BRB No. 99-1123 BLA

JACK LAMBERT Claimant-Petitioner v. GREAT WESTERN COAL (KY) INC. Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-489) of Administrative Law Judge Rudolph 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). Claimant filed his original claim for benefits on December 10, 1992. Director's Exhibit 43. This claim was denied on May 13, 1993, as claimant did not establish any element necessary for entitlement. Director's Exhibit 43. Claimant filed the present duplicate claim on September 25, 1995. Director's Exhibit 1. This duplicate claim was denied by the administrative law judge in a Decision and Order issued on July 12, 1999, which found that claimant established thirty-four and one-half years of coal mine employment. The administrative law judge further found however, that the newly submitted evidence

failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a), and 718.204(c), and thus, failed to establish a material change in condition pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in his consideration of the x-ray readings and medical reports of record pursuant to Sections 718.202(a), and 718.204(c). Employer, and the Director, Office of Workers' Compensation Programs have not participated in this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra.*

When a claimant 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 there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Sharondale Corp. v. Ross,* 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[1]

[1]The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

After careful consideration of the administrative law judge's Decision and Order, and the evidence of record, we conclude that the Decision and Order denying benefits is supported by substantial evidence and contains no reversible error. In the instant case, the administrative law judge rationally found that claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge weighed the conflicting interpretations of each of the twelve newly submitted x-ray readings of record pursuant to 20 C.F.R. §718.202(a)(1), noted the relative qualifications of each reader, and rationally determined that all of these physicians were relatively equally well qualified since they were all either board-certified radiologists and, or B-readers.[2] The administrative law judge therefore permissibly credited the nine readings which found no evidence of pneumoconiosis, over the three readings which were positive for the presence of the disease, based on the weight of the evidence. Director's Exhibits 18, 19, 37-42. *Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Contrary to claimant's contention, it is within the administrative law judge's discretion to rely on the numerical weight of the evidence, in addition to the qualifications of the readers of the x-rays of record. *Id*., *see Staton v. Norfolk & Western Railway Co.,* 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Wilt v. Wolverine Mining Co.,* 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.,* 14 BLR 1-65 (1990).

We also find no error in the administrative law judge's findings pursuant to Section 718.202(a)(4). The administrative law judge considered the newly submitted report of Dr. Dahhan, who found no evidence of pneumoconiosis, and the opinion of Dr. Baker, who diagnosed chronic obstructive pulmonary disease, chronic bronchitis, and mild hypoxemia due to coal dust exposure, and rationally credited Dr. Dahhan's opinion due to his qualifications as a board-certified pulmonologist. Director's

[2]A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985).

Exhibits 16, 40. We reject claimant's contention that Dr. Baker's qualifications are superior to Dr. Dahhan's, since although the record indicates that Dr. Baker is a Fellow of the College of Chest Physicians, the record does not contain any evidence regarding the exact nature of his qualifications in pulmonary medicine. Consequently, the administrative law judge's finding that, Dr. Dahhan's qualifications are "superior" to Dr. Baker's qualifications, is supported by the evidence in the record. *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Moreover, the positive x-ray readings of Drs. Vuskovich and Bassali are not medical reports which must be considered at Section 718.202(a)(4), and Dr. Dahhan's diagnosis of chronic bronchitis is not a diagnosis of pneumoconiosis since this physician did not attribute this condition to claimant's coal dust exposure. *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989). As the administrative law judge has provided a rational basis for his weighing of the evidence, we affirm his finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), or a material change in conditions pursuant to Section 725.309(d).

Claimant's brief also challenges the administrative law judge's findings pursuant to Section 718.204(c). However, as claimant's brief fails to allege any specific error with regard to the administrative law judge's findings of fact or conclusions of law, but merely refers to numerous board holdings regarding the weighing of the evidence at this section, we decline to address the administrative law judge's findings on this issue. *See Cox v. Benefits Review Board,* 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g Cox v. Director, OWCP,* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP,* 10 BLR 1-119 (1987); *Fish v. Director, OWCP,* 6 BLR 1-107 (1983).

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that claimant has not established a material change in conditions, or entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge