BRB No. 06-0168 BLA

BEN PENNINGTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 07/19/2006
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 on Remand Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, PSC), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denial of Benefits (03-BLA-5139) of Administrative Law Judge Daniel J. Roketenetz rendered 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 Board vacated the administrative law judge's 2004 Decision and Order-Denial of Benefits and remanded the case for consideration as a request for modification[1] under 20 C.F.R. §725.310 (2000). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis or total respiratory disability. The administrative law judge also found that the prior denial of benefits did not contain a mistake in a determination of fact. Accordingly, the administrative law judge determined that the prerequisites for modification were not established and denied benefits pursuant to Section 725.310. Decision and Order at 15-16.

On appeal, claimant contends that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.204(b)(2)(iv). Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and urges the Board to reject claimant's allegation that he was not provided with a complete pulmonary evaluation.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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[1] The procedural history is summarized in the administrative law judge's Decision and Order at 1-3 and in *Pennington v. Leeco, Inc.*, BRB No. 04-0408 (Feb. 28, 2005) (unpublished).

[2] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis or that he is totally disabled pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3), 718.204(b)(2)(i)-(iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge properly found that the positive readings of the March 21, 2001 and the June 27, 2001 x-rays, by physicians who did not have special radiological qualifications, were countered by two negative readings for pneumoconiosis by physicians who are both B readers and Board-certified radiologists. Director's Exhibits 7, 8, 23; Employer's Exhibits 3, 5- 7. The administrative law judge found all of the other readings were negative, and based on a proper qualitative analysis of the conflicting x-ray readings, found that claimant did not establish the existence of pneumoconiosis by a preponderance of the new x-ray evidence. Decision and Order at 6; *see Staton v. Norfolk & Western Ry. 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); *White, v. New White Coal Co*., 23 BLR 1-4 (2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, that he merely counted the negative readings, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions in which Drs. Baker and Hussain diagnosed pneumoconiosis and the contrary opinions of Drs. Rosenberg, Broudy, and Wiot. Claimant specifically argues only that the administrative law judge erred in rejecting the March 21, 2001 opinion by Dr. Baker, as it was "based merely upon his x-ray interpretation," even though the doctor had conducted a physical examination and performed a blood gas and pulmonary function study. Claimant's Brief at 4. Claimant's argument is without merit. Contrary to claimant's assertion, the administrative law judge properly found that Dr. Baker's diagnosis of coal workers' pneumoconiosis was not well reasoned or documented because Dr. Baker gave no basis for his diagnosis beyond his own positive x-ray reading and a reference to claimant's coal mine employment history. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000). Because claimant does not otherwise challenge the administrative law judge's finding pursuant to Section 718.202(a)(4), it is affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker and Hussain diagnosing claimant as totally disabled, and the contrary opinions of Drs. Broudy and Rosenberg. The only specific argument claimant sets forth is that:

The claimant's usual coal mine work included being a mine 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 opinion 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. Judge Roketenetz made no mention of the claimant's usual coal mine work with conjunction with Drs. Baker and Hussain's opinions of disability.

Claimant's Brief at 8. In accordance with the teaching of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, the administrative law judge held that Dr. Baker'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). Moreover, because such an opinion does not address a miner's physical capacity to perform his work, it is not necessary for the administrative law judge to determine the exertional requirements of claimant's usual coal mine employment when considering the doctor's opinion.

Claimant also alleges that Dr. Baker's opinion "may be sufficient for invoking the presumption of total disability." Claimant's Brief at 6; Director's Exhibit 8. Contrary to claimant's assertion, claimant is not entitled to a presumption of disability as the record contains no evidence of complicated pneumoconiosis and the claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); *Kabachka v. Windsor Power House Coal Corp.*, 11 BLR 1-1171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Rather, claimant must establish each element of entitlement by a preponderance of the evidence. *Trent*, 11 BLR at 1-27.

Claimant further alleges that the opinion of Dr. Baker is well reasoned and documented, and should not have been rejected as the Board has previously held that it is an error to reject a medical opinion solely because it is based on non-conforming and/or non-qualifying pulmonary function studies. Contrary to claimant's contentions, the administrative law judge reasonably found that Dr. Baker's statement that persons such as claimant, that develop pneumoconiosis, should limit further exposure to coal dust is not equivalent to a finding of total disability and therefore is entitled to "little weight." Decision and Order at 14; Director's Exhibit at 8. *Zimmerman*¸ 871 F.2d 564, 12 BLR 2-254; *Taylor*, 12 BLR 1-83 (1988). Moreover, the administrative law judge permissibly relied on and found the contrary opinions of Drs. Broudy and Rosenberg, that claimant retains the respiratory capacity to perform coal mine work, "well-reasoned, well-documented and consistent with the objective evidence of record. Decision and Order at 14-15; *Fields*, 10 BLR 1-19, 1-21-22; Employer's Exhibits1, 2, 4; Director's Exhibit 26.

Accordingly, the administrative law judge reasonably relied on the opinions of Drs. Broudy and Rosenberg and the non-qualifying pulmonary function and blood gas studies in finding that the new evidence did not establish total disability under Section 718.204(b)(2). *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); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Additionally, claimant's assertion that pneumoconiosis is a progressive and irreversible disease that must have worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work, provides no basis to disturb the administrative law judge's finding. Claimant's Brief at 8. The administrative law judge's findings as to the presence of a totally disabling and respiratory or pulmonary impairment must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8.

Finally, we reject claimant's assertion that remand of the case to the district director for a new pulmonary evaluation is required on the ground that Dr. Hussain, who examined claimant at the request of the Department of Labor, did not perform a complete pulmonary evaluation. The Director has previously taken the position that Section 923(b) of the Act requires him to provide a complete pulmonary evaluation once per claim filed by a miner, but not with each modification request, because a modification request is merely a continuation of the miner's original claim. *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62-63 (1994); *see also Eversole v. Perry County Coal Corp*. BRB No. Nos. 05-0186 BLA and 05-0186 BLA-A (June 27, 2005) (unpub.). This Board has given deference to the Director's interpretation. *Id.* The record reflects that claimant received a complete pulmonary evaluation conducted by Dr. Baker on February 24, 1994, which was credited by Administrative Law Judge Michael O'Neill in his 1996 Decision and Order - Denying Benefits, and by Judge Roketenetz in his current decision. Claimant has not asserted that Dr. Baker's evaluation was not complete. Director's Exhibit 6. Thus, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation because of any deficiency in Dr. Hussain's evaluation. 20 C.F.R. §725.406(a); *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994).

Because claimant has not raised any meritorious allegations of error under Sections 718.202(a) and 718.204(b)(2), we affirm the administrative law judge's finding that claimant has not demonstrated a change in conditions under Section 725.310 (2000). We also affirm the administrative law judge's determination that the prior denial contains no mistake in a determination of fact pursuant to Section 725.310 (2000), as it is rational and supported by substantial evidence. Decision and Order at 15. We therefore affirm the denial of benefits. 20 C.F.R. §725.310 (2000); *Consolidation Coal Co. v. Worrell*, 27

F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc*, 17 BLR 1-14 (1992).

Accordingly, the administrative law judge's Decision and Order on Remand Denial of Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge