BRB No. 05-1002 BLA

DAVID BOGGS, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JERICOL MINING, INCORPORATED	)	
	)	DATE ISSUED: 07/26/2006
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.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-5529) of Administrative Law Judge Rudolf L. Jansen on a subsequent claim[1] filed pursuant to the

[1] Claimant filed his first application for benefits on March 23, 1992. By Decision and Order dated May 25, 1995, Administrative Law Judge Charles P. Rippey denied benefits. Claimant took no further action on this claim and subsequently, filed a second application on June 7, 1996, which the district director denied on September 26, 1996. Because claimant took no further action on this claim, the claim was administratively closed. On November 8, 2002, claimant filed a third application for benefits, which is the subject of the case *sub judice*. Director's Exhibit 4.

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). Initially, the administrative law judge credited the parties' stipulation that claimant worked in qualifying coal mine employment for forty-five years. The administrative law judge also found that the stipulation made by the parties in claimant's second claim that claimant established the existence of pneumoconiosis arising out of coal mine employment, was binding on the parties in the adjudication of the instant claim. Thereafter, the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718 and found that because claimant failed to establish total respiratory disability or total disability due to pneumoconiosis, 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, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find total respiratory disability established by pulmonary function study evidence pursuant to Section 718.204(b)(2)(i), and erred in failing to credit the medical opinion of claimant's treating physician, Dr. Miller, who opined that claimant was totally and permanently disabled from returning to his usual coal mine work as a coal mine supervisor. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate 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 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).

Claimant first contends that the administrative law judge erred in failing to find that the FEV_1 value on the August 7, 2003 pulmonary function study administered by Dr. Hudson and the FEV_1 to FVC ratio value on the December 11, 2002 pulmonary function study administered by Dr. Baker were qualifying values sufficient to establish total disability.

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and that the existence of pneumoconiosis arising out of coal mine employment was established as 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, 5.

The August 7, 2003 pulmonary function study administered by Dr. Hudson resulted in an FEV_1 value of 1.14, an FVC value of 1.98, and an FEV_1 to FVC ratio of 58%. No MVV value was reported. Director's Exhibit 18. The December 11, 2002 pulmonary function study administered by Dr. Baker yielded an FEV_1 value of 1.33 and an FEV_1 to FVC ratio of 53%. No MVV value was reported. Director's Exhibit 13. *See* Decision and Order at 7.

Finding that each test contained conflicting height measurements for claimant, the administrative law judge determined that the average of the conflicting measurements was 64.75 inches. Accordingly, for purposes of evaluating the pulmonary function studies, the administrative law judge found that claimant's height was 64.75 inches. This was rational. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-80-81 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 6 n.5.[3] Further, because claimant was 80 years old at the time he performed the studies and the table values only provide standards for persons 71 years of age or younger, the administrative law judge calculated the ratio by which the values decreased over a ten year period in order to extrapolate values to the age of 80 and found that the qualifying values for an 80 year old male at a height of 64.75 inches were 1.30 for FEV_1, 1.72 for FVC, and 56 for MVV.[4] 20 C.F.R. Part 718, App. B; *see Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA, *slip op*. at 7 n.7 (Dec. 20, 1996) (unpub.); *accord Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-1279 BLA, *slip op*. at 6-7 (Nov. 24, 2000) (unpub.); *see also Shertzer v. McNally-Pittsburgh Manufacturing Co.*, BRB No. 05-0289 BLA, *slip op*. at 5 (Sep. 21, 2005) (unpub.); Decision and Order at 7 n.7. Considering the newly submitted pulmonary function studies, therefore, the administrative law judge correctly concluded that while the FEV_1 value of the August 7, 2003 pulmonary function test was qualifying, this study was insufficient to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i) because the FVC value was non-qualifying and the MVV value was not reported. *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984); *Tischler v. Director, OWCP*, 6 BLR 1-1086 (1984); *Sexton v. Peabody Coal Co.*, 7 BLR 1-411, 1-412 n.2 (1984); *Bolyard v. Peabody Coal Co.*, 6 BLR

[3] Because claimant has not challenged the administrative law judge's determination that claimant was 64.75 inches tall for purposes of evaluating the pulmonary function studies, or his method of extrapolating qualifying values for an 80 year old miner, we affirm his findings. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-710; Decision and Order at 6 n.5, and at 7 n.7.

[4] The regulations at Part 718, Appendix B provide table values based upon the miner's age, height, and gender to determine whether a study has produced qualifying values. 20 C.F.R. §718.204(b)(2)(i), Appendix B.

1-767 (1984). Likewise, the administrative law judge found that because the recorded FEV_1 value of the December 11, 2002 pulmonary function study was non-qualifying, this test was also insufficient to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i). *Ibid; see* Decision and Order at 7, and at 7 n.7; Director's Exhibit 13. Because claimant has not otherwise challenged the administrative law judge's weighing of the newly submitted pulmonary function studies, we affirm the administrative law judge's weighing of this evidence and his determination that these tests failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i) as this determination was rational, supported by substantial evidence, and contained no reversible error. *See Winchester*, 9 BLR at 1-178; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); *Burich*, 6 BLR at 1-1191; Decision and Order at 13.

Claimant next asserts that the administrative law judge erred by failing to accord proper weight to the opinion of Dr. Miller, claimant's treating physician for twenty-eight years, who opined that claimant was totally disabled due to his disabling chronic obstructive pulmonary disease that arose from his fifty years of coal dust exposure. Claimant asserts that the administrative law judge failed to adequately explain his determination that Dr. Miller's opinion was not well reasoned, particularly in light of: Dr. Miller's long term treatment of claimant, *i.e.*, twenty-eight years of general treatment and nine years of specific treatment for respiratory concerns; the frequency of claimant's visits to Dr. Miller (once every three months); Dr. Miller's board-certification in internal medicine and specific expertise in treating coal miners on a daily basis since 1973; and Dr. Miller's reliance on additional medical evidence, including x-ray readings, pulmonary function studies, and the medical reports of Drs. Jarboe and Hudson.

Considering the length and frequency of treatment provided to claimant by Dr. Miller as well as other factors set forth in Section 718.104(d)(4) and the standard for the treatment of treating physicians' opinions articulated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003), *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), the administrative law judge found that Dr. Miller's opinion was not entitled to special deference as it was poorly reasoned. Accordingly, contrary to claimant's contention, the administrative law judge did in fact consider Dr. Miller's treatment of claimant for more than twenty years, his frequent examinations of claimant every three months, and his reliance on objective tests including x-ray interpretations, and pulmonary function studies administered by Drs. Hudson and Baker but, nevertheless, within a permissible exercise of his discretion, determined that Dr. Miller's disability opinion was not well-reasoned and entitled to less weight because it was based in part on non-conforming pulmonary function studies that lacked a repeatability within a five percent variance. This was rational. 20 C.F.R. §718.104(d)(5); *see Odom*, 342 F.3d at

492, 22 BLR at 2-622; *Williams*, 338 F.3d at 513, 22 BLR at 2-647 ("in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade."); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); Decision and Order at 14; Director's Exhibit 15.

Instead, the administrative law judge permissibly found that the contrary opinions of Drs. Jarboe and Baker, that claimant had the respiratory capacity to perform his usual coal mine work, were more persuasive and, therefore, entitled to dispositive weight because both physicians rendered well documented and well-reasoned opinions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 15; Director's Exhibits 13, 18, 19. Because the administrative law judge's discrediting of Dr. Miller's opinion was rational, contains no reversible error and is supported by substantial evidence, we affirm the administrative law judge's findings that the medical opinion evidence was insufficient to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).[5]

In conclusion, the administrative law judge properly found that the two newly submitted pulmonary function studies were non-qualifying, that the one newly submitted arterial blood gas study was non-qualifying, that there was no evidence of cor pulmonale with right-sided congestive heart failure, and that the four newly submitted medical opinions were insufficient to demonstrate a totally disabling respiratory or pulmonary

[5] Finally, in a cursory single sentence in the middle of his argument concerning the administrative law judge's treatment of Dr. Miller's opinion, claimant contends that the administrative law judge erred in failing to find that Dr. Jarboe was "biased" because Dr. Jarboe's finding of no pneumoconiosis was contrary to the administrative law judge's determination that claimant established the existence of pneumoconiosis. Claimant's Brief at 17-18. This assertion, however, is not adequately briefed. It is, accordingly, rejected. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Moreover, the fact that Dr. Jarboe did not find the existence of pneumoconiosis by x-ray does not, in and of itself, affect his opinion that claimant does not have a totally disabling respiratory impairment.

impairment. Accordingly, after weighing all the evidence relevant to Section 718.204(b)(2)(i)-(iv), the administrative law judge rationally found that the newly submitted evidence failed to affirmatively establish total respiratory disability, *see Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*), and that it was, therefore, unnecessary to consider whether total disability was due to pneumoconiosis. Decision and Order at 14-15. Because we affirm the administrative law judge's determination that because claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204, we also affirm the administrative law judge's finding 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 pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *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