BRB No. 03-0488 BLA

RUBEN SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/22/2003
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (01-BLA-0806) of Administrative Law Judge Joseph E. Kane regarding a request for modification of a prior denial of a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal

[1] The prior procedural history is set forth in the Board's Decision and Order of July 19, 2000. *Shepherd v. Director, OWCP*, BRB No. 99-1079 (July 19, 2000) (unpublished).

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] In the duplicate claim, the Board affirmed the administrative law judge's finding that the newly submitted evidence did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b) and his finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). *Shepherd v. Director, OWCP*, BRB No. 99-1079 BLA (July 19, 2000) (unpublished). Subsequently, on August 18, 2000, claimant submitted new evidence and requested modification of the prior denial. Director's Exhibit 76. Following a hearing, the administrative law judge issued a decision crediting claimant with eight and one-half years of coal mine employment and finding the evidence insufficient to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R.§725.310 (2000).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish pneumoconiosis under Section 718.202(a)(1), (a)(4) or total disability under Section 718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs responds, urging affirmance of the administrative law judge's denial of benefits.[4]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are codified at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The revisions to the regulations at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

[4]We affirm, as unchallenged, the administrative law judge's finding of eight and one-half years of coal mine employment and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm as unchallenged on appeal, the administrative law judge's finding that there is no mistake in a determination in fact in the prior denial pursuant to 20 C.F.R.§725.310 (2000). *Id*.

After consideration of the administrative law judge's Decision and Order, the issues on appeal and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error. Under Section 718.202(a)(1), contrary to claimant's assertion, the administrative law judge did not selectively analyze the newly submitted x-ray evidence. The administrative law judge found that the newly submitted x-ray evidence of record contains two interpretations of one x-ray dated May 16, 2001. The administrative law judge correctly found that Dr. Barrett, a dually qualified physician,[5] read the x-ray as negative for the existence of pneumoconiosis and Dr. Baker, a Board-certified pulmonologist, read the same x-ray as positive for the existence of pneumoconiosis.[6] Decision and Order at 10. The administrative law judge rationally found the newly submitted x-ray evidence in equipoise and, therefore, insufficient to establish the existence of pneumoconiosis by a preponderance of the evidence. *Id; Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Under Section 718.202(a)(4), claimant argues that the administrative law judge erred in rejecting the opinions of Drs. Baker, Alam and Breeding. The administrative law judge found that Dr. Baker diagnosed coal workers' pneumoconiosis and bronchitis due, at least in part, to coal dust exposure. Decision and Order at 11, 12; Claimant's Exhibit 1. The administrative law judge acknowledged that Dr. Baker's opinion recorded claimant's symptoms, occupational, medical, smoking and family histories, the results of claimant's physical examination, normal pulmonary function and blood gas studies and a

[5] A dually qualified physician is a B reader and a Board-certified radiologist. A "B reader" is a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51(b)(2); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A designation of "Board-certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(1)(ii)(C).

[6] The administrative law judge acknowledged that Dr. Baker has been certified as a B reader in the past, but his curriculum vitae indicated that his certification expired on January 31, 2001, while the reading was performed on May 2001. Decision and Order at 10.

positive x-ray. Decision and Order at 7. The administrative law judge however rationally determined that Dr. Baker's reports did not constitute a reasoned medical opinion because the physician based his diagnosis on nothing more than the duration of claimant's coal dust exposure and his May 16, 2001 abnormal chest x-ray which was found to be insufficient alone to establish the existence of pneumoconiosis by x-ray in light of a contrary reading. *Peabody Coal Co. v. Groves*, 227 F.3d 829. 22 BLR 2-320 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 7, 11; Claimant's Exhibit 1. The administrative law judge further noted that Dr. Baker did not explain how the pulmonary function and arterial blood gas studies or examination findings supported a diagnosis of pneumoconiosis. Decision and Order at 7, 11-12; Claimant's Exhibit 1. Similarly, the administrative law judge permissibly discounted Dr. Baker's diagnosis of bronchitis because the sole basis for the doctor's conclusion, claimant's "history," was vague. *Groves*, 277 F.3d 829, 22 BLR 2-320; *Cornett*, 227 F.3d 569, 22 BLR 2-107; Decision and Order at 12; Claimant's Exhibit 1. The administrative law judge reasonably exercised his discretion by according diminished weight to Dr. Baker's opinion that he found documented, but inadequately reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Further, the administrative law judge reasonably found the opinions of Drs. Breeding and Alam, in which both physicians diagnosed pneumoconiosis, were not well documented because they failed to include the x-ray readings, medical findings or laboratory tests they relied on to reach their conclusions. *Groves*, 277 F.3d 829, 22 BLR 2-320; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en* banc); Decision and Order at 11; Director's Exhibits 88, 91. Contrary to claimant's contention, the administrative law judge was not required to accord enhanced weight to the opinions of Drs. Breeding and Alam based on their status as treating physicians, as he found that their opinions were not well supported. *Williams,v. Penn Allegheny Coal Co.*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Griffith v. Director , OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Under Section 718.204(b)(2)(iv), claimant alleges that the opinions of Drs. Baker, Alam and Breeding are sufficient to establish total disability. Claimant's contentions lack merit. The administrative law judge permissibly found Dr. Alam's opinion poorly supported because he failed to include the results of the pulmonary function study upon which he based his conclusion and referred to a blood gas study that is not part of the record. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 15; Director's Exhibits 88, 91. The administrative law judge reasonably found Dr. Breeding's opinion insufficient to establish total disability because in his August 3, 2000 letter, the doctor noted claimant's pulmonary problems and treatments, but failed to state claimant's limitations, and in his July 10, 2002 letter the doctor stated that claimant was totally disabled as a result of his pelvic fracture and lumbar sacral disc. *Fields*, 10 BLR 1-

19; Decision and Order at 15; Claimant's Exhibit 2. Similarly, the administrative law judge reasonably gave less weight to Dr. Baker's opinion because he concluded that claimant has a Class I impairment, but failed to discuss whether or not claimant would be prevented from performing his usual coal mine employment. *Fields*, 10 BLR 1-19; Decision and Order at 15; Claimant's Exhibit 1. Accordingly, we affirm the administrative law judge's finding that the preponderance of the newly submitted medical opinion evidence and the opinions of the physicians in the prior denial do not support a finding that claimant is totally disabled pursuant to Section 718.204(b), as it is supported by substantial evidence.

We reject claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the physicians' assessments of claimant's physical limitations. This analysis is required in situations where a physician details a claimant's physical limitations, but does not provide an opinion regarding the extent of any disability from which the claimant suffers. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc); see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). Herein, the administrative law judge rationally found that the medical opinions of record either failed to address claimant's limitations or addressed the issue of disability, but were not well supported, or stated that claimant's total disability was not respiratory or pulmonary in nature. Claimant's Exhibits 1, 2; Director's Exhibits 88, 91.[7] Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience, does not support a finding of total respiratory or pulmonary disability compensable under the Act.[8] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal* Co., 19 BLR 1-18 (1994); *see also Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

[7] Additionally, claimant argues because pneumoconiosis is a progressive and irreversible disease, it can be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis "claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable gainful work." Claimant's Brief at 7. Contrary to claimant's contention, there is no new evidence in the record to support this allegation.

[8] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

Because the administrative law judge reasonably found that the newly submitted medical evidence of record is insufficient to establish the existence of pneumoconiosis or total disability at Sections 718.202(a) and 718.204(b)(2), we affirm his finding that claimant has failed to establish a change in conditions pursuant to Section 725.310 (2000). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987).

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge