BRB No. 06-0724 BLA

FELIX JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FAIRDALE MINING, SUCCESSOR TO QUICK SILVER MINING, INCORPORATED	)	DATE ISSUED: 06/28/2007
	)	
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.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

John T. Chafin (Chafin Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Benefits (04-BLA-0138) of Administrative Law Judge Rudolf L. Jansen on a duplicate claim[2] 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).[3] This case is before the Board for the third time on claimant's third request for modification of the denial of a duplicate claim. The procedural posture of the pending claim, filed on February 7, 1986, is set forth seriatim. Upon initial consideration, Administrative Law Judge Donald W. Mosser credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty years and adjudicated the claim on its merits pursuant to 20 C.F.R. Part 718. Judge Mosser found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, Judge Mosser denied benefits on July 12, 1994, which the Board affirmed on September 29, 1995. *Jones v. Quick Silver Mining, Inc.*, BRB No. 94-3658 BLA (Sept. 29, 1995) (unpub.); Director's Exhibits 116, 132.

---

[1] Claimant filed his first application for benefits on January 19, 1973 with the Social Security Administration (SSA), which was denied on June 5, 1979. Thereafter, claimant elected that the Department of Labor (DOL) review his claim. The claim was denied by DOL and administratively closed because claimant neither appealed the denial nor requested modification within one year of the denial. Director's Exhibit 99. On September 13, 1983, claimant filed a second application for benefits, which was finally denied by DOL on January 4, 1984. Director's Exhibit 100. Subsequently, claimant filed a third application for benefits on February 7, 1986, which is the subject of this appeal. Director's Exhibit 1.

[2] Because claimant filed the pending application for benefits on February 7, 1986, which is prior to January 19, 2001, the effective date for application of the newly amended regulations regarding "subsequent claims," the regulations set forth in Section 725.309 (2000) are applicable to the instant case and the instant claim is properly construed as a "duplicate claim" rather than a "subsequent claim." Hence, it is claimant's burden to demonstrate a material change in conditions since the date upon which the order denying the prior claim became final. 20 C.F.R. §§725.309 (2000), 725.309 (2002); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (defining material change in conditions standard for duplicate claims).

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Thereafter, claimant filed a petition for modification with supporting evidence on December 6, 1995, which was denied by the district director on June 29, 1996. Director's Exhibits 134, 144. Pursuant to claimant's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges (OALJ). Prior to the hearing, however, the case was remanded to the district director for resolution of the responsible operator issue. The district director made no changes regarding the responsible operator finding and the case was returned to the OALJ. Director's Exhibits 145, 151, 152.

A formal hearing was held before Judge Mosser on November 18, 1997. Recognizing that this case involved a petition for modification of the denial of a duplicate claim, Judge Mosser addressed the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total respiratory disability at 20 C.F.R. §718.204(c)(2000), the elements which were previously adjudicated against claimant. Judge Mosser determined that the newly submitted evidence failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000); that consequently, claimant failed to establish a basis for modifying the previous denial, *i.e.*, a mistake in a determination of fact or change in conditions under 20 C.F.R. §725.310 (2000), of the prior denial of his duplicate claim. 20 C.F.R. §§725.309 (2000), 725.310 (2000). By Decision and Order dated August 5, 1998, therefore, Judge Mosser again denied benefits. Director's Exhibit 175.

The Board, in *Jones v. Fairdale Mining*,[4] BRB No. 98-1499 BLA (Sept. 28, 1999) (unpub.), affirmed Judge Mosser's finding that the preponderance of the x-ray interpretations rendered by the physicians with the best radiological qualifications was negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1); that the diagnosis of pneumoconiosis by Dr. Bushey was worth less weight under Section 718.202(a)(4)(2000) as it as not sufficiently reasoned; and that none of the newly submitted medical opinions, namely those of Drs. Bushey, Broudy, Branscomb, Dahhan, and Fino, established that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4) (2000). Hence, the Board affirmed Judge Mosser's denial of benefits. Director's Exhibit 186.

Claimant filed a new application for benefits on January 7, 2000, which was construed as claimant's second petition for modification, as it was filed within one year of the Board's affirmance of Judge Mosser's denial of benefits. This claim was similarly denied by the district director on March 14, 2000. Director's Exhibits 187, 198. Thereafter, claimant requested a formal hearing, which was held before Administrative

[4] A review of the record reveals that Fairdale Mining Company was the successor operator to Quick Silver Mining, Incorporated. Director's Exhibits 175, 233.

Law Judge Daniel J. Roketenetz on October 3, 2001. By Decision and Order dated May 30, 2002, Judge Roketenetz found that the newly submitted evidence, as well as the previously submitted evidence, was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4) and total disability due to pneumoconiosis at Section 718.204; accordingly, he denied benefits based on claimant's failure to establish modification based on a change in condition or a mistake in a determination of fact in the prior denials. Director's Exhibit 233.

On May 28, 2003, claimant filed a third request for modification accompanied by supportive evidence. The district director denied claimant's request for modification on March 18, 2004. Director's Exhibits 234, 248. Although claimant's request for a formal hearing, after this denial, was granted and scheduled for November 16, 2005, claimant and employer submitted a joint request to Administrative Law Judge Rudolf L. Jansen (the administrative law judge). The parties requested that the administrative law judge render a decision based on the record, and not conduct a formal hearing. The administrative law judge granted the parties' request, credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty years and, after reviewing the newly submitted evidence in conjunction with the previously submitted evidence, determined that claimant failed to establish a change in conditions by failing to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(b), elements previously adjudicated against claimant. The administrative law judge also found, on reviewing the record, that no mistake in a determination of fact had been made in the prior denials. The administrative law judge, therefore, found that claimant failed to establish a basis for modification, as the evidence failed to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Sections 718.202(a)(1) and (a)(4), and total respiratory disability under Section 718.204(b)(2)(iv). In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.[5]

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

[5] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3), 718.204(b)(2)(i)-(iii) because 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 6, 13, 16.

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).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the positive interpretation of Dr. Baker, who read an x-ray film dated December 15, 1999, was sufficient to establish the existence of pneumoconiosis. In considering the x-ray evidence, however, the administrative law judge properly found that the three newly submitted x-ray interpretations were insufficient to establish the existence of pneumoconiosis as all three interpretations of the two x-rays taken on December 8, 2003 and on September 9, 2004, one by a dually-qualified radiologist and two by B-readers, were read as negative for pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *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); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Langerud v. Director, OWCP*, 9 BLR 1-101, 1-103 (1986); Decision and Order at 13; Director's Exhibit 247; Employer's Exhibits 3, 4. As the administrative law judge's determination is rational and supported by substantial evidence, and claimant has not otherwise challenged the administrative law judge's weighing of the x-ray evidence, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and therefore, a chance in conditions. Likewise, on review of all the evidence, the administrative law judge properly found that a mistake in a determination of fact was not made in the prior decisions denying benefits.

Claimant next contends that the administrative law judge erred in finding that Dr. Cornett's medical opinion did not establish the existence of pneumoconiosis at Section 718.202(a)(4) because Dr. Cornett diagnosed both clinical and legal, *i.e.*, the presence of chronic obstructive pulmonary disease arising out of coal mine employment, pneumoconiosis. Claimant contends that the administrative law judge erred in rejecting Dr. Cornett's opinion as her opinion was based on her treatment of claimant, in addition to positive x-ray interpretations.

In assessing the credibility of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that, while Dr. Cornett was a treating physician, her 2003 opinion was not entitled to preferential weight because it was "poorly reasoned and documented." Decision and Order at 14. The administrative law judge determined that, although Dr. Cornett indicated that she relied on a chest x-ray and "Dexa scans" in diagnosing claimant with "black lung" and chronic obstructive pulmonary disease arising out of coal mine employment, she failed to provide the results of such tests or any other type of additional objective documentation supporting her conclusions.

The administrative law judge found that while Dr. Cornett's opinion was based on a physical examination conducted in October 15, 2003, her diagnosis of pneumoconiosis was devoid of diagnostic test results, and consequently, was not well documented. This was rational. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003)(administrative law judge as factfinder should decide whether physician's report is sufficiently reasoned and documented); *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 14; Director's Exhibit 243.

Instead, the administrative law judge credited the contrary 2003 and 2004 opinions of Drs. Dahhan and Fino, that there was insufficient evidence to diagnose either clinical or legal pneumoconiosis, because both physicians based their opinions on complete pulmonary evaluations of claimant, consisting of claimant's medical, social, and coal mine employment histories, physical examinations, chest x-ray interpretations, and pulmonary function and arterial blood gas studies. The administrative law judge determined that Drs. Dahhan and Fino provided detailed, well reasoned and documented opinions worthy of dispositive weight. Decision and Order at 14; Director's Exhibits 231, 247; Employer's Exhibits 2, 3, 5-7. Because the administrative law judge's crediting of the opinions of Drs. Dahhan and Fino is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and thereby failed to establish a change in conditions. Likewise, on review of the record, the administrative law judge rationally found that as no mistake in a determination of fact had been made in the prior decision denying benefits.

Claimant also asserts that "[s]ince a diagnosis of pneumoconiosis requires removal from dust pursuant to Section 718.204, disability had been established[.]" Claimant's Brief at 8. Claimant argues that the reasoned and documented opinions of Drs. Cornett and Baker fully support this proposition. Contrary to claimant's contention, however, the fact that claimant should no longer be exposed to coal mine dust does not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), and thereby failed to establish a change in conditions. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). Likewise, on review of the record, the administrative law judge rationally found that no mistake in fact had been made in the prior decisions denying benefits. Consequently, we affirm the administrative law judge's determination that claimant failed to establish total disability.

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