BRB No. 04-0610 BLA

DANIEL HICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/28/2005
LEECO, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
	)	
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.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2003-BLA-5445) of Administrative Law Judge Rudolf L. Jansen on a 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). Initially, the administrative law judge found that this case involves the filing of a subsequent claim on May 15, 2001, pursuant to 20 C.F.R. §725.309.[1] Decision and Order at 3, 9-10. The administrative law judge credited claimant with twelve years of coal mine employment and adjudicated the claim under 20 C.F.R. Part 718. Decision and Order at 3; Hearing Transcript at 19. Weighing the newly submitted evidence of record, the administrative law judge found that claimant failed to prove the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 10-12. In addition, he found the new medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 12-14. Consequently, the administrative law judge found that claimant failed to meet his burden to establish a change in one of the applicable conditions of entitlement pursuant to Section 725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and (a)(4) and in failing to find total disability established pursuant to Section 718.204(b)(2)(iv). Claimant also contends that the administrative law judge erred in considering evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(3)(i). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal. However, the Director notes that any error in the administrative law judge's admission of evidence in violation of the Section 725.414 evidentiary limitations is harmless, in view of the administrative law judge's weighing of the admissible evidence.[2]

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[1] Claimant's initial application for benefits, filed on June 25, 1990, was denied by the district director on October 19, 1990, based on the determination that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1. Claimant filed a second application for benefits on May 2, 1996, which was denied by the district director on February 2, 1998. Director's Exhibit 1. The case was thereafter transferred to the Office of Administrative Law Judges. Following a formal hearing, Administrative Law Judge Thomas F. Phalen, Jr. denied benefits, finding that claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory disability. Director's Exhibit 1.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twelve years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii). These findings are therefore affirmed. *See 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

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 totally disabling. *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 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); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish both the existence of pneumoconiosis and that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either that he is suffering from pneumoconiosis or that he is totally disabled.[3] 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

In challenging the finding that the evidence is insufficient to establish one of the applicable elements of entitlement, claimant generally argues that the administrative law judge erred in finding that the new x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding that the weight of the x-ray interpretations by the better qualified physicians was negative for the existence of pneumoconiosis. 20 C.F.R.

[3] Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

§718.202(a)(1); Decision and Order at 5, 10; *see 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge considered a positive x-ray interpretation by Dr. Hussain, who does not possess any special radiological qualifications, but reasonably found that this interpretation was outweighed by the negative interpretations by physicians who are B readers. Decision and Order at 10; Director's Exhibits 9, 23, 27; Employer's Exhibit 2. Since the administrative law judge permissibly considered both the quality and the quantity of the new x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we affirm the administrative law judge's weighing of the x-ray evidence as it is supported by substantial evidence.[4] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton*, 65 F.3d at 59-60, 19 BLR at 2-280; *Woodward*, 991 F.2d 319-20, 17 BLR at 2-86-87; *Edmiston*, 14 BLR at 1-68. Moreover, although the administrative law judge erred in admitting the rebuttal re-reading of a September 14, 2000 x-ray by Dr. Poulos,[5] in violation of the regulations pursuant to 20 C.F.R. §724.414(a)(3)(ii), his reliance upon the respective qualifications of the physicians who rendered admissible readings to resolve the conflicting interpretations of the properly admitted evidence renders the error harmless. *Larioni v. Director*, OWCP, 6 BLR 1-1276 (1984).

Claimant further asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the medical opinion of Dr. Hussain. Specifically, claimant contends that the report of Dr. Hussain is well documented and reasoned, and alleges that the administrative law judge erred in stating

[4] Claimant also generally contends that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. However, claimant has not provided any support for this assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence.

[5] Employer submitted Dr. Poulos's March 18, 2002 re-reading of a film dated September 14, 2000 as rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). Employer's Brief at 11. However, the record does not contain an original reading of the September 14, 2000 x-ray submitted by claimant or the Director. Consequently, this reading would only be admissible as employer's affirmative evidence under Section 725.414(a)(3)(i). Because employer has already submitted two x-ray readings in support of its affirmative case, Director's Exhibit 27; Employer's Exhibit 2, this x-ray interpretation is excessive under Section 725.414(a)(3)(i).

that the physician's opinion was based solely upon his positive x-ray interpretation. Claimant's Brief at 4-5. We disagree.

In considering the medical opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally considered the quality of the evidence in determining whether the opinions of record were supported by the underlying documentation and adequately explained. Decision and Order at 11-12; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge found that Dr. Hussain based his opinion on a positive chest x-ray, claimant's history of dust exposure and the results of his pulmonary function and blood gas studies. Decision and Order at 11; Director's Exhibit 9. Nonetheless, the administrative law judge found Dr. Hussain's opinion to be poorly documented and reasoned because the physician relied on an inaccurate smoking history,[6] and also based his opinion on a pulmonary function study which was found to be invalid because of claimant's inability to correctly perform the ventilatory study. *Id.*; Director's Exhibit 9; Employer's Exhibits 3, 5. Thus, contrary to claimant's contention, the administrative law judge did not reject Dr. Hussain's medical opinion solely because it was based on a positive x-ray reading. Claimant's Brief at 4-5. As claimant does not otherwise allege any specific error in the administrative law judge's weighing of Dr. Hussain's opinion, we hold that the administrative law judge acted within his discretion as trier-of-fact in according this opinion less weight. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Rosenberg and Repsher, that claimant did not have pneumoconiosis, because he found their opinions to be better supported by claimant's medical history and the overall weight of the objective evidence when considered as a whole. Decision and Order at 12; Employer's Exhibits 2, 3, 5, 7; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also specifically noted that both physicians had the advantage of reviewing the medical evidence of record for a more complete picture of claimant's health. Decision and Order at 12. Consequently, we affirm as supported by substantial evidence the administrative

[6] Dr. Hussain stated that claimant never smoked, whereas the administrative law judge found that the record supports a smoking history of two packs per day for twenty years. Decision and Order at 3, 11; Director's Exhibit 9; Hearing Transcript at 22. The administrative law judge found this difference "significant." Decision and Order at 11.

law judge's finding decision to accord greater weight to the opinions of Drs. Rosenberg and Repsher and in finding that the medical opinion evidence does not establish the existence of pneumoconiosis under Section 718.202(a)(4).[7]

At Section 718.204(b)(2)(iv), claimant contends that the administrative law judge should not have rejected the opinion of Dr. Hussain because he did not rely solely on claimant's work history or pulmonary function study.[8] Claimant also contends that the administrative law judge must consider the exertional requirements of claimant's usual coal mine employment in considering an opinion on total disability.

Contrary to claimant's contention, the administrative law judge acted within his discretion in according little weight to Dr. Hussain's opinion, because he found that Dr. Hussain's conclusion that claimant was totally disabled was not supported by the objective medical evidence of record, especially in light of the finding that the pulmonary function studies were invalid. Decision and Order at 12; Director's Exhibit 9; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-106 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; *McMath*, 12 BLR at 1-9; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we affirm the administrative law judge's determination to accord Dr. Hussain's opinion less weight on the issue of total disability.

In addition, the administrative law judge rationally found that the contrary opinions of Drs. Rosenberg and Repsher, stating that claimant retains the pulmonary capacity to perform his usual coal mine employment, were more thorough and detailed, well-reasoned, and supported by the objective medical evidence, and thus were entitled to "full weight." Decision and Order at 13-14; Employer's Exhibits 2, 3, 5, 7; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields*, 10 BLR 1-19; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability under Section 718.204(b)(2)(iv).

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[7] The Director notes that the administrative law judge admitted the deposition testimony of Drs. Wiot and Poulos into the record in violation of 20 C.F.R. §725.414(c). Any error by the administrative law judge in admitting these depositions into the record is harmless because he did not rely on them. S*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends that a single medical opinion may be sufficient to invoke a presumption of total disability. *Meadows* addressed invocation of the interim presumption at 20 C.F.R. §727.203(a) and is not applicable to this Part 718 claim.

Moreover, 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. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985)(holding that the test for total disability is solely a medical test, not a vocational test); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (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 proof and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

In light of our affirmance of the administrative law judge's findings that the new evidence was insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability pursuant to Section 718.204(b), we affirm the administrative law judge's determination, pursuant to Section 725.309(d), that claimant failed to meet his burden to establish a change in one of the applicable conditions of entitlement since the prior denial of benefits.

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