BRB No. 08-0113 BLA

O. C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 08/25/2008
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

O.C., Center, Kentucky, *pro se*.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (05-BLA-5556) of Administrative Law Judge Alice M. Craft on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant filed his first application for benefits on April 30, 1980, which was denied by the district director on August 11, 1981, based on claimant's failure to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 1. Claimant's second application, filed on February 24, 1982, was treated as a request for modification and was also denied. Director's Exhibit 1. Claimant's third application, the

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718, and credited claimant with one year of qualifying coal mine employment. The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and therefore, that claimant established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Next, the administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director) responds to claimant's *pro se* appeal, urging affirmance of the administrative law judge's denial of benefits.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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subsequent claim for benefits, was filed on December 8, 2003 and is pending herein on appeal. Director's Exhibit 2.

[2] We affirm the administrative law judge's determination that because claimant demonstrated total disability, claimant established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309 as this determination, which is not adverse to claimant, has not been challenged by the Director, Office of Workers' Compensation Programs. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10-11.

totally disabling.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement… has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

We first address the administrative law judge's length of coal mine employment determination. Claimant bears the burden of proof in establishing the length of his coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The administrative law judge is given great latitude in the computation of years of coal mine employment and, as such, her calculation of years of coal mine work will be upheld, when based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578 (1983).

In the instant case, the administrative law judge considered the conflicting evidence of record and, within a proper exercise of her discretion, provided a rational basis for computing the length of claimant's coal mine employment as one year, between 1967 and 1979. *See Tressler v. Allen & Garcia Co.*, 8 BLR 1-365, 1-368 (1985). The administrative law judge acknowledged claimant's allegation that he worked for ten to fifteen years in coal mine employment "off and on" but noted that the Social Security earnings records supported only one year of coal mine employment. Decision and Order at 3; Director's Exhibit 2. The administrative law judge found the Social Security earnings records reflected coal mine employment for a cumulative year between 1967 and 1979 with three coal companies: Hovatter Trucking, Crest Coal Company, and Branham and Baker Coal Company. Decision and Order at 3; Director's Exhibits 1, 9. The administrative law judge assessed claimant's Employment History form and the Description of Coal Mine Work form, where claimant indicated that he worked with Wright Coal Company, Tip Top Coal Company, Terry Elcorn Coal Company, and Armstrong Trucking, and found these documents less reliable because claimant failed to

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

provide adequate information concerning the actual dates of employment for each company and there were no earnings reported for these companies in claimant's Social Security earnings record. Decision and Order at 3; Director's Exhibits 1, 3, 4. In addition, the administrative law judge considered affidavits and/or statements signed by Larry Nickels, Eva Lee Nickels, and Della Collins, indicating that claimant was employed with coal mine companies "in the 60's and 70's." However, the administrative law judge determined that these statements lacked any information concerning the identity of the coal companies that employed claimant or the duration of his alleged employment. Decision and Order at 3-4; Director's Exhibit 5. Accordingly, the administrative law judge rationally concluded that claimant's Social Security earnings records were a more reliable indicator of claimant's coal mine employment history. Because the administrative law judge permissibly found that the Social Security earnings records were more reliable than assertions by claimant and his witnesses, we affirm the administrative law judge's determination that claimant worked for one year in qualifying coal mine employment as this determination is rational and supported by substantial evidence. *See Mills*, 348 F.3d at 136, 23 BLR at 2-16; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1232 (1984) (administrative law judge did not err in primarily relying on Social Security earnings record to compute length of coal mine employment); Decision and Order at 4.

Relevant to Section 718.202(a)(1), the x-ray evidence of record consists of five x-ray interpretations of two chest x-ray films dated June 13, 1980 and March 1, 2004. The administrative law judge noted that the June 13, 1980 x-ray was read as negative for pneumoconiosis by three physicians: Dr. Dessen, a Board-certified radiologist and B reader; Dr. Ko, a Board-certified radiologist; and Dr. Deppe, who does not possess any radiological expertise. The administrative law judge found that the March 1, 2004 x-ray was read as positive for pneumoconiosis by Dr. Baker, a B reader, and as negative for pneumoconiosis by Dr. Barrett, a Board-certified radiologist and B reader. Decision and Order at 6, 13; Director's Exhibits 1, 14, 15.

In evaluating this evidence, the administrative law judge properly considered the radiological expertise of the physicians interpreting the x-rays and found that the sole positive interpretation of Dr. Baker, a B reader, was outweighed by the negative interpretation of the same x-ray by Dr. Barrett, a dually qualified radiologist. Further, relying on the weight of the negative readings, the administrative law judge rationally determined that the x-ray evidence was negative for pneumoconiosis. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Trent*, 11 BLR at 1-27-28; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 13. Hence, the administrative law judge's findings constitute a qualitative and quantitative analysis of the x-ray evidence, and we affirm her weighing of the conflicting readings

and her resultant finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis. Accordingly, as the administrative law judge's determination is rational and supported by substantial evidence, we affirm her finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Likewise, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3). A review of the record reveals that there is no biopsy evidence. Hence, claimant cannot establish the existence of pneumoconiosis under Section 718.202(a)(2). Similarly, a review of the record reveals that none of the presumptions set forth in Section 718.202(a)(3) is applicable to this case. The record contains no evidence establishing that claimant has complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the instant claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305; and this is a living miner's claim, *see* 20 C.F.R. §718.306. Decision and Order at 12.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), a review of the record reveals that there are three physicians' opinions of record. In a report dated June 13, 1980, Dr. Deppe opined that there was no evidence of pulmonary disease arising out of coal mine employment. Director's Exhibit 1. After conducting a pulmonary evaluation of claimant on March 1, 2004, Dr. Baker diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis due to coal dust exposure and cigarette smoking. Director's Exhibit 14. In a supplemental report dated October 7, 2004, Dr. Baker revised his original opinion, which was based on a coal mine employment history of twenty years, and opined that, if the duration of claimant's coal mine employment was only one year, such exposure would not cause either clinical or legal pneumoconiosis and claimant's long history of cigarette smoking would be the cause of his symptoms. Director's Exhibit 20. In treatment notes based on an examination of claimant on April 16, 2006, Dr. Dickerson, claimant's treating physician, indicated that claimant suffered from shortness of breath but did not opine as to its etiology.[4] Claimant's Exhibit 2.

Initially, the administrative law judge rationally found Dr. Deppe's 1980 opinion, that claimant had no pulmonary disease, less reliable as to claimant's current condition since it was remote in time. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *accord Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233 (table), 20 BLR 2-67 (4th Cir. 1996) (claimant's entitlement to benefits is measured

[4] The administrative law judge noted that no other treatment records were submitted into the record. Decision and Order at 10.

by his physical condition at the time of the hearing). Next, the administrative law judge found that the first opinion rendered by Dr. Baker diagnosing clinical and legal pneumoconiosis was entitled to diminished weight because Dr. Baker relied on his positive interpretation of a chest x-ray, which was subsequently read as negative for pneumoconiosis by a better qualified physician and which was contrary to the administrative law judge's determination that the probative x-ray evidence, *i.e.*, readings rendered by physicians with superior radiological expertise, was insufficient to establish the existence of pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-649 (6th Cir. 2003) (administrative law judge may not rely on physician's opinion that miner has pneumoconiosis when physician based his opinion entirely on x-ray evidence that was discredited by administrative law judge); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 14. Conversely, the administrative law judge permissibly found that Dr. Baker's supplemental report was worthy of probative weight as Dr. Baker opined that one year of coal mine employment, an employment history that was consistent with that found by the administrative law judge, was an insufficient duration of exposure to cause an occupational lung disease attributable to coal mine employment. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 14; Director's Exhibit 20. In addition, the administrative law judge properly found that Dr. Dickerson's opinion was insufficient to establish the existence of pneumoconiosis because Dr. Dickerson failed to attribute claimant's shortness of breath to a particular disease or condition. *See* 20 C.F.R. §718.201; *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm her weighing of the medical opinion evidence and, accordingly, affirm her finding that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4).

Because the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) is rational, contains no reversible error, and is supported by substantial evidence, we affirm her determination that claimant failed to satisfy his burden of establishing the existence of pneumoconiosis, a requisite element of entitlement under Part 718. *See* 20 C.F.R. §718.202(a); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Hence, we affirm the administrative law judge's determination that entitlement to benefits is precluded.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge 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