BRB No. 05-0366 BLA

KERMIT SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	DATE ISSUED: 12/23/2005
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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[1] appeals the Decision and Order – Denying Benefits (03-BLA-5855) of Administrative Law Judge Joseph E. Kane in a subsequent miner's 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). The administrative law judge credited the miner with sixteen years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 8. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* at 8-9. The administrative law judge also found the new evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 9-10. Therefore, the administrative law judge found that claimant failed to demonstrate that one of the applicable conditions of entitlement has changed since his previous denial pursuant to 20 C.F.R. §725.309(d). *Id.* at 10. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the new evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant's Brief at 2-3. Additionally, claimant contends that the administrative law judge erred in failing to find total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 4-6. Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 4. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, arguing only that remand for a complete and credible pulmonary evaluation is not needed in this case. [2]

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[1]Claimant is Kermit Sizemore, the miner, who filed his second claim for benefits on July 18, 2001. Director's Exhibit 2. Claimant's first claim for benefits was filed on August 27, 1998. Director's Exhibit 1. A Department of Labor claims examiner denied claimant's first claim for benefits on December 21, 1998 because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability due to pneumoconiosis. *Id.*

[2]We affirm the administrative law judge's finding of sixteen years of coal mine employment and his findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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's second claim was filed on July 18, 2001, after the amended regulations took effect. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) . . .) has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1 (2004). Claimant's first claim was denied because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability due to pneumoconiosis.

Claimant initially contends that the administrative law judge erred in finding the new x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered four readings of three x-rays, taken on February 20, 2002, May 29, 2002, and September 24, 2003.[3] Of these four x-ray interpretations, the administrative law judge noted that Dr. Hussain, who is neither a B reader[4] nor a Board-certified radiologist, read the February 20, 2002 x-ray as positive for the existence of pneumoconiosis and Dr. Sargent, who is a B reader and a Board-certified radiologist, found this x-ray to be unreadable. Decision and Order at 8. The administrative law judge accorded greater weight to Dr. Sargent's reading, based on his superior qualifications, and found that this x-ray does not support a finding of pneumoconiosis. *Id.* The administrative law judge also noted that Dr. Hussain found the May 29, 2002 x-ray to be positive for the existence of pneumoconiosis and noted that the quality of that film was verified by Dr. Barrett. *Id.* However, the administrative law

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[3]In addition, Dr. Barrett interpreted claimant's May 29, 2002 x-ray for film quality only. Director's Exhibit 16.

[4]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

judge found the interpretation of a subsequent, September 24, 2003, x-ray by Dr. Repsher, a B reader, to be entitled to greater weight based on this physician's superior qualifications. Accordingly, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id.*

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3. Contrary to claimant's assertion, the administrative law judge permissibly considered the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit, because the administrative law judge thoroughly considered both the positive and negative x-ray interpretations in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Therefore, we affirm the administrative law judge's finding that the new x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[5]

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) based on the new medical evidence.

Pursuant to Section 718.204(b)(2)(iv), claimant asserts that, given the duties involved with claimant's last coal mine work, "it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment . . . ."

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[5]Although claimant states in his brief that "[p]ursuant to §725.414, there are limitations to the amount of evidence that each party can submit," claimant does not allege any error committed by the administrative law judge with regard to 20 C.F.R. §725.414. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant's Brief at 5. In a living miner's case, a finding of total respiratory disability must be corroborated by at least a quantum of medical evidence. *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1987); *Trent*, 11 BLR at 1-28. The administrative law judge found that because Drs. Hussain, Broudy, and Repsher opined that claimant retained the respiratory capacity to perform his usual coal mine employment,[6] claimant has not met his burden of establishing total respiratory disability based on the new medical opinion evidence. Claimant does not contend that the opinions of Drs. Hussain, Broudy, and Repsher are sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Accordingly, we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b) based on the new medical evidence. *See Fields*, 10 BLR at 1-21; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

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[6]Dr. Hussain opined that claimant suffers from a mild impairment. Director's Exhibit 10. However, Dr. Hussain also opined that claimant retains the respiratory capacity to perform the work of a coal miner. *Id.* In their reports, Drs. Broudy and Repsher found that claimant has no respiratory impairment and that he retains the functional respiratory capacity to perform his last coal mining job. Director's Exhibit 41; Employer's Exhibit 2.

[7]Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, 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).

Lastly, claimant argues that, given the administrative law judge's finding at Section 718.202(a)(4) that Dr. Hussain's opinion is not well-reasoned, the Director failed to provide him with a complete and credible pulmonary evaluation as required under Section 413(b) of the Act, 30 U.S.C. §923(b).[8] In considering Dr. Hussain's opinion pursuant to Section 718.202(a)(4), the administrative law judge found that this physician based his finding of the existence of pneumoconiosis on claimant's history of coal dust exposure and his positive reading of the February 20, 2002 x-ray. However, because the administrative law judge determined that the February 2002 film was unreadable based on Dr. Sargent's interpretation, the administrative law judge stated that this x-ray "cannot present objective support for Dr. Hussain's diagnosis." Decision and Order at 8. The administrative law judge further stated that Dr. Hussain performed another reading of the May 29, 2002 x-ray which he read as positive for the existence of pneumoconiosis. *Id.* at 8-9. Nonetheless, the administrative law judge found Dr. Hussain's opinion to be "not well-reasoned where he relied only on the x-ray and coal dust exposure to reach his diagnosis." *Id.* at 9. The administrative law judge added "[a]ssuming that [Dr. Hussain's] opinion was worthy of probative weight, I find that it is not sufficient to overcome the better reasoned opinion [of Dr. Repsher] weighing against a finding of pneumoconiosis." *Id.*

In response to claimant's assertion, the Director contends that the administrative law judge erred in stating that Dr. Hussain's finding of the existence of pneumoconiosis based on his February 20, 2002 x-ray reading is unreasoned because Dr. Hussain read a subsequent, May 29, 2002, x-ray as positive for pneumoconiosis and Dr. Barrett confirmed the quality of this later x-ray. However, the Director argues that any error the administrative law judge may have committed by not according some weight to Dr. Hussain's diagnosis of pneumoconiosis based on the May 29, 2002 x-ray is harmless because the administrative law judge, alternatively, assumed that Dr. Hussain's opinion was worthy of probative weight but outweighed by Dr. Repsher's credible opinion that claimant does not suffer from pneumoconiosis. Therefore, the Director maintains that because the administrative law judge "did not completely discredit [Dr. Hussain's opinion regarding pneumoconiosis], there was no breach of the Director's duty to provide a complete pulmonary evaluation and the Board should reject claimant's argument to the contrary." Director's Brief at 2-3. Additionally, the Director argues that even if Dr. Hussain's finding of pneumoconiosis were deemed to be credible and probative, claimant

[8]Claimant selected Dr. Hussain to perform a pulmonary evaluation on him. Director's Exhibit 9.

still could not prevail because Dr. Hussain's conclusions do not support a finding of total respiratory disability, an essential element of entitlement.[9]

Pursuant to Section 413(b) of the Act, "Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges,* 18 BLR at 1-87; *Pendley v. Director, OWCP,* 13 BLR 1-23 (1989)(*en banc order*), that a remand of the case is not warranted based on the facts of this case. Therefore, we decline to remand this case for another pulmonary evaluation.

Based on the foregoing, we affirm the administrative law judge's finding that this claim fails pursuant to Section 725.309 because claimant has not established that one of the applicable conditions of entitlement has changed since the date of the denial of the prior claim.

[9]None of the evidence submitted with the prior claim supports claimant in establishing total respiratory disability pursuant to 20 C.F.R. §718.204(b). Therefore, even if claimant established the existence of pneumoconiosis, an element of entitlement previously adjudicated against him pursuant to 20 C.F.R. §725.309(d), his second claim would fail because of a lack of evidence of total respiratory disability.

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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JUDITH S. BOGGS
Administrative Appeals Judge