BRB No. 05-0118 BLA

OWEN CORNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY	)	DATE ISSUED: 07/08/2005
	)	
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.

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

Denise M. Davidson (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5902) of Administrative Law Judge Rudolf L. Jansen 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). The administrative law judge credited claimant with thirty-four years and seven months of qualifying coal mine employment pursuant to the parties' stipulation, and, based on the date of filing, adjudicated the claim pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's previous claim had been denied because the evidence was insufficient to establish the existence of pneumoconiosis or total disability, and that the present claim, filed on March 14, 2001, was subject to the provisions at 20 C.F.R.

§725.309(d).[1] The administrative law judge found that the newly-submitted evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), thus claimant failed to demonstrate a change in one of the applicable conditions of entitlement at Section 725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish either the existence of pneumoconiosis at Section 718.202(a)(1), (4), or total disability at Section 718.204(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response in this appeal.[2]

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.[3] 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).

Claimant first contends that the administrative law judge erred in finding the newly-submitted x-ray evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), arguing that the administrative law judge "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," "placed substantial weight on the numerical superiority of the x-ray interpretations," and "selectively analyzed" the evidence. Claimant's Brief at 3. Claimant's arguments are

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[1] Claimant's original claim for benefits, filed on July 21, 1995, was denied by Administrative Law Judge Robert L. Hillyard in a Decision and Order issued on September 8, 1997. Director's Exhibit 1. The Board affirmed Judge Hillyard's denial of benefits on September 15, 1998. *Cornett v. Apogee Coal Co.*, BRB No. 97-1777 BLA (Sep. 15, 1998)(unpub.). Claimant took no further action until the filing of the present claim for benefits on March 14, 2001. Director's Exhibit 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) or total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] 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 the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

without merit. The administrative law judge accurately determined that all of the newly-submitted x-ray interpretations of record were negative for pneumoconiosis, Decision and Order at 5, 8, and we affirm his findings at Section 718.202(a)(1) as they are supported by substantial evidence.

Claimant also generally asserts that the administrative law judge erred in evaluating the medical opinions of record in finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). Claimant's Brief at 4-5. Contrary to claimant's arguments, however, the administrative law judge accurately determined that the newly-submitted evidence of record at Section 718.202(a)(4) consisted of the medical opinions of Drs. Hussain and Lockey, and that both physicians attributed claimant's mild respiratory impairment to smoking but found the evidence insufficient to support a diagnosis of pneumoconiosis. Decision and Order at 6, 9; Director's Exhibit 6; Employer's Exhibit 1; *see Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). The administrative law judge's findings at Section 718.202(a)(4) are supported by substantial evidence and are affirmed.

Lastly, claimant contends that the administrative law judge erred in finding that claimant was not totally disabled. Claimant has not identified any specific error in the administrative law judge's finding that the newly-submitted evidence was insufficient to establish total respiratory or pulmonary disability at Section 718.204(b)(2)(i)-(iv) because the pulmonary function studies and blood gas studies produced non-qualifying values; there was no evidence of cor pulmonale with right-sided congestive heart failure; and the medical opinions of Drs. Hussain and Lockey did not support a finding of total disability. Decision and Order at 9-10. Rather, claimant maintains that total disability is also a legal determination to be made by the administrative law judge through comparison of the exertional requirements of claimant's usual coal mine employment with the medical assessments of claimant's respiratory impairment, and that age, education and work experience are relevant in determining the miner's ability to perform comparable and gainful work.[4] Claimant's Brief at 5-6. Contrary to claimant's arguments, however, the administrative law judge determined that claimant's usual coal mine employment involved heavy lifting, crawling, stooping and crouching in his position as a Section Foreman. Decision and Order at 3. The administrative law judge further determined that Dr. Hussain opined that claimant had a mild respiratory impairment but did not address

[4] Additionally, claimant argues that because pneumoconiosis is a progressive and irreversible disease, it can "be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable gainful work." Claimant's Brief at 6-7. Contrary to claimant's contention, there is no evidence in the record to support this allegation.

claimant's ability to perform his usual coal mine employment or similar work, Director's Exhibit 6; and that Dr. Lockey affirmatively opined that claimant's mild respiratory impairment did not prevent him from performing his usual coal mine employment duties or comparable work, Employer's Exhibit 1. As Dr. Lockey based his opinion upon a physical examination, accurate work history, and the results of claimant's pulmonary function and blood gas studies, the administrative law judge acted within his discretion in finding that the opinion was well reasoned, documented, and entitled to full weight. Decision and Order at 6, 10; *see Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge thus reasonably concluded that the record failed to support a finding of total disability under Section 718.204(b)(2), and we affirm his findings thereunder as supported by substantial evidence. Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.[5] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

As the administrative law judge permissibly found that the newly-submitted evidence of record was insufficient to establish either the existence of pneumoconiosis or total respiratory disability, we affirm his finding that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial pursuant to Section 725.309(d). Consequently, we affirm the administrative law judge's denial of benefits.

[5] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In Bentley, the Board held that age, work experience and education are only relevant 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 20 C.F.R. §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(b)(1), (b)(2).

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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BETTY JEAN HALL
Administrative Appeals Judge