BRB No. 06-0292 BLA

RICKY L. CURRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEATHERWOOD ENERGY CORPORATION, INCORPORATED	)	DATE ISSUED: 08/30/2006
	)	
and	)	
	)	
TRAVELERS 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 – 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.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5298) of Administrative Law Judge Rudolf L. Jansen rendered on a subsequent claim filed on February 7, 2002, 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).[1] The administrative law judge initially found the evidence sufficient to establish twelve years of coal mine employment, as stipulated by the parties. Decision and Order at 5; Transcript at 7. The administrative law judge also found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that the newly submitted evidence was insufficient to establish a change in an applicable condition of entitlement since the date upon which claimant's prior claim became final pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and total disability pursuant to Section 718.204(b)(2)(iv). Claimant also argues that the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete pulmonary evaluation. Employer responds in support of the administrative law judge's denial of benefits. The Director responds, asserting that the Board should reject claimant's argument that the Director failed to provide him with a pulmonary examination that complies with the requirements of Section 413(b) of the Act.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[2] The relevant evidence consists of three x-rays taken on

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[1] Claimant filed his first claim for benefits on September 5, 1997, which was denied by the district director on January 5, 1998, because the evidence was insufficient to establish any element of entitlement. Decision and Order at 5; Director's Exhibit 1. Because claimant did not pursue this claim any further, the denial became final.

[2] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR

April 5, 2002, February 5, 2003, and February 20, 2003.[3] In considering the newly submitted x-ray evidence, the administrative law judge rationally found that the preponderance of the evidence did not establish the existence of pneumoconiosis, based on the two negative readings of the "most highly qualified readers," Drs. Broudy and Jarboe. Decision and Order at 11; Director's Exhibits 17, 18. An administrative law judge may credit x-ray interpretations by B readers with greater weight. *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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Thus, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Consequently, we affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d) by establishing the existence of pneumoconiosis under 20 C.F.R. §718.202(a), an element of entitlement previously adjudicated against claimant.[4]

Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).[5] The newly submitted medical opinions include the opinions by Drs. Simpao, Broudy, and Jarboe. While Dr. Simpao opined that claimant is totally disabled, Drs. Broudy and Jarboe stated that claimant is not totally disabled. Director's Exhibits 15, 17-19. In weighing these medical opinions, the administrative law judge rationally assigned the opinions of Drs. Broudy and Jarboe, that claimant is not totally disabled, with greater

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1-710 (1983); Decision and Order at 11-12.

[3] Dr. Simpao, who has no radiological qualifications, interpreted the April 5, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 15. Dr. Sargent, a Board-certified radiologist and B reader, interpreted this x-ray for film quality only. Director's Exhibit 16. The February 5, 2003 x-ray was interpreted as negative for pneumoconiosis by Dr. Broudy, a B reader. Director's Exhibit 17. The February 20, 2003 x-ray was read as negative for pneumoconiosis by Dr. Jarboe, a B reader. Director's Exhibit 18.

[4] Any error in the administrative law judge's identification of Dr. Jarboe as a Board-certified radiologist and B reader, when he is, in fact, solely a B reader, is harmless as it does not affect the administrative law judge's weighing of the x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 8, 11; Director's Exhibit 18.

[5] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *See Skrack, supra*; Decision and Order at 13.

probative weight because he found their opinions are better reasoned and documented than Dr. Simpao's opinion, in that they are supported by the normal objective evidence and normal pulmonary examinations of claimant.[6] *See Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13; Director's Exhibits 17-19. In contrast, the administrative law judge rationally assigned Dr. Simpao's opinion of total disability lesser probative weight, after finding it unreasoned and not well-documented, because Dr. Simpao failed to reconcile his conclusion of total disability with the normal results of the pulmonary function and blood gas studies.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 13; Director's Exhibit 15. Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).[8] Therefore, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement under Section 725.309(d) with respect to total disability pursuant to 20 C.F.R. §718.204(b), an element of entitlement previously adjudicated against claimant.

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[6] The administrative law judge also assigned greater probative weight to the opinions by Drs. Broudy and Jarboe, in part, because of their qualifications in the area of pulmonary medicine. Decision and Order at 13. The record reflects that Drs. Simpao, Broudy, and Jarboe are all Board-certified in internal medicine and pulmonary disease. Director's Exhibits 17, 18; Claimant's Exhibit 1. Any error in the administrative law judge's decision to assign greater probative weight to the opinions of Drs. Broudy and Jarboe, in part, because of their qualifications in the area of pulmonary medicine is harmless, however, as the administrative law judge additionally provided a valid reason for assigning their opinions greater probative weight. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983); Director's Exhibits 17-19.

[7] Claimant argues that the administrative law judge should have addressed whether the physicians had an accurate understanding of the exertional requirements of claimant's usual coal mine employment before relying on their opinions to hold that claimant is not totally disabled, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Claimant's Brief at 5. *Cornett* is distinguishable from the instant case in that in *Cornett*, Drs. Broudy and Dahhan knew only that the miner worked underground, before opining that the miner was not totally disabled. In the instant case, Drs. Broudy and Jarboe identified claimant's job titles and activities before concluding that claimant is not totally disabled. *See* Director's Exhibits 17-19.

[8] We reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

Claimant lastly contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required under Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). In the instant case, the administrative law judge rationally assigned greater probative weight to the opinions of Drs. Broudy and Jarboe, that claimant is not totally disabled, and thus lesser probative weight to Dr. Simpao's opinion of total disability. As the Director asserts, the administrative law judge's assigning of greater probative weight to the opinions of Drs. Broudy and Jarboe does not render Dr. Simpao's opinion incomplete or incredible. The Director is not required to provide claimant with a dispositive medical evaluation but only one that is complete and credible. Thus, we reject claimant's argument that the Director failed to provide claimant with a full pulmonary evaluation.

In light of our affirmance of the administrative law judge's finding that the newly submitted x-ray and medical opinion evidence is insufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge