

BRB No. 05-0311 BLA

TIMOTHY CREECH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
R&B COAL COMPANY, INCORPORATED)	DATE ISSUED: 07/13/2005
)	
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 Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Hazard, Kentucky, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim (2003-BLA-06123) of Administrative Law Judge Daniel F. Solomon 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 accepted the parties' stipulation to fifteen years of coal mine employment and noted that the claim before him,

filed on October 3, 2001, was a subsequent claim pursuant to 20 C.F.R. §725.309(d).¹ The administrative law judge determined 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) or total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found, therefore, that claimant did not establish a change in an applicable condition of entitlement under Section 725.309(d). 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)(iv). Claimant also contends that remand to the district director is required, as he did not receive a complete, credible pulmonary evaluation as is required by 20 C.F.R. §725.406. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation (the Director), has also responded and contends that remand for a complete pulmonary evaluation is not warranted in this case.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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe 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 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

¹ Claimant filed an application for benefits on July 30, 1997. Director's Exhibit 1. The district director finally denied this claim on February 17, 1998 on the ground that claimant did not establish any of the requisite elements of entitlement. *Id.* Claimant took no further action until filing a claim for benefits on October 3, 2001. Director's Exhibit 2.

² We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing a subsequent claim pursuant to Section 725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.³ See *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The court has further held 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. See *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).

With respect to the administrative law judge's weighing of the newly submitted x-ray evidence pursuant to Section 718.202(a)(1), claimant argues that the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant's also contends that the administrative law judge selectively analyzed the x-ray evidence. Claimant allegations of error are without merit. The administrative law judge acted within his discretion as fact-finder in determining that none of the three newly submitted films of record was positive for pneumoconiosis based upon the interpretations performed by physicians with superior qualifications. Decision and Order at 14; Director's Exhibits 11, 18, 21, 23, 26; Employer's Exhibits 1, 2; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

With respect to Section 718.202(a)(4), claimant asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the newly submitted medical opinion of Dr. Baker. This contention is without merit. In weighing the newly submitted medical opinions relevant to Section 718.202(a)(4), the administrative law judge properly considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. Decision and Order at 14-15; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge acted within his discretion, as fact-finder, in determining that

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment took place in the Commonwealth of Kentucky. Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

the opinions in which Drs. Baker and Hussain diagnosed pneumoconiosis were outweighed by the newly submitted opinions in which Drs. Dahhan and Branscomb concluded that claimant does not have pneumoconiosis. Decision and Order at 14-15; Director's Exhibits 10, 21; Employer's Exhibits 1, 3.

The administrative law judge rationally determined that the newly submitted opinions of Drs. Dahhan and Branscomb were more persuasive, as their conclusions were based upon a review of all of the evidence of record, better explained, and more consistent with the underlying objective evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, fully addressed the opinion of Dr. Baker and rationally found that his opinion was insufficient to establish the existence of pneumoconiosis, despite his status as claimant's treating physician, as the contrary opinions of Drs. Dahhan and Branscomb were accorded greater weight. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495. We affirm, therefore, the administrative law judge's determination that the newly submitted medical opinion evidence does not support a finding of either pneumoconiosis or a change in an applicable condition of entitlement under Sections 718.202(a)(4) and 725.309(d).

Regarding the issue of total disability pursuant to Section 718.204(b)(iv), claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's finding regarding the extent of any respiratory impairment. Claimant's Brief at 6-8, citing *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Hvidzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that Dr. Baker's opinion supports a finding of total disability because Dr. Baker "opined that, due to his class II breathing impairment, the claimant [is] 100% occupationally disabled for work in the coal mine industry or similar dusty occupations based on Section 5.8, page 106, chapter 5 of Guides to the Evaluation of Permanent Impairment, Fifth Edition." Claimant's Brief at 6. Claimant maintains that comparing Dr. Baker's finding to claimant's usual coal mine work leads to the conclusion that claimant is totally disabled because:

The claimant's usual coal mine work included being an electrician and foreman. It can reasonably be concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as

well as the medical opinions of Dr. Baker, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 8. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit has held that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

Claimant further alleges that the administrative law judge erred in according less weight to Dr. Baker's diagnosis because he relied upon nonconforming and/or nonqualifying objective studies. We disagree. The administrative law judge rationally determined that Dr. Baker's opinion was outweighed by the opinions in which Drs. Dahhan and Branscomb stated that claimant is not totally disabled, as their opinions are more extensively documented, because they had the opportunity to review all of the evidence of record, and were better supported by the objective evidence of record. Decision and Order at 18; *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Cornett*, 227 F.3d 569, 22 BLR 2-107.

Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant also maintains that the administrative law judge erred in failing to address claimant's age or work experience in determining that claimant is not totally disabled. 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).

Claimant also argues generally that, inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, it has adversely affected his ability to perform his usual coal mine employment. Although pneumoconiosis is recognized as a latent and progressive disease in 20 C.F.R. §718.201(c), this does not create a presumption that relieves a claimant from the burden of establishing, by a preponderance of the medical evidence, that he is totally disabled and that pneumoconiosis is at least a contributing cause of his total disability. 20 C.F.R. §718.204; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994).

Because claimant has not raised any meritorious allegations of error, we affirm the administrative law judge's findings under Sections 718.202(a) and 718.204(b)(2) and his determination that claimant has not demonstrated a change in an applicable condition of entitlement under Section 725.309(d). We must also affirm, therefore, the denial of benefits. 20 C.F.R. §725.309(d); *Ross*, 42 F.3d 993, 19 BLR 2-10.

Finally, we find no merit in claimant's assertion that remand to the district director is required because the opinion of Dr. Hussain, who examined claimant at the request of the Department of Labor, was discredited by the administrative law judge under Sections 718.202(a)(4) and 718.205(b)(2)(iv). The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 10.⁴ The administrative law judge did not find, nor does claimant allege, that Dr. Hussain's report was incomplete. With respect to the issue of the existence of pneumoconiosis, the administrative law judge found that the probative value of Dr. Hussain's opinion was "undermined" and "diminished" by his reliance upon a positive x-ray reading and claimant's history of coal dust exposure and that the opinions of Drs. Dahhan and Branscomb were entitled to "greater weight." Decision and Order at 14, 15. He did not find that Dr. Hussain's diagnosis of pneumoconiosis was undocumented or unreasoned.

Similarly, when considering the newly submitted medical opinions relevant to the issue of total disability, the administrative law judge did not reject Dr. Hussain's opinion or find it entirely lacking in credibility. Rather, he determined that Dr. Hussain's opinion was not as thoroughly explained or as documented as the opinions of Drs. Dahhan and Branscomb. Decision and Order at 18. Because Dr. Hussain's report was complete and the administrative law judge found it outweighed by the contrary medical opinions, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. 20 C.F.R. §725.406(a); *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); accord *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

⁴ Dr. Hussain examined claimant at the request of the Department of Labor on January 23, 2002. Director's Exhibit 10. He obtained an x-ray, pulmonary function study, and a blood gas study and recorded claimant's occupational, social, and medical histories. Dr. Hussain diagnosed pneumoconiosis based on his x-ray findings and claimant's history of dust exposure. He stated that claimant has a moderate pulmonary impairment which prevents him from performing the work of a miner. *Id.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge