BRB No. 04-0421 BLA

JIMMY DALE HENSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 01/25/2005
	)	
and	)	
	)	
JAMES RIVER COAL 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 - 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 S. Kennedy and Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5519) of Administrative Law Judge Rudolf L. Jansen on a claim[1] filed pursuant to the provisions

[1] Claimant, Jimmy Dale Hensley, filed his first application for benefits on June 7, 1995, which was denied by Administrative Law Judge J. Michael O'Neill in a Decision and Order dated April 28, 1997 and affirmed by the Board on February 25, 1998.

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 initially credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-two years. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b), and therefore, concluded that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final under 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Sections 718.202(a)(1) and (a)(4) and total respiratory disability under Section 718.204(b)(2)(iv).[2] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal.

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that he failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the x-ray interpretations and by relying exclusively on the qualifications of the physicians providing the x-ray interpretations.

Director's Exhibit 1; *Hensley v. Mountain Clay, Inc.*, BRB No. 97-1098 BLA (Feb. 25, 1998) (unpub.). Claimant took no further action on this claim. On April 2, 2001, claimant filed a subsequent claim for benefits, which is the subject of the case *sub judice*. Director's Exhibit 3.

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3-4, 9-10, 11-12.

Section 718.202(a)(1) provides, in pertinent part, "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1). The administrative law judge considered the radiological expertise of the physicians and accorded greater weight to the negative interpretations of those physicians who were both Board-certified radiologists and B-readers and accorded less weight to the sole positive x-ray interpretation provided by a physician with no radiological or B-reader expertise. This was rational. 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9; Director's Exhibits 9, 10, 25, 26; Employer's Exhibits 2. Consequently, because the administrative law judge rationally relied on the negative x-ray readings of physicians with superior radiological expertise, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(1).

Regarding Section 718.202(a)(4), claimant avers that the administrative law judge erred not only by failing to credit the opinion of Dr. Simpao, but also by substituting his opinion for that of Dr. Simpao. Claimant asserts that the administrative law judge erred in discrediting Dr. Simpao's opinion not only because Dr. Simpao relied on a positive x-ray interpretation, which was contrary to the administrative law judge's finding that the x-ray evidence was negative for the existence of pneumoconiosis, but also because Dr. Simpao rendered a documented report based on a physical examination, claimant's medical and employment histories, chest x-ray, pulmonary function study, arterial blood gas study.

The administrative law judge found that, although Dr. Simpao's opinion diagnosing the presence of pneumoconiosis was well documented and reasoned, it was entitled to no weight because it contained a cursory analysis and was outweighed by the contrary opinion of Dr. Vuskovich. The administrative law judge, within a proper exercise of his discretion, found that Dr. Vuskovich's opinion, that claimant does not suffer from coal workers' pneumoconiosis, which was based on a lack of radiological evidence, lack of physical examination findings consistent with pneumoconiosis, and normal pulmonary function and arterial blood gas studies, was entitled to dispositive weight because Dr. Vuskovich rendered a thorough and detailed report concerning claimant's respiratory condition, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405, 1-407 (1985), possessed a more complete picture of claimant's pulmonary health because he analyzed the medical reports of record, *see Stark v. Director,* OWCP, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP,* 7 BLR 1-106, 1-108 (1984), and maintained superior expertise than Dr. Simpao in occupational and pulmonary disease medicine, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-

107 (6th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order at 10-11. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm the administrative law judge's crediting of Dr. Vuskovich's opinion and discrediting of Dr. Simpao's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant argues that in rendering his finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred by rejecting the well reasoned and documented opinion of Dr. Simpao and by finding that claimant failed, therefore, to carry his burden of establishing total respiratory disability by a preponderance of the evidence. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant argues that a single medical opinion may be sufficient to invoke the presumption of total disability.

Claimant's reliance on *Meadows* is misplaced, however, because that case dealt with the application of the interim presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. Part 727. The instant case arises under 20 C.F.R. Part 718 which requires that claimant must affirmatively establish each element of entitlement. 20 C.F.R. §§718.2, 718.202, 718.203, 718.204; *Trent*, 11 BLR at 1-26; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *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). The administrative law judge permissibly found that Dr. Simpao's total disability assessment was entitled to little probative weight because Dr. Simpao, relying on non-qualifying pulmonary function and arterial blood gas studies, failed to provide any rationale or explanation for his finding that claimant does not have the respiratory capacity to perform his usual coal mine employment. *See Cornett*, 227 F.3d at 569, 22 BLR at 2-107; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89 n.4; *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-155; *King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-46; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 12.

Claimant further contends that the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work or to consider that claimant's disability, age, and limited education and work experience would preclude claimant from obtaining gainful employment outside of the coal mine industry. Because he assigned little probative weight to Dr. Simpao's opinion that claimant was totally disabled and found that the other physicians of record, Drs. Vuskovich and Broudy,

opined that claimant retained the physiological capacity to continue his previous coal mine employment, the administrative law judge properly concluded that the medical opinion evidence was insufficient to demonstrate that claimant is totally disabled by a respiratory or pulmonary impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-87 (1988); *Gee*, 9 BLR at 1-4. Hence, contrary to claimant's assertion, the administrative law judge did not err by failing to specifically compare the exertional requirements of claimant's usual coal mine work with claimant's physical limitations or to consider other factors affecting claimant's ability to obtain gainful employment because the administrative law judge found that the opinion of Dr. Simpao, the only physician of record to opine that claimant was totally disabled, was insufficient to demonstrate total respiratory disability since this opinion did not contain any supporting rationale. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 12. Accordingly, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004).

Consequently, because we affirm the administrative law judge's determinations that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability pursuant to Section 718.204(b) as these findings are rational, contain no reversible error, and are supported by substantial evidence, we must affirm the administrative law judge's determination that claimant failed to establish that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final under Section 725.309(d). *See Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge