BRB No. 05-0164 BLA

RONNIE EVERSOLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 08/23/2005
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-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 Alice M. Craft, 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.

Jeffrey S. Goldberg (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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5416) of Administrative Law Judge Alice M. Craft 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 twenty-seven years of coal mine employment and noted that the claim before her was a request for modification under 20 C.F.R. §725.310.[1] Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and determined that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis or total respiratory disability. The administrative law judge also found that the prior denial of benefits did not contain a mistake in a determination of fact. Accordingly, the administrative law judge determined that the prerequisites for modification were not established and denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1) and 718.204(b)(2)(iv). 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. 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), has also responded and urges the Board to reject claimant's allegation that he was not provided with a complete pulmonary

[1] Claimant filed a claim on April 7, 1997, which was finally denied by the Board in a Decision and Order issued on April 26, 2000. *Eversole v. Bledsoe Coal Corp.*, BRB No. 99-0811 BLA (Apr. 26, 2000)(unpub.); Director's Exhibit 1. Claimant filed a second application for benefits on February 22, 2001. The district director responded by inquiring as to whether claimant wanted his filing to be treated as a request for modification. Claimant notified the district director that he would rather withdraw his 1997 claim and file an application for benefits under the revised regulations which became effective on January 19, 2001. On March 31, 2001, the district director granted claimant's request to withdraw his 1997 claim and treated claimant's February 22, 2001 application for benefits as a new claim filed on March 31, 2001. Director's Exhibits 23, 29. In her Decision and Order, the administrative law judge found that because the district director did not have the authority to allow claimant to withdraw his 1997 claim once the decision denying his claim became effective, the case before her presented a request for modification. Decision and Order at 2; *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*); *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*). The parties have not challenged the administrative law judge's finding with respect to the procedural posture of this case.

evaluation.[2]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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 her discretion as fact-finder in determining that then newly submitted x-ray evidence did not support a finding of pneumoconiosis, as the preponderance of readings by physicians who are Board-certified radiologists and B readers was negative for pneumoconiosis. Decision and Order at 19; Director's Exhibits 12, 13; Employer's Exhibit 6; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995);[3] *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Claimant also argues 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 an x-

[2] We affirm the administrative law judge's decision to credit claimant with twenty-seven years of coal mine employment and 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)(3), 718.204(b)(2)(i)-(iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment took place in Kentucky. Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

ray reading in excess of these guidelines. This contention lacks merit. Because claimant's February, 2001 claim constituted a modification request, claimant's 1997 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. §§725.309(c), 725.2(c).

With respect to the newly submitted medical opinion evidence, claimant maintains that the administrative law judge erred in finding that Dr. Baker's opinion does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). We disagree. The administrative law judge acted within her discretion in finding that Dr. Baker's diagnosis of pneumoconiosis was outweighed by the contrary probative evidence of record, including the better-supported opinions of Drs. Broudy and Repsher. Decision and Order at 21; Director's Exhibits 12, 13; Employer's Exhibit 3; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Regarding the administrative law judge's findings under Section 718.204(b)(2)(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 6-8, citing *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Hvidzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a mine 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, as well as the medical opinion of Dr. Baker, 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 8. 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.[4] *Zimmerman v. Director, OWCP*, 871 F.2d

[4] Moreover, we note that the administrative law judge credited, as better explained, Dr. Repsher's opinion that claimant has no pulmonary impairment of any

564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

Claimant further alleges that the administrative law judge erred in according less weight to Dr. Baker's diagnosis because he relied upon nonconforming and/or nonqualifying objective studies. We disagree. The administrative law judge rationally determined that Dr. Baker's opinion was outweighed by the opinions in which Drs. Broudy and Repsher stated that claimant is able to perform his usual coal mine work from a respiratory standpoint, as their opinions are better supported by the objective evidence of record and are more thoroughly explained. Decision and Order at 22; Director's Exhibits 12, 13; Employer's Exhibit 3; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002).

Further, contrary to claimant's argument, 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). We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8.

Because claimant has not raised any meritorious allegations of error, we affirm the administrative law judge's findings under Sections 718.202(a) and 718.204(b)(2) and her determination that claimant has not demonstrated a change in conditions under Section 725.310. We also affirm the administrative law judge's determination that the prior denial contains no mistake in a determination of fact pursuant to Section 725.310, as it is rational and supported by substantial evidence. Decision and Order at 19, 21-22. We therefore affirm the denial of benefits. 20 C.F.R. §725.310; *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).

Finally, we reject claimant's assertion that remand to the district director for a new pulmonary evaluation is required on the ground that the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was not a complete pulmonary evaluation. The Director has previously taken the position that Section 923(b)

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kind, and Dr. Broudy's opinion that claimant has no significant respiratory or pulmonary impairment. Director's Exhibit 13; Employer's Exhibit 1.

of the Act requires him to provide a complete pulmonary evaluation once per claim filed by a miner, but not a new pulmonary evaluation with each modification request, because a modification request is merely a continuation of the miner's claim. This Board has given deference to the Director's interpretation. Accordingly, we hold that it is irrelevant whether claimant received a complete pulmonary evaluation from Dr. Hussain because he earlier received an evaluation in connection with this claim at the Director's request. That evaluation, conducted by Dr. Wicker on April 14, 1997, was fully credited by Administrative Law Judge Thomas F. Phalen, Jr. in his 1999 Decision and Order Denying Benefits, and by Judge Craft in her current decision, and claimant has not asserted that it was not a complete evaluation. Director's Exhibit 1 (internal exhibit labeled Director's Exhibit 10). Thus, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation because of any deficiency in Dr. Hussain's evaluation. 20 C.F.R. §725.406(a); *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge