BRB No. 99-1186 BLA

CECIL SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOUR ACES MINING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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 - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0213) of Administrative Law Judge Joseph H. Kane on a duplicate 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 the initial Decision and Order, Administrative Law Judge Stuart A. Levin (the administrative law judge) found seventeen and one-half years of coal mine employment, and based on the filing date of the initial application for benefits,

applied the regulations found at 20 C.F.R. Part 718. Director's Exhibit 25. Judge Levin found that claimant failed to establish total disability at 20 C.F.R. §718.204(c), and accordingly denied benefits. Director's Exhibit 25. Claimant filed a duplicate claim on December 30, 1997 pursuant to 20 C.F.R. §725.309(d), and submitted new evidence. Director's Exhibit 1. The administrative law judge determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and determined that this was sufficient to establish a material change in conditions pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[1] He thus reviewed all of the evidence at Section 718.204(c) and found that claimant failed to establish total disability. Benefits were again denied. Claimant appeals, contending that the administrative law judge erred in failing to find that the medical reports sufficient to establish total disability at Section 718.204(c)(4).[2] Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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*,

[1] The administrative law judge determined that there were no findings made at 20 C.F.R. §718.202(a) in the previous Decision and Order. He held that for the purposes of 20 C.F.R. §725.309(d), none of the requisite elements of entitlement were previously adjudicated in claimant's favor. Decision and Order at 17, n.5. As no party disputes this, we affirm the administrative law judge's holding as rational. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(c)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant contends the administrative law judge erred in failing to credit the opinions of Drs. Baker and Chaney. We disagree. The evidence of record contains the opinions of five physicians. Dr. Broudy finds no coal workers' pneumoconiosis, that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor, and that claimant has no significant pulmonary disease or respiratory impairment which has arisen from his occupation as a coal miner. Director's Exhibit 14. Dr. Chaney, the treating physician, finds chronic obstructive pulmonary disease caused, at least in part, by coal mine employment and exposure to coal dust, and states that claimant has a pulmonary disability due to coal exposure and cigarette smoking. Director's Exhibits 17, 20. Dr. Baker finds coal workers' pneumoconiosis and minimal impairment, and opines that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. He also checked the "no impairment" box on a form. Director's Exhibit 5. Dr. Baker issued a report that was submitted with the earlier claim dated July 30, 1993 which states that claimant is not capable of returning to his former coal mine employment, and finds the impairment mild. Director's Exhibit 25. Dr. Myers diagnoses silicosis and opines that claimant is able to return to his usual coal mine employment from a pulmonary standpoint. Director's Exhibit 25. Additionally, Dr. Anderson finds pneumoconiosis, and concludes that claimant is physically able, from a pulmonary standpoint, to do his usual coal mine employment. Director's Exhibit 25.

The administrative law judge correctly determined that Dr. Baker's findings in 1993 were insufficient to establish total disability, and that, even if they were sufficient, they would contradict his most recent findings of no impairment. Thus, the administrative law judge permissibly discredited Dr. Baker's opinion as seriously flawed, and properly accorded it no weight. Decision and Order at 22-23; *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J. concurring.); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996). We therefore reject claimant's contention that Dr. Baker's opinion is reasoned and documented, as the administrative law judge properly discredited his opinion because of its inconsistency.

The only other opinion which could meet claimant's burden is Dr. Chaney's. Although the administrative law judge noted that Dr. Chaney is the treating physician, he found the physician's opinion lacks any objective testing, or any mention of treatment for breathing disorders. The administrative law judge therefore permissibly found Dr. Chaney's opinion not well reasoned or well documented. Decision and Order at 23; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-233 (6th Cir. 1995); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). We thus reject claimant's contention that the administrative law judge should have considered claimant's physical job requirements in conjunction with the opinions of Drs.

Baker and Chaney, as the administrative law judge properly accorded their opinions no weight.

Moreover, the administrative law judge permissibly accorded greater weight to Dr. Broudy, as his opinion is based on an examination and clinical findings and other pertinent data, making his opinion well reasoned. The administrative law judge did not assign any particular weight to the opinions of Drs. Anderson and Myers, but any error is harmless, as their opinions cannot establish total disability. *Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd* 9 BLR 1-104 (1986).

Contrary to claimant's argument, the administrative law judge is not required to consider age, education and work experience in determining whether claimant is totally disabled from his usual coal mine employment, inasmuch as these factors are not relevant to establishing total disability at Section 718.204(c). *See Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Nor, contrary to claimant's general contention, does a mere diagnosis of simple pneumoconiosis give rise to a presumption of total disability. *Gee*, *supra*. Accordingly, we affirm the administrative law judge's weighing of the medical evidence at 718.204(c), and affirm his finding of no total disability. As claimant failed to establish an essential element of entitlement, the administrative law judge properly denied benefits. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge