BRB No. 04-0344 BLA

TERRY GREGORY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: _____
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5283) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a subsequent 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 at

[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.

least twenty years of coal mine employment and adjudicated this subsequent 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 pursuant to 20 C.F.R. §718.202(a)(1)-(4). 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) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[3] Consequently, the administrative law judge found the evidence insufficient to establish a "material" change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits.[4]

On appeal, claimant challenges the administrative law judge's finding 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). Claimant also challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined

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[2]Claimant filed his initial claim on January 22, 1996. Director's Exhibit 1. This claim was denied by the district director on June 26, 1996. *Id*. Because claimant did not pursue this claim any further, the denial of benefits became final. Claimant filed his most recent claim on February 14, 2001. Director's Exhibit 3.

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c). The administrative law judge's reference to the prior regulations at 20 C.F.R. §718.204(c)(1)-(4) (2000) in considering the issue of total disability is a typographical error. The administrative law judge properly considered the issue of total disability under the amended regulations.

[4]In finding that the instant subsequent claim was timely filed, the administrative law judge indicated the three-year limitation language in the decision by the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BRB 2-288 (6th Cir. 2001), was dicta. Contrary to the administrative law judge's finding, in *Furgerson v. Jericol Mining*, 22 BLR 1-216 (2002)(*en banc*), the Board held that the statute of limitations language in *Kirk* was not dicta. Nevertheless, we need not remand the case for further consideration in accordance with *Kirk* in view of our disposition of the case on the merits.

to participate in this appeal.[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).

Although the administrative law judge indicated that claimant's 2001 claim is a "duplicate" claim under 20 C.F.R. §725.309 (2000), it is actually properly identified as a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1996 claim was finally denied. 20 C.F.R. §725.309(d).[6] The pertinent regulations provide that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. *Id*. In considering claimant's 1996 claim, the district director found that the evidence was insufficient to establish that claimant suffered from pneumoconiosis, that the disease was caused at least in part by coal mine work, and that claimant was totally disabled by the disease.[7] Director's Exhibit 1.

Initially, claimant contends that the administrative law judge erred in finding the

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[5]Since the administrative law judge's twenty year length of coal mine employment finding and his findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) 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 stated that "the regulations regarding duplicate claims as they existed prior to January 19, 2001, are applicable in this case." Decision and Order at 6. Although the administrative law judge erred in applying the regulations at 20 C.F.R. §725.309 (2000) rather than the amended regulations at 20 C.F.R. §725.309, his error is harmless because it does not affect the outcome of this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7]In characterizing the denial, the administrative law judge stated that "[t]he claim filed in 1996 was denied when it was determined that the [c]laimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis." Decision and Order at 8.

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 improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The record consists of three x-rays dated February 7, 2001, April 18, 2001 and June 4, 2001. Dr. Baker read the February 7, 2001 x-ray as positive for pneumoconiosis, Director's Exhibits 11, 22, while Dr. Wiot read the same x-ray as negative for pneumoconiosis, Director's Exhibit 32. Further, Dr. Hussain read the April 18, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 10, while Dr. Wiot read the same x-ray as negative for pneumoconiosis, Director's Exhibits 33. The administrative law judge also stated that "Dr. Sargent interpreted the [April 18, 2001] x-ray for quality purposes, finding the quality to be good ('1')."[8] Decision and Order at 9. Both Drs. Broudy and Wiot read the June 4, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 31; Employer's Exhibit 4.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in the qualifications of the readers. *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). In this case, the administrative law judge properly accorded greater weight to the negative x-ray readings that were provided by physicians who are B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In considering the conflicting x-ray readings, the administrative law judge stated:

> In the instant case, the positive readings were rendered by Drs. Baker and Hussain, neither of which holds any special qualifications. By contrast, Drs. Wiot and Broudy interpreted negative x-ray readings. Both physicians are B-readers, Dr. Wiot being also a [B]oard-certified radiologist.

Decision and Order at 10 (footnote omitted). Thus, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. Moreover, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the

[8]Dr. Sargent is a B reader and a Board-certified radiologist. Director's Exhibit 10.

existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[9] *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Next, claimant 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). Drs. Baker and Hussain opined that claimant suffers from pneumoconiosis, Director's Exhibits 10, 11, while Drs. Broudy and Vuskovich opined that claimant does not suffer from the disease, Employer's Exhibits 2, 4, 6, 7, 9. The administrative law judge permissibly discredited the opinions of Drs. Baker and Hussain because they are not reasoned, noting that their diagnoses of pneumoconiosis are based only on x-ray readings and histories of coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge stated, "[a]s both physicians [Drs. Baker and Hussain] fail to state any other bases for their diagnoses of pneumoconiosis beyond the x-rays and exposure history, I find their reports neither well-reasoned nor well-documented." Decision and Order at 14. Thus, we reject claimant's assertion that the administrative law judge erred in substituting his opinion for that of Drs. Baker and Hussain by finding that their positive x-ray readings were outweighed by the negative x-ray readings of record. Further, since the administrative law judge properly discredited the opinions of Drs. Baker and Hussain, the only opinions of record that could support a finding of pneumoconiosis, 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).

Finally, claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[10] Claimant specifically asserts that the administrative law judge erred in discrediting the opinions of Drs. Baker and Hussain. The administrative law judge

[9]Claimant generally suggests that the administrative law judge "may have" selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 8-10. Thus, we reject claimant's suggestion.

[10]Claimant asserts that a single medical opinion supportive of a finding of total disability is "sufficient for invoking the presumption of total disability." Claimant's Brief at 8. However, claimant has not identified any presumption of total disability that is applicable in this case, nor does one exist, given the facts and evidence in this Part 718 case.

considered the reports of Drs. Baker, Broudy, Hussain and Vuskovich. In a report dated February 7, 2001, Dr. Baker opined that claimant suffers from a Class I impairment. Director's Exhibit 11. Dr. Baker also opined that the presence of pneumoconiosis suggests a 100% disability since it usually requires removal from exposure to the dust causing the condition. *Id*. In a subsequent deposition dated December 10, 2001, however, Dr. Baker opined that claimant retains the respiratory capacity to return to his previous job in or around the mining industry. Director's Exhibit 30 at 5, 7-8. Dr. Hussain, in a report dated April 18, 2001, opined that claimant suffers from a moderate impairment and that claimant does not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 10. However, in a subsequent deposition dated February 8, 2002, Dr. Hussain opined that claimant retains the respiratory capacity to return to his previous job in and around the mining industry. Director's Exhibit 29 at 10. Drs. Broudy and Vuskovich opined that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similar arduous manual labor. Employer's Exhibits 2, 4, 6, 7, 9. Based on his weighing of the conflicting medical opinions, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment.

Claimant asserts that the administrative law judge erred in discrediting the opinions of Drs. Baker and Hussain because they are based on non-qualifying pulmonary function studies. Contrary to claimant's assertion, the administrative law judge permissibly discredited Dr. Baker's opinion because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989). As previously noted, Dr. Baker opined that claimant is 100% occupationally disabled because the presence of pneumoconiosis usually requires removal from exposure to the dust causing the condition. Director's Exhibit 11. Further, the administrative law judge permissibly discredited Dr. Baker's February 7, 2001 opinion because it is inconsistent with his subsequent December 10, 2001 opinion.[11] *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984). Additionally, the administrative law judge permissibly discredited Dr. Hussain's April 18, 2001 opinion because it is inconsistent with

[11]In considering Dr. Baker's February 7, 2001 report, the administrative law judge noted that "[Dr. Baker] states that this impairment constitutes a finding of total disability." Decision and Order at 16. The administrative law judge also noted that "Dr. Baker, in his deposition testimony taken on December 10, 2001, testified that he believes that the [c]laimant retained the respiratory capacity to return to his previous job in the mining industry." *Id*. at 17.

his subsequent February 8, 2002 opinion.[12] *Id*. Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the opinions of Drs. Baker and Hussain because they are based on non-qualifying pulmonary function studies.[13] Moreover, since the administrative law judge permissibly discredited the opinions of Drs. Baker and Hussain, *Zimmerman*, 871 F.2d at 567, 12 BLR at 2-258; *Fagg*, 12 BLR at 1-79; *Surma*, 6 BLR at 1-802, we reject claimant's assertion that the administrative law judge erred in failing to identify and compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's and Dr. Hussain's assessments of claimant's impairment. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that claimant's condition has worsened to the point that he is totally disabled, since pneumoconiosis is a progressive and irreversible disease. Claimant has the burden of establishing each element of entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). The record contains no new credible medical opinion evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv).

We also hold that, contrary to claimant's assertion, 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 work. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R.

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[12]With regard to Dr. Hussain's April 18, 2001 opinion, the administrative law judge noted that "[Dr. Hussain]…stated that the [c]laimant does not have the respiratory capacity to return to his previous job in the mining industry." Decision and Order at 17. The administrative law judge additionally noted that in a deposition dated February 8, 2001, "Dr. Hussain responded, '[b]ased upon that, [claimant] is not impaired as far as his pulmonary function study or his blood gas.'" *Id*.

[13]As previously noted, Dr. Baker additionally opined that claimant suffers from a Class I impairment. Director's Exhibit 11. Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*).

§718.202(a), total disability at 20 C.F.R. §718.204(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), *see* n.5 at 3, we hold that claimant failed to establish that any of the applicable elements of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309.

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