BRB No. 04-0271 BLA

KENNETH L. HATMAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRUSH RIDGE MINING	)	DATE ISSUED: 12/08/2004
	)	
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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Glenn B. Rutherford (Slovis, Rutherford & Weinstein P.L.L.C.), Knoxville, Tennessee, for claimant.

Herbert B. Williams (Stokes, Fansler & Williams), Knoxville, Tennessee, for employer.

Sarah M. Hurley (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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-0431) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a duplicate 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).[1] The administrative law judge credited claimant with eighteen years and nine months of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.202(a) overall,[3] and 718.203(b). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the evidence

[1]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 found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his first claim with the Social Security Administration (SSA) on January 31, 1973. Director's Exhibit 1. After several denials by the SSA, this claim was finally denied by the Department of Labor (DOL) on October 27, 1989. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim with the DOL on August 18, 1991. Director's Exhibit 2. This claim was denied by the DOL on June 30, 1992 and December 16, 1992. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his most recent claim with the DOL on June 12, 1998. Director's Exhibit 3.

[3]Since claimant's most recent coal mine work occurred in Tennessee, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). However, in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) overall, the administrative law judge weighed together all of the evidence pursuant to 20 C.F.R. §718.202(a)(1)-(4) in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *See also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The Board has declined to apply *Compton* and *Williams* to cases outside of the Third and Fourth Circuits. Nonetheless, in view of our disposition of this case pursuant to 20 C.F.R. §718.202(a)(1)-(4), we hold that any error by the administrative law judge in applying *Compton* in this case is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1982).

insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Both employer and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the administrative law judge's denial of benefits.[5]

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).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. In *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him in order to assess whether the evidence is sufficient to establish a material change in conditions. The Sixth Circuit also held that a miner must show that his condition has worsened since the filing of an initial claim. *Ross*, 42 F.3d at 998, 19 BLR at 2-20. Hence, the Sixth Circuit held that a miner must show that the new evidence differs qualitatively from the evidence submitted with the previously denied claim. *Ross*, 42 F.3d at 999, 19 BLR at 2-21; *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000). In the instant case, the administrative law judge stated that the dismissal of claimant's most recent, prior claim in June 1992 represents a failure by claimant to prove any of the elements of entitlement.[6]

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[4]The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

[5]Since the administrative law judge's length of coal mine employment finding and his findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6]The administrative law judge noted that a claimant must prove, by the preponderance of the evidence, the existence of pneumoconiosis, pneumoconiosis arising out of coal mine

Decision and Order at 11. The administrative law judge therefore stated, "for purposes of adjudicating the present duplicate claim, I will evaluate the evidence developed since June 1992 to determine whether [claimant] can now prove either the presence of pneumoconiosis or total respiratory disability." *Id.*

Claimant initially contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge erred in placing substantial weight on the numerical superiority of the negative x-ray interpretations. The record consists of sixteen interpretations of four x-rays dated August 4, 1998, September 15, 2000, May 25, 2001 and January 6, 2003. Fifteen readings are negative for pneumoconiosis, Director's Exhibits 13-16, 36, 37, 43; Claimant's Exhibit 1, and one reading is positive for pneumoconiosis, Director's Exhibit 15. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge properly accorded greater weight to the x-ray readings that were provided by physicians who are qualified as B readers and/or Board-certified radiologists, all of which were negative. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge specifically stated:

> Dr. Burton found the presence of pneumoconiosis in the September 15, 2000 film. However, Dr. Broudy, Dr. Dahhan, Dr. Wiot, Dr. Spitz and Dr. Sargent interpreted the film [as] negative for pneumoconiosis. In addition to their consensus outweighing Dr. Burton's sole opinion, all five doctors who read the chest x-ray as negative for pneumoconiosis are B-readers, and the later [sic] three physicians are also [B]oard certified radiologists. [Dr. Burton is not a B reader or a Board-certified radiologist.] As a result, I find that the September 15, 2000 film is negative for pneumoconiosis.

Decision and Order at 13. Thus, since the administrative law judge properly considered both the quantitative and qualitative nature of the x-ray readings, we reject claimant's assertion that the administrative law judge erred in placing substantial weight on the numerical superiority of the negative x-ray interpretations.[7] Further, since it is supported by substantial

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employment, total disability and total disability due to pneumoconiosis. Decision and Order at 10-11. However, the administrative law judge found that "of the four principle [sic] conditions of entitlement, the only elements that are capable of changing are whether a miner has pneumoconiosis or whether he is totally disabled." *Id.* at 11.

[7]We also reject claimant's assertion that the administrative law judge erred in failing to find that the x-ray readings are in compliance with the requirements of 20 C.F.R. §718.102

evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Next, claimant generally contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). However, claimant does not delineate how the administrative law judge erred in his analysis of the evidence relevant to the issue of the existence of pneumoconiosis. Claimant merely asserts that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Thus, claimant has failed to allege any specific error in the administrative law judge's findings or legal conclusions, and as such, claimant fails to provide a basis upon which the Board may review the administrative law judge's findings. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since the administrative law judge properly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18.

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

SO ORDERED.

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and Appendix A because claimant does not specifically identify in what way the x-ray evidence does not comply with the regulations.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge