BRB No. 99-0825 BLA

KENNETH STEPHENS)
)
Claimant-Petitioner)
)
v.)
)
OLD BEN COAL COMPANY)
) 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 and Decision on Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Kenneth Stephens, Winslow, Indiana, *pro se*.

Amy E. Wilmot (Arter & Hadden, LLP), Washington, D.C., for employer.

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 and Decision on Motion for Reconsideration (98-BLA-321) of Administrative Law Judge Rudolf L. Jansen 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 found, and the parties stipulated to, thirteen and one-quarter years of qualifying coal mine employment and, based on the date of filing, adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. After determining that the instant case was a

[1]The record indicates that claimant filed his initial claim on May 5, 1984, which was finally denied by Administrative Law Judge Bernard Gilday on April 1, 1987 for

duplicate claim, the administrative law judge noted the proper standard and found that on the basis of the newly submitted evidence, claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis and thus insufficient to establish a material change in conditions. The administrative law judge further found that even if the existence of pneumoconiosis was established, the evidence of record was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order, Decision on Motion for Reconsideration and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error therein. 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 noted that the previous claim was denied as claimant did not establish the

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failing to establish the existence of pneumoconiosis. Director's Exhibit 26A. Claimant took no further action until he filed the present claim on August 9, 1994. Director's Exhibit 1A.

existence of pneumoconiosis. Decision and Order at 3-5; Director's Exhibit 26A. The United States Court of Appeals for the Seventh Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997).

The administrative law judge, in the instant case, permissibly determined that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the newly submitted x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the overwhelming weight of the x-ray readings was negative. Director's Exhibits 12A, 24A, 30A, 34A, 43A-45A, 47A-49A; Employer's Exhibits 1-3, 18, 20, 24 26, 27; Decision and Order at 9; *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1988)(*en banc*).

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. Decision and Order at 9. 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; *Langerud v. Director,*

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

[3]The parties submitted a Joint Stipulation of Medical Evidence listing forty-nine x-rays interpretations of thirteen x-rays taken between 1990 and 1997. All of the interpretations were by Board-certified radiologists, B readers or both. Forty-five of the interpretations were negative for pneumoconiosis, four were positive. Decision and Order at 5. Joint Exhibit 1.

[4]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the

OWCP, 9 BLR 1-101 (1986); Decision and Order at 10.

In weighing the newly submitted medical opinions of record, the administrative law judge also rationally concluded that the preponderance of this evidence was insufficient to establish pneumoconiosis. The administrative law judge considered first the opinions of those physicians who examined the claimant specifically for black lung disease. The administrative law judge properly gave greater weight to Dr. Selby's opinion, unequivocally finding no evidence of pneumoconiosis, over the contrary opinion of Dr. Garcia, because the record reflects that Dr. Selby is a board-certified pulmonary specialist, and the record is silent as to Dr. Garcia's qualifications. The administrative law judge also reasonably concluded that the opinion of the third examining physician, Dr. Combs, was equivocal, because although he mentioned a pulmonary impairment due to "environmental pollutants," he did not list pneumoconiosis or black lung disease as a cause. The administrative law judge then considered the four reports of consulting physicians, all of whom are pulmonary specialists and credited the opinions of the "overwhelming majority of highly qualified physicians," those of Drs. Renn, Castle and Stewart, finding claimant did not have pneumoconiosis, over the contrary opinion of Dr. Cohen. The administrative law judge then, within a proper exercise of his discretion gave great weight to the reports and notes of Dr. Feltt, claimant's treating physician from 1993 to 1996, which failed to mention black lung or any respiratory disease. The administrative law judge reasonably concluded that the weight of the medical opinion evidence does not show that claimant has pneumoconiosis. *See Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985)*; Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Piccin, supra*; Decision and Order at 10-11; Decision on Motion for Reconsideration at 2-3; Director's Exhibits 10A, 15A, 28A, 30A, 34A, 49A; Employer's Exhibits 19, 36; Claimant's Exhibit 1. The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we

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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 1A. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

affirm the administrative law judge's finding that the newly submitted medical opinion evidence of record is insufficient to establish pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law. *Clark, supra*; *Trent, supra*; *Perry, supra*.

Since claimant failed to establish the existence of pneumoconiosis, 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 and we need not address the administrative law judge's disability causation findings on appeal. *See Spese*, *supra*.

Accordingly, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration denying benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge