BRB No. 04-0593 BLA

ELDON COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 01/31/2005
	)	
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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5896) of Administrative Law Judge Rudolf L. Jansen denying benefits 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). The administrative law judge found, and the parties stipulated to, twenty-five years of coal mine employment.[1] Decision and Order at 3; Hearing Transcript at 8. Based on

[1] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 1, 3. Accordingly, this case arises within the jurisdiction of

the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4, 9. After determining that this claim is a subsequent claim,[2] the administrative law judge noted the proper standard and found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 10-14. Consequently, the administrative law judge found that claimant failed to establish any element of entitlement previously adjudicated against him and thus did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Decision and Order at 10, 14. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and in failing to find total disability due to pneumoconiosis established pursuant to 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 filed a letter indicating that he will not respond to this appeal.[3]

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to

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the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 3.

[2] Claimant filed his initial claim for benefits on June 24, 1994, which was finally denied by the district director on December 9, 1994 as claimant failed to establish the existence of pneumoconiosis or the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on April 23, 2001, which was denied by the district director on January 28, 2003. Director's Exhibits 2, 24. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 25.

[3] The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).[4]

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge correctly noted that the previous claim was denied because claimant did not establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 10; Director's Exhibit 1. Considering the newly submitted evidence, the administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (a)(4), or total disability pursuant to Section 718.204(b)(2)(iv). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

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[4] The Sixth Circuit court also held under the former regulation that the administrative law judge must compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).

Pursuant to Section 718.202(a)(1), the administrative law judge considered four readings of three new chest x-rays. Three readings were negative for pneumoconiosis and one was positive. The administrative law judge accorded greater weight to the readings by physicians possessing radiological credentials. Decision and Order at 10. Because the sole positive reading was rendered by a physician lacking radiological qualifications, Director's Exhibit 7, the administrative law judge found that the x-ray evidence did not support a finding of the existence of pneumoconiosis.[5] Claimant contends that the administrative law judge erred by relying on the physicians' radiological credentials and improperly relied on the numerical superiority of the negative x-ray readings. Claimant also suggests that the administrative law judge "may have 'selectively analyzed' the x-ray evidence . . . ." Claimant's Brief at 3. Contrary to claimant's assertions, a review of the record reflects that the administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See* 20 C.F.R. §718.202(a)(1); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant asserts that the administrative law judge erred by failing to find that Dr. Baker's medical opinion established the existence of pneumoconiosis. Claimant's Brief at 4-5. We disagree. Dr. Baker diagnosed "Coal Workers' Pneumoconiosis 1/0" based on "abnormal chest x-ray & coal dust exposure." Director's Exhibit 7 at 4. The administrative law judge acted within his discretion when he found that this portion of Dr. Baker's opinion was not well documented or reasoned because it was based solely on a positive x-ray reading and a coal dust exposure history. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003). Dr. Baker also diagnosed "chronic bronchitis" based upon "history of cough, sputum production, and wheezing," and attributed the chronic bronchitis to coal dust exposure. Director's Exhibit 7 at 4. The administrative law judge found this portion of Dr. Baker's opinion "to be reasoned regarding the diagnosis of chronic bronchitis." Decision and Order at 12. The administrative law judge, however, permissibly found that Dr. Baker's opinion was outweighed by the "better reasoned" medical opinions of Drs. Dahhan and Rosenberg. Decision and Order at 12; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Specifically, the administrative law judge found that Drs. Dahhan and Rosenberg had both examined claimant and reviewed the medical evidence of record, and

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[5] When Dr. Baker read the October 4, 2001 x-ray as "1/0" for pneumoconiosis, he reported that he was at that time neither Board-certified in radiology nor a B-reader. Director's Exhibit 10. The record reflects that although Dr. Baker previously listed a B-reader credential on his curriculum vitae, he indicated that the B-reader credential would expire on January 31, 2001. Claimant's Exhibit 1.

rendered thorough, detailed opinions explaining their conclusions that claimant has no pneumoconiosis and no respiratory or pulmonary impairment. Decision and Order at 12. The administrative law judge rationally concluded that Drs. Dahhan and Rosenberg based their opinions on "a more complete picture of the miner's health." *Id*.; *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We therefore affirm the administrative law judge's findings pursuant to Section 718.202(a)(4) as they are supported by substantial evidence and are in accordance with law.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered all the relevant newly submitted evidence and permissibly found that Dr. Baker's medical opinion was insufficient to meet claimant's burden to establish total disability because Dr. Baker did not opine that claimant was totally disabled. *See* 20 C.F.R. §718.204(b)(1); *Gee*, 9 BLR at 1-5; Decision and Order at 13; Director's Exhibit 7. Rather, Dr. Baker diagnosed minimal to no impairment and opined that claimant retains the respiratory capacity to perform the work of a coal miner or comparable work in a dust free environment. Director's Exhibit 7. Moreover, contrary to claimant's contention, opinions such as Dr. Baker's, that diagnose no significant impairment, need not be discussed by the administrative law judge in terms of claimant's job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

Finally, claimant cites the Board's decision in *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), and argues that he is totally disabled for comparable and gainful work in view of his age, work experience, and education. Claimant's argument lacks merit. Initially, the Board's decision in *Bentley* is inapposite.[6] Moreover, under Section 718.204(b), the test for total disability is medical, not vocational. *See* 20 C.F.R. §718.204(b)*; Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). We therefore reject claimant's argument that he is totally disabled from a vocational standpoint. Because claimant raises no other specific challenge to the administrative law judge's credibility determinations with respect to the newly submitted medical opinions concerning total disability under Section 718.204(b)(2)(iv), we affirm the administrative law judge's findings as they are supported by substantial evidence and are in accordance with law. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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[6] In *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), a case decided under the 20 C.F.R. Part 410 regulations, the Board noted that age, work experience, and education are relevant only to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(a), (b)(1).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). The administrative law judge is empowered to weigh the medical evidence and to draw his or her own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge properly determined that the newly submitted evidence does not establish either the existence of pneumoconiosis or total disability, claimant has failed to establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). Consequently, we affirm the denial of benefits in this subsequent claim. *See* 20 C.F.R. §725.309(d).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge