrative law judge properly concluded that Dr. Ward did not diagnose pneumoconiosis when he interpreted the x-rays dated June 11, 1997, January 7, 1998, February 18, 1998. *See* Director's Exhibit 6; *Trent*, *supra*. Likewise, the administrative law judge correctly concluded that Drs. Wheeler, Scott, and Gayler, who are Board-certified Radiologists and B-readers as well as Associate Professors of Radiology, and

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[4] Contrary to claimant's argument that the evidence of record does not contradict his testimony that he worked twelve years in coal mine employment, claimant acknowledged during his testimony at the September 1, 1987 hearing that both the Hecla Mine and the Sunshine Mine, where he worked during the 1960s, were silver and gold mines, not coal mines. *See* Director's Exhibit 27.

[5] The record reveals that Dr. Ward also reviewed and interpreted x-rays dated January 3, 1998 and January 6, 1998. *See* Director's Exhibit 6. Dr. Ward did not diagnose pneumoconiosis based on these x-ray interpretations. *Id*.

Dr. Zaldivar, a B-reader, interpreted the December 16, 1998 x-ray as negative for simple or complicated pneumoconiosis. *See* Director's Exhibit 23; Employer's Exhibit 1; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trent*, *supra*. In addition, the administrative law judge also determined that the x-ray dated June 17, 1998 was interpreted by Dr. Gaziano, a B-reader, as positive for simple pneumoconiosis, and by Dr. Ranavaya, a B-reader, and Dr. Navani, a Board-certified Radiologist and B-reader, as showing small opacities (1/0) and Category A large opacities consistent with pneumoconiosis. *See* Director's Exhibit 10-12. The administrative law judge also noted that Dr. Navani recommended further testing and that Drs. Gaziano and Navani indicated that the large opacity in claimant's left upper lung could possibly be cancer. *Id.* In weighing this evidence, the administrative law judge permissibly accorded greatest weight to the negative interpretations of Drs. Wheeler, Scott, and Gayler based on their superior qualifications. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge did not err in finding that the weight of the x-ray evidence was insufficient to establish the presence of complicated pneumoconiosis.

The administrative law judge appropriately determined that Dr. Ward did not diagnose pneumoconiosis, either simple or complicated, in his narrative review of the January 5, 1998 CT scan. *See* Director's Exhibit 6. Regarding the December 16, 1998 CT scan performed by Dr. Sparks, the administrative law judge accurately found that Dr. Sparks' impression was that "claimant had 'small opacities and bands of fibrotic tissue in both lung apices...suggestive of occupational pneumoconiosis' " and that the presence of a mass in the left upper lobe [of the lung] was more consistent with being a tumor [neoplasm] than a conglomerate pulmonary fibrosis. *See* Decision and Order at 5; Director's Exhibit 23. The administrative law judge also correctly concluded that Dr. Wheeler found no evidence of silicosis or coal workers' pneumoconiosis when he reviewed the December 16, 1998 CT scan and that Dr. Scott did not diagnose pneumoconiosis after reviewing this CT scan. *See* Decision and Order at 6; Employer's Exhibit 1. Likewise, in the exercise of his discretion, the administrative law judge permissibly accepted Dr. Zaldivar's deposition testimony that upon further consideration, he no longer believed that the small nodules in the December 16, 1998 CT scan were pneumoconiosis. *See* Decision and Order at 6; Employer's Exhibit 5, p. 13. Thus, in light of the physicians' findings in their reports, the administrative law judge did not err when he found that none of the CT scan interpretations contained a diagnosis of

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[6] Although the administrative law judge correctly notes that Dr. Gaziano's curriculum vitae is in the record, Drs. Ranavaya and Navani identified their radiological qualifications on the x-ray interpretation report. *See* Director's Exhibits 10, 11.

[7] In his deposition, Dr. Zaldivar testified that given the large nodule appears to be due to infection, he believed that all nodules are due to infection, not pneumoconiosis. *See* Director's Exhibit 5 at p. 13.

complicated pneumoconiosis and that the CT scan evidence confirmed that the x-ray evidence was negative for pneumoconiosis. *See Melnick*, *supra*.

Next, the administrative law judge properly determined that Dr. Turjman, the physician who performed the needle biopsy of the mass in claimant's left upper lung, did not make a determination in his report on the presence of coal workers' pneumoconiosis. *See* Decision and Order at 6; Director's Exhibit 6. Additionally, the administrative law judge correctly found that Dr. Kleinerman, who is Board-certified in anatomical and clinical pathology and reviewed the slides of the biopsy, concluded that the slides showed no evidence of coal workers' pneumoconiosis or interstitial fibrosis. *See* Decision and Order at 6; Employer's Exhibit 2. Thus, the administrative law judge properly found that the biopsy evidence failed to establish complicated pneumoconiosis. *See Melnick*, *supra*.

Finally, the administrative law judge did not abuse his discretion when he declined to accord determinative weight to Dr. Gaziano's diagnosis of complicated pneumoconiosis in his September 30, 1998 report. In so doing, the administrative law judge permissibly found that Dr. Gaziano vacillated in his opinion after noting that in June 1998, Dr. Gaziano diagnosed simple coal workers' pneumoconiosis based on a positive x-ray interpretation of 1/0, that in his report of September 11, 1998, Dr. Gaziano stated that he did not believe that three years of coal mine employment would cause complicated pneumoconiosis, and that after reviewing the biopsy report, Dr. Gaziano decided that the lesion [in claimant's left upper lung] was complicated pneumoconiosis but then stated that "a cancer cannot be absolutely excluded". *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Director's Exhibit 13.

At 20 C.F.R. §718.304, claimant bears the burden of proving the presence of complicated pneumoconiosis based on all the relevant medical evidence of record. *See Melnick*, *supra*. In the instant case, the administrative law judge properly weighed all the relevant evidence on the issue of complicated pneumoconiosis and correctly found that the weight of this evidence did not establish the presence of complicated pneumoconiosis. We, therefore, affirm the findings of the administrative law judge pursuant to Section 718.304 as they are supported by substantial evidence. As the administrative law judge found the newly submitted evidence insufficient to establish complicated pneumoconiosis, we affirm his finding that claimant failed to demonstrate a material change in conditions at Section 725.309 and the denial of benefits.

Accordingly, the Decision and Order of the administrative law judge 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