BRB No. 96-1064 BLA

PAUL E. ORMAN Claimant-Petitioner v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/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.

Paul E. Orman, Jasonville, Indiana, *pro se*.

Terri A. Czajka (Ice, Miller, Donadio & Ryan), Indianapolis, Indiana, for employer.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order

(94-BLA-0828) of Administrative Law Judge Daniel J. Roketenetz 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 thirty-seven years

of coal mine employment pursuant to the parties' stipulation,[2] found this claim to be a duplicate claim, and determined that the evidence failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Seventh Circuit, within whose appellate jurisdiction this case arises, has held that pursuant to Section 725.309(d), a claimant must show either that he "did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application." *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 556, 15 BLR 2-227, 2-229. (7th Cir. 1991). The prior claim was denied in part because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 29 at 36. Accordingly, the administrative law judge reviewed the evidence developed after the prior denial to determine whether it demonstrated that claimant has since contracted pneumoconiosis. Decision and Order at 5.

Pursuant to Section 718.202(a)(1), the administrative law judge correctly found that the record contains no positive x-ray readings. Decision and Order at 6. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 6-7; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge found that the medical opinion evidence developed since the prior denial failed to establish the existence of pneumoconiosis.[4] Decision and Order at 4-5. Dr. Combs examined claimant on behalf of the Department of Labor (DOL) and diagnosed a "restrictive lung defect," which he attributed to "environmental pollutants." Director's Exhibit 13. Dr. Bhuptani also examined claimant and diagnosed a "severe obstructive impairment and moderate restrictive impairment" which he thought could be due to "interstitial lung disease." Employer's Exhibit 18. He added that, "I suspect that the patient has some element of pneumoconiosis in addition to his severe obstructive impairment." *Id*. Dr. Tuteur reviewed the medical evidence and concluded that claimant does not have pneumoconiosis. Employer's Exhibit 28. Dr. Tuteur explained that he detected no evidence of a "primary pulmonary disorder" because claimant's x-rays and CT scan were negative for pneumoconiosis, his chest examinations were normal, no restriction was detected on any of the valid pulmonary function studies, and no gas exchange impairment was found in the blood gas studies. *Id*.

The administrative law judge permissibly accorded greatest weight to the opinion of Dr. Tuteur based on his superior qualifications as a pulmonary specialist. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The record indicates that Dr. Tuteur is board-certified in both internal and pulmonary medicine, Director's
Exhibit 21, but does not contain the credentials of Drs. Combs and Bhuptani. The administrative law judge also permissibly found Dr. Tuteur's opinion to be the "most persuasive," *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), because Dr. Tuteur provided "specific and detailed discussion" of why the medical evidence "supports his conclusion that pneumoconiosis is not present." Decision and Order at 8. In contrast, the administrative law judge found the opinions of Drs. Combs and Bhuptani to be "not as thorough or well supported."[5] Decision and Order at 9; *see Clark*, *supra*. Because the administrative law judge properly weighed the medical

opinion evidence and the record supports his finding, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Therefore, we affirm the administrative law judge's finding that the evidence failed to establish that claimant has developed pneumoconiosis since the denial of his prior claim, and thus, failed to establish a material change in conditions pursuant to Section 725.309(d). *See McNew*, *supra*.

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

NANCY S. DOLDER
Administrative Appeals Judge