BRB No. 04-0638 BLA

SHELBY G. HERRON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLQUEST ENERGY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 04/22/2005
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (02-BLA-5421) of Administrative Law Judge Richard T. Stansell-Gamm 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 initially noted that claimant's prior application for benefits was denied as abandoned in 1993. Hence, the administrative law judge determined that, pursuant to 20 C.F.R. §725.409(c), claimant failed to prove any element of entitlement in the prior claim. The administrative law judge thus considered the evidence submitted since the prior denial to adjudicate the instant claim filed on May 7, 2001. Decision and Order at 5. The administrative law judge initially noted the parties' stipulation to, *inter alia*, at least twenty-three years of coal mine employment. *Id*. at 4. The administrative law judge further found that the evidence was insufficient to establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). *Id*. at 11-14. The administrative law judge thus determined that claimant failed to establish a change in one of the requisite conditions of entitlement at 20 C.F.R. §725.309(d), and denied the claim. *Id*. at 14.

On appeal, claimant alleges error in the administrative law judge's findings that the evidence was insufficient to establish both the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv).[1] Employer/carrier (employer) responds, seeking affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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).

Claimant contends that the administrative law judge "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," placed substantial weight on the numerical superiority of the negative x-ray readings, and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

The x-ray evidence consists of seven interpretations of four x-rays, with two readings being positive for pneumoconiosis. The administrative law judge initially noted that Dr. Dahhan, a B reader, read the November 14, 2001 and February 12, 2003 x-rays as negative, Director's Exhibit 11; Employer's Exhibit 5, and that there were no contrary interpretations. Decision and Order at 7. With regard to the January 8, 2002 x-ray, the

[1] Claimant does not challenge the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C. F.R. §718.202(a)(2) and (a)(3) and failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). We thus affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge accorded greater weight to Dr. Spitz's negative reading, over Dr. Baker's positive reading, based on the fact that Dr. Spitz was dually qualified as a B reader and Board-certified radiologist whereas Dr. Baker had no special radiological qualifications. *Id.* The administrative law judge next addressed the November 5, 2001 x-ray, which was read as negative by both Dr. Forehand, a B reader, and Dr. Wiot, a dually qualified reader, and as positive by Dr. Alexander, a dually qualified reader. The administrative law judge found that this x-ray was inconclusive. Specifically, given that the two, better qualified physicians, Drs. Wiot and Alexander, rendered conflicting interpretations, the administrative law judge rationally determined that he was "unable to ascertain whether the November 5, 2001 chest x-ray establishes the presence of pneumoconiosis." *Id*. at 8. The administrative law judge thereby analyzed the quantitative and qualitative nature of the relevant x-ray evidence, including assessing the readers' relative qualifications, and properly found that three of the four x-rays were negative for pneumoconiosis and thus, that claimant failed to establish the existence of pneumoconiosis by x-ray evidence at 20 C.F.R. §718.202(a)(1).[2] *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 9. We affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) because it is supported by substantial evidence and is in accordance with law.

Claimant next contends that the administrative law judge did not provide a valid reason for according less weight to the opinion of Dr. Baker at 20 C.F.R. §718.202(a)(4), the only physician of record to diagnose pneumoconiosis. Claimant also cites to the provisions of 20 C.F.R. §718.104(d) regarding an administrative law judge's consideration of the report of a claimant's treating physician, and asserts that the administrative law judge should have accorded controlling weight to Dr. Baker's opinion that claimant had pneumoconiosis, based on his status as claimant's treating physician.

Claimant's contentions lack merit. While the administrative law judge cited to 20 C.F.R. §718.104(d), *see* Decision and Order at 11, he did not explicitly consider Dr. Baker's opinion pursuant to the factors outlined therein. The administrative law judge, however, recognized Dr. Baker as having examined and treated claimant for his breathing problems between April 17, 1997 and January 8, 2002, which he characterized as "frequent and historic contact" with claimant, putting Dr. Baker "in a position to develop the best documented opinion in the record." Decision and Order at 10, 12.

[2] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge considered all of the x-ray evidence, without engaging in a selective analysis. Decision and Order at 6-8. We thus reject claimant's suggestion.

The administrative law judge found, however, that the probative value of Dr. Baker's opinion was diminished for two reasons:

> First, other than a few illegible treatment notes, the record does not contain the unique underlying documentation Dr. Baker may have used to reach his conclusion. Second, as discussed below, Dr. Baker based his pneumoconiosis diagnosis on recent radiographic evidence that was similarly available to Dr. Forehand and Dr. Dahhan. Thus, although Dr. Baker treated Mr. Herron for breathing problems, he does not have significant documentary advantage over the other two doctors based on the evidence in the record on the issue of whether Mr. Herron has black lung disease.

Decision and Order at 12.[3] The administrative law judge further stated that "[b]esides not gaining a documentary advantage as treating physician, Dr. Baker ultimately has less of a probative impact than Dr. Forehand and Dr. Dahhan" because, *inter alia*, Dr. Baker relied on a positive x-ray interpretation reread as negative by a better qualified reader. *See* Decision and Order at 7. The administrative law judge thereby provided valid reasons for finding the probative value of Dr. Baker's opinion diminished on the issue of the issue of the existence of pneumoconiosis. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Decision and Order at 12. We affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as he properly accorded less weight to Dr. Baker's opinion, the only medical opinion which could assist claimant in satisfying his burden of proof under 20 C.F.R. §718.202(a)(4). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

Claimant next asserts that the administrative law judge should have found Dr. Shipley's interpretation of the CT scan evidence to be suspect. Claimant notes that Dr. Shipley interpreted CT scans dated September 7, 1996 and December 23, 1996, noting, *inter alia*, "tiny ground glass nodules consistent with respiratory bronchiolitis associated with cigarette smoking." *See* Employer's Exhibit 12. Claimant argues that the evidence shows that claimant never smoked cigarettes.

Claimant's contention lacks merit. The administrative law judge correctly characterized Dr. Shipley's interpretations of the September 7, 1996 and December 23, 1996 CT scans as "show[ing] no evidence of coal workers' pneumoconiosis."

[3] The administrative law judge noted that a pulmonary function test taken in conjunction with Dr. Baker's September 12, 2002 physical examination, is not of record but is referenced by Dr. Baker. Decision and Order at 2 n.2, 10 n.29; *see* Claimant's Exhibit 2.

Employer's Exhibit 12; *see* Decision and Order at 9. This evidence cannot assist claimant in satisfying his burden of proof at 20 C.F.R. §718.202(a)(4) and thus, we decline to address it further. Based on the foregoing, we affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Claimant next argues that Dr. Baker's opinion is reasoned and documented and should have been credited by the administrative law judge to find total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability." Claimant's Brief at 9.

Claimant's contentions lack merit. Contrary to claimant's assertion, the administrative law judge addressed the exertional requirements of claimant's usual coal mine work as a mine foreman, and found that this work "required occasional heavy manual labor." Decision and Order at 4, 13, 14. The administrative law judge rationally found that he was unable to determine the reasonableness of Dr. Baker's opinion on the issue of total disability because objective evidence underlying the physician's opinion was not in the record. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 14. Further, the administrative law judge correctly noted that while Dr. Baker found "reduced" values on pulmonary function testing, he did not state that claimant was totally disabled. Decision and Order at 14; *see* Claimant Exhibit 2. A review of the record supports the administrative law judge's finding, where Dr. Baker never stated that claimant's respiratory or pulmonary problems compromised his ability to perform his usual coal mine work or comparable work. *See* Director's Exhibits 12, 13; Claimant's Exhibit 2. The administrative law judge further properly determined that to the extent Dr. Baker's reference to "reduced" values on pulmonary function testing "might be interpreted as a finding of total respiratory disability, his observation is again outweighed by the documented and reasoned consensus of Dr. Forehand and Dr. Dahhan that Mr. Herron does not have a pulmonary impairment." Decision and Order at 14; *see Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988).

Claimant further contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 10. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Lastly, claimant argues that inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 10. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and

progressive disease. Claimant's assertion that his pneumoconiosis has worsened over time, however, is unsupported by any evidence and thus, we decline to address it further.

Based on the foregoing, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) as it is supported by substantial evidence and is in accordance with law. We also affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2), and thereby failed to establish a change in one of the applicable conditions of entitlement under 20 C.F.R. §725.309(d). We thus affirm the administrative law judge's denial of benefits in the instant case.

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge