BRB No. 98-1649 BLA

JAMES ROBINSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SWITCHBCK COAL COMPANY, INCORPORATED	)	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 Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James Robinson, Martin, Kentucky, *pro se*.

Richard Davis (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (98-BLA-236) of Administrative Law Judge Thomas F. Phalen 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).[1] The

[1]Claimant initially filed a claim for benefits on November 23, 1982, which was denied by the Department of Labor on March 17, 1983, on the basis of claimant having failed to establish a totally disabling respiratory impairment. Director's Exhibit 47. Claimant filed a second claim on February 2, 1989, which was denied by the Department of Labor on July 25, 1989, and again on September 13, 1989. Director's Exhibit 48. Claimant took no further

administrative law judge found that the parties stipulated to a coal mine employment history of ten years and found that the stipulation was supported by the evidence of record. Decision and Order at 4. The administrative law judge further found that the instant claim constituted a request for modification of a previously denied duplicate claim and was thus governed by the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Decision and Order at 8-9. The administrative law judge then considered the evidence submitted subsequent to claimant's second claim and concluded that this newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and thus claimant failed to establish a change in conditions at those subsections. Decision and Order at 10-11, 11-13. The administrative law judge further concluded that claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3). Decision and Order at 11. Further, the administrative law judge concluded that, even if claimant established the existence of pneumoconiosis, the newly submitted evidence of record failed to support a finding of total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(c). Finally, the administrative law judge concluded that a review of the earlier findings in the instant case led to his conclusion that there were no mistakes

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action until the filing of the instant claim on October 28, 1993, Director's Exhibit 1, which was denied by the district director on April 21, 1994. Director's Exhibit 21. Claimant requested a hearing and inasmuch as the request was not timely, the request was deemed a request for modification. This request was denied by the district director. Director's Exhibits 22, 23, 46. Claimant subsequently requested a hearing, Director's Exhibit 26, and the hearing was held before the administrative law judge on April 7, 1998. On September 1, 1998, the administrative law judge issued the Decision and Order denying benefits from which claimant now appeals.

in the determination of fact. Decision and Order at 14. Accordingly, the administrative law judge denied claimant's request for modification and benefits. Employer responds to claimant's appeal and urges affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not filed a brief.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (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 considering the instant claim, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) rather than determining whether claimant established a basis for modification of the district director's denial of benefits on claimant's duplicate claim issued on April 21, 1994. *See Hess v. Director, OWCP*, 21 BLR 1-142 (1998); *see generally Ross, supra*. Nevertheless, we hold that any error in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), in view of the administrative law judge's affirmable finding that the newly submitted evidence failed to establish the existence of pneumoconiosis. *See* discussion, *infra*.

[2]We affirm, as not adverse to claimant and unchallenged by the other parties, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In concluding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge considered nineteen interpretations of six x-rays and concluded that the weight of the readings by physicians with superior qualifications was negative for the existence of the disease. The administrative law judge found that only three of the newly submitted interpretations were positive for the existence of the disease, Director's Exhibit 40, but that none of these interpretations were provided by physicians with the superior qualifications of B-reader and board-certified radiologist.[3] The administrative law judge further found, correctly, that a "numerous" amount of the negative readings were rendered by these physicians with the dual qualifications, Decision and Order at 10; Director's Exhibits 8, 12, 17-19 40, 43; Employer's Exhibits 1-3. The administrative law judge, in a permissible exercise of his discretion, thus accorded greatest weight to the readings of these physicians with superior qualifications. *See Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985). Accordingly, we affirm the administrative law judge's determination that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993)

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

Finally, we affirm the administrative determination that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In reaching this determination, the administrative law judge, in a

[3]a "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). a board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

permissible exercise of his discretion, concluded that the opinions of Drs. Branscomb, Fino and Dahhan, all of whom concluded that claimant did not suffer from pneumoconiosis, Director's Exhibits 9, 44; Employer's Exhibits 4, 5, were entitled to the greatest weight as these opinions were the best reasoned and documented of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985). The administrative law judge further, in a permissible exercise of his discretion, accorded less weight to the opinions of Drs. Sundaram and DeGuzman, Director's Exhibit 40, who diagnosed the presence of pneumoconiosis, as these physicians failed to explain the bases for their determinations. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). Accordingly, we affirm the administrative law judge's determination that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Ondecko, supra*.

Inasmuch as the newly submitted evidence has failed to establish the existence of pneumoconiosis, claimant is precluded from establishing a material change in conditions pursuant to Section 725.309, *see Ross, supra*; *Hess*, *supra*, and claimant is precluded from establishing 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)*.[4]

[4]We need not address the administrative law judge's findings regarding total disability. *See Trent, supra*; *Perry, supra*; *see also Coen v. Director, OWCP*, 7 BLR 1-30 (1984)

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge