BRB No. 05-0144 BLA

WILLIE RAY JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-Respondent	)	DATE ISSUED: 08/23/2005
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-6097) of Administrative Law Judge Rudolf L. Jansen 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, after noting that the instant claim was a modification request, found forty years of qualifying coal mine employment.[1] The administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204 and thus, found that the evidence failed to support modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his weighing of the x-ray evidence pursuant to Section 718.202(a). Claimant also contends that the administrative law judge erred in admitting x-ray evidence in excess of the evidentiary limitations set forth in the revised regulations. Claimant argues further that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, states that the Director met his obligation to provide claimant with a complete and credible pulmonary evaluation.[2]

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[1] Claimant filed an application for benefits with the Department of Labor on August 8, 2000, which was denied by the district director on November 17, 2000 as claimant failed to establish any element of entitlement. Director's Exhibit 1. By letter dated March 28, 2001, claimant requested withdrawal of this claim, which was granted by the district director by Order dated April 5, 2001. *Id.* Employer objected to the Order granting claimant's request for withdrawal. *Id.* On June 27, 2001, claimant filed a second application for benefits. Director's Exhibit 3. Prior to a determination on the merits of claimant's second application, the district director addressed employer's objection to the granting of withdrawal of the initial claim and notified claimant that because the decision denying his initial claim had become effective, the district director lacked the authority under 20 C.F.R. §725.306 to grant withdrawal of claimant's August, 2000 claim. Director's Exhibit 28, citing *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc)*. Therefore, the district director treated claimant's June, 2001 claim as a request for modification. *Id.*

[2] We affirm the administrative law judge's decision to credit claimant with forty years of coal mine employment, his findings that claimant did not establish the existence of pneumoconiosis or that he is totally disabled pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(4), 718.204(b)(2)(i)-(iii), and his finding that the prior denial does not contain a mistake in a determination of fact, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

In challenging the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1), claimant argues that the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence. These contentions lack merit. The administrative law judge acted within his discretion as fact-finder in determining that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis, as none of the three newly submitted films was read as positive for the disease. Decision and Order at 9; Director's Exhibits 8, 11, 13; Employer's Exhibits 4, 6; *Staton v. Norfolk & Western Railroad 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). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Claimant further contends that the administrative law judge erred in failing to enforce the evidentiary guidelines set forth at 20 C.F.R. §725.414, as employer submitted x-ray evidence in excess of these guidelines. This contention lacks merit. Because the June, 2001 claim constituted a request for modification, claimant's August, 2000 claim was still pending on January 19, 2001, the effective date of the revised regulations. Thus, the evidentiary limitations set forth in revised Section 725.414 are not applicable to this claim. 20 C.F.R. §725.2(c).

In addition, we find no merit in claimant's assertion that remand to the district director is required because the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was discredited by the administrative law judge. The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form.[3] 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's

[3] Dr. Hussain examined claimant at the request of the Department of Labor on October 3, 2001. Director's Exhibit 11. He obtained an x-ray, pulmonary function study, and a blood gas study and noted claimant's occupational, social, and medical histories. Dr. Hussain diagnosed pneumoconiosis based on his x-ray findings and claimant's history of dust exposure. He stated that claimant has a mild pulmonary impairment but that claimant is capable, from a respiratory standpoint, of performing the work of a coal miner. *Id*.

Exhibit 11. The administrative law judge did not find, nor does claimant allege, that Dr. Hussain's report was incomplete as to any of the elements of entitlement.

With respect to the issue of the existence of pneumoconiosis, the administrative law judge accorded Dr. Hussain's opinion "less weight" because he provided no basis for his diagnosis of pneumoconiosis other than his reliance upon a 0/1 x-ray reading and claimant's history of coal dust exposure. Decision and Order at 10; Director's Exhibit 11. The administrative law judge, however, did not reject Dr. Hussain's opinion, but rather, found it outweighed by the contrary opinions of Drs. Broudy and Rosenberg, that claimant was not suffering from coal workers' pneumoconiosis, which he found well reasoned and documented. Decision and Order at 10-11. Moreover, with respect to the issue of total disability, the administrative law judge treated Dr. Hussain's opinion as adequately reasoned and documented. Decision and Order at 12. There is no merit, therefore, to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. 20 C.F.R. §725.406(a); *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

Regarding the administrative law judge's weighing of the evidence relevant to Section 718.204(b)(iv), claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's finding regarding the extent of any respiratory impairment. Claimant's Brief at 5-6, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Hvidzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Specifically, claimant maintains that:

> The claimant's usual coal mine work included being a foreman. It can reasonably be concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5-6. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

Because claimant does not otherwise allege any error in the administrative law judge's finding that none of the newly submitted medical opinions of record indicate that claimant is totally disabled from performing his usual coal mine employment, this finding is affirmed. Decision and Order at 12; Director's Exhibit 11; Employer's Exhibits 2, 4, 6, 10; *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Contrary to claimant's additional contention, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 (2004). Claimant's further assertion that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, provides no basis to disturb the administrative law judge's finding. The administrative law judge's findings as to the presence of a totally disabling respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Accordingly, we affirm the administrative law judge's finding that claimant has not established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2).

Because we have affirmed the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment, we also his affirm his determination that claimant has failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc*, 17 BLR 1-14 (1992).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge