BRB No. 05-0274 BLA

JAMES E. REYNOLDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SANDY FORK MINING COMPANY INCORPORATED	)	DATE ISSUED: 08/18/2005
	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
	)	
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer.

Sarah M. Hurley (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2003-BLA-5565) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent 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). Based on the date of filing, March 9, 2001, the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.[1] Director's Exhibit 5. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), or total disability at 20 C.F.R. §718.204(b), and that claimant had failed, therefore, to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis and total disability established. Claimant also argues, in light of the administrative law judge's failure to credit the opinion of Dr. Baker on the issue of pneumoconiosis, that the Director, Office of Workers' Compensation Programs, (the Director) failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim as required under the Act. 30 U.S.C. §923(b). Thus, claimant contends that he should either be awarded benefits or the case should be remanded to provide him with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. Employer contends that the evidence failed to establish the existence of pneumoconiosis and total respiratory disability, and that claimant failed to identify a valid

[1] Claimant filed his first claim for benefits on February 4, 1985, which was denied by Administrative Law Judge Bernard J. Gilday, Jr. on August 1, 1989, due to claimant's failure to establish any required element of entitlement. Director's Exhibits 1, 2. On appeal, the Board affirmed the denial of benefits. *Reynolds v. Sandy Fork Mining Co., Inc.*, BRB No. 89-2757 BLA (May 16, 1991)(unpub.). Claimant filed a second claim on May 14, 1992, which was denied on March 20, 1995, by Administrative Law Judge Robert D. Kaplan as claimant failed to establish the existence of pneumoconiosis, or a material change in condition pursuant to 20 C.F.R. §725.309(d)(2000). Director's Exhibit 2. On appeal, the Board affirmed the denial of benefits. *Reynolds v. Sandy Fork Mining Co., Inc.*, BRB No. 95-1559 BLA (Nov. 19, 1996) (unpub.). The Board also denied claimant's Motion for Reconsideration. *Reynolds v. Sandy Fork Mining Co., Inc.*, BRB No. 95-1559 BLA (Feb. 24, 1997) (unpub.)(Order). Claimant filed a third application for benefits on February 1, 1999, which was denied by the district director on May 20,1999, as claimant again failed to establish any required element of entitlement. Director's Exhibit 3.

legal basis for overturning the administrative law judge's total disability findings, and did not specifically challenge the finding that claimant did not establish a change in an applicable element of entitlement. The Director responds, contending, that claimant was provided a complete, credible pulmonary evaluation as required by the Act, pursuant to Section 413(b), 30 U.S.C. §923(b), and that, in any case, as Dr. Baker did not diagnose a total respiratory disability, it is unnecessary to remand the case, as claimant, even if the case were remanded for Dr. Baker to clarify his opinion regarding the existence of pneumoconiosis, would still be unable to establish total disability, a required element of entitlement.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge "need not defer to a doctor with superior qualifications" and "need not accept as conclusive the numerical superiority of x-ray interpretations." Claimant's Brief at 3. Claimant further suggests that the administrative law judge "may have" improperly selectively analyzed the x-ray evidence of record. Claimant's Brief at 3. We find no merit in these assertions. The administrative law judge rationally found that claimant had not established the presence of pneumoconiosis by a preponderance of the x-ray evidence as the administrative law judge considered the radiological qualifications of each reader, and the quality of each interpretation, and permissibly determined that the single positive reading of pneumoconiosis did not outweigh the greater number of negative readings. Decision and Order at 13-15; Employer's Exhibit 1; Claimant's Exhibit 1; Director's Exhibits 13, 15; 20 C.F.R. §718.202(a)(1); *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. 1995); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).[2] Further, claimant points to no evidence which

[2] Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth

supports his suggestion that the administrative law judge selectively analyzed the x-ray evidence of record. *See Cox v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge's failure to credit Dr. Baker's diagnosis of pneumoconiosis means that the Director has not fulfilled his obligation to provide claimant with a complete, credible pulmonary evaluation. Section 413(b) requires the director to provide claimant with a complete, credible, pulmonary evaluation which addresses each required element of entitlement, thereby affording claimant the opportunity to substantiate his claim. 30 U.S.C. §923(b). We reject claimant's argument. Dr. Baker's opinion addresses each requisite element of entitlement, including the existence of pneumoconiosis. The administrative law judge, however, found Dr. Baker's opinion diagnosing the existence of pneumoconiosis to be less reliable than the opinions of Drs. Broudy and Dahhan, who found no pneumoconiosis, because Dr. Baker provided inconsistent diagnoses regarding the presence of pneumoconiosis, and his opinion was not supported by adequate documentation, while the contrary opinions of Drs. Dahhan and Broudy were well supported by their underlying documentation and these physicians possessed better qualifications than Dr. Baker. This was rational. 30 U.S.C. §923(b); Employer's Exhibit 1; Director's Exhibits 13, 15; Decision and Order – Denial of Benefits at 15-16; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-8 (1993); *Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Accordingly, because Dr. Baker did address the existence of pneumoconiosis, but the administrative law judge rationally found his opinion, as to the existence of pneumoconiosis, to be less reliable than the opinions of Drs. Dahhan and Broudy, we agree with the Director that he has fulfilled his statutory obligation of providing claimant with a complete, credible pulmonary evaluation and remand is not required. *See Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1994). We, therefore, affirm the administrative law judge's finding that the existence of pneumoconiosis has not been established by the new evidence at Section 718.202(a)(4), and that claimant has failed therefore to establish a change in this applicable condition of entitlement.

Likewise, we reject claimant's contention that the evidence establishes total disability pursuant to Section 718.204(b)(2)(iv). Considering the opinions of Drs. Baker, Broudy, and Dahhan along with the non-qualifying pulmonary function and blood gas studies, the

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Circuit. Director's Exhibit 1; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge properly found that the evidence failed to establish total disability. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-6 (2004); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*); *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984). Further, contrary to claimant's argument, contraindication against further coal dust exposure is insufficient to establish that claimant is totally disabled. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Likewise, contrary to claimant's argument, it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are relevant to determining the miner's ability to perform comparable and gainful work, not to establishing whether claimant is totally disabled from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(2)(iv); *White*, 23 BLR at 1-6-7; *Fields*, 10 BLR 1-19. Additionally, contrary to claimant's assertion, total disability cannot be presumed on the basis of a diagnosis of simple pneumoconiosis. *See* Claimant's Brief at 4-6; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1; *White*, 23 BLR 1-7 n.8. Accordingly substantial evidence supports the administrative law judge's finding that the new medical opinion evidence failed to establish total respiratory disability. We, therefore, affirm the administrative law judge's finding that the new evidence is insufficient to establish the presence of a totally disabling respiratory impairment, and consequently his finding that claimant failed to establish a change in an applicable element of entitlement pursuant to Section 725.309(d). 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[3]

[3] The administrative law judge's further findings that the newly submitted evidence of record failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge