BRB No. 04-0394 BLA

EDD BEGLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 01/18/2005
	)	
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.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2003-BLA-5474) of Administrative Law Judge Rudolf L. Jansen with respect to 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). The administrative law judge noted that claimant filed claims with the Department of Labor and the Social Security Administration that were finally denied on March 31, 1980. Director's Exhibit 1. The administrative law judge further determined, pursuant to 20 C.F.R. §725.309, that claimant filed a subsequent claim on May 25, 2001. Director's Exhibit 3. The

administrative law judge considered the newly submitted evidence of record and determined that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1), (a)(4) and 718.204(b)(2). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has also responded and maintains that the Board should affirm the denial of benefits.[1]

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 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).[2] Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues initially that the administrative law judge erred in finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as the administrative law judge relied exclusively on the qualifications of the x-ray readers, counted heads, and selectively analyzed the evidence. These contentions are without merit. The administrative law judge rationally determined that the existence of pneumoconiosis was not demonstrated at Section 718.202(a)(1) based upon the fact that a preponderance of the x-ray

[1] We affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), (a)(3) and total disability under §718.204(b)(2)(i)-(iii), as these determinations were not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 3.

interpretations by the better qualified physicians was negative for the disease. Decision and Order at 13; 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

With respect to the medical opinion evidence, claimant argues that the administrative law judge erred in finding that Dr. Baker's opinion was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 14; Director's Exhibit 11. We disagree. The administrative law judge acted within his discretion in finding that Dr. Baker's diagnosis of coal workers' pneumoconiosis was not well documented or well reasoned, as it was premised solely upon a positive x-ray reading, which conflicted with the administrative law judge's finding at Section 718.202(a)(1), and upon claimant's history of coal dust exposure. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge also rationally determined that Dr. Baker did not diagnose legal pneumoconiosis, as Dr. Baker did not indicate that claimant's chronic bronchitis was related to coal dust exposure. 20 C.F.R. §718.201.

Claimant also alleges generally that the administrative law judge should have determined that Dr. Simpao's opinion supported a finding of pneumoconiosis under Section 718.202(a)(4). Director's Exhibit 10. Because claimant has not identified a specific error in the administrative law judge's decision to discredit Dr. Simpao's diagnosis of pneumoconiosis, there is no basis upon which we can review the administrative law judge's finding. It is, therefore, affirmed. *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).

Claimant contends that the administrative law judge should not have discredited Dr. Simpao's diagnosis of a totally disabling respiratory impairment because Dr. Simpao relied upon a nonconforming, nonqualifying pulmonary function study. Claimant also argues that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work to the functional limitations noted by Dr. Simpao. Lastly, claimant cites the Board's decision in *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), and argues that the administrative law judge should have considered claimant's age, education, and vocational status in determining whether claimant is totally disabled.

Claimant's contentions lack merit. The administrative law judge acted within his discretion in finding that Dr. Simpao's opinion regarding total disability was entitled to little weight, as Dr. Simpao relied upon a pulmonary function study that was invalidated by Dr. Vuskovich and because Dr. Simpao did not explain why he diagnosed a moderate impairment in light of pulmonary function study and blood gas study values that were

within the normal range. *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Although claimant is correct in stating that an administrative law judge may not discredit a physician's diagnosis of a totally disabling respiratory impairment merely because the diagnosis is based on nonqualifying objective studies, an administrative law judge may accord less weight to an opinion where, as here, the physician does not explain how the objective evidence supports his conclusion. *Carson*, 19 BLR at 1-22; *Clark*, 12 BLR at 1-155.

In addition, the physicians who indicated that claimant could no longer perform his usual coal mine work, Drs. Baker and Simpao, did not describe physical limitations that the administrative law judge could compare to the exertional requirements of claimant's job as a scoop operator and belt line worker. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clay v. Director, OWCP*, 7 BLR 1-82 (1984). Finally, claimant's reliance on *Bentley* is misplaced. In *Bentley*, the Board held that age, work experience and education are relevant only to a claimant's ability to perform comparable and gainful work, an issue which was not reached in this case because the administrative law judge properly found that claimant did not establish that he had any impairment that disabled him from his usual coal mine employment. 20 C.F.R. §718.204(b)(1)(i), (ii); *see also Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

We therefore affirm the administrative law judge's findings that claimant has failed to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(b)(2). Thus, we must also affirm the denial of benefits.[3] *Perry*, 9 BLR at 1-2.

[3] The Director, Office of Workers' Compensation (the Director), notes correctly that claimant's May 25, 2001 application for benefits should have been treated as a request for modification pursuant to 20 C.F.R. §725.310 and not a newly filed subsequent claim, because claimant's November 17, 1994 claim was still pending. Although the district director issued an order purporting to grant claimant's request to withdraw his 1994 claim, the district director lacked the authority to grant withdrawal, because a decision on the merits denying claimant's 1994 claim had already become effective. *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*); *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*). We concur with the Director, however, that remand is not required because the administrative law judge addressed whether the newly submitted evidence established a change in conditions, and claimant alleges no error regarding the absence of a mistake of fact finding. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge