BRB No. 98-1191 BLA

JESSE MELTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARLAN CENTRAL COAL COMPANY	)	DATE ISSUED: 6/25/99
	)	
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-Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Before: SMITH and BROWN Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (97-BLA-0889) of Administrative Law Judge Daniel J. Roketenetz, on a duplicate 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).[1] The administrative law judge

[1]Claimant's initial claim, filed on October 12, 1982, was denied by the district director on March 8, 1983 because claimant failed to establish total disability and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Director's Exhibit 35. The record does not indicate that claimant took any further action with regard to his 1982 claim. Claimant next filed for benefits on February 23, 1987. Director's Exhibit 36. Administrative Law Judge Bernard J. Gilday, Jr., issued a Decision and Order-Denying Benefits on June 8, 1992, finding that claimant

credited claimant with fifteen and one-half years of coal mine employment and found that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). Therefore, the administrative law judge determined that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits. On appeal, claimant alleges that the administrative law judge erred in finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (a)(4) and total disability pursuant to Section 718.204(c). Employer has not filed a brief on appeal and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but failed to establish total disability pursuant to Section 718.204(c). Director's Exhibit 35. Thus, Judge Gilday concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 and entitlement pursuant to Part 718. *Id.* Claimant appealed, and the Board affirmed the denial of benefits, but vacated the finding of pneumoconiosis pursuant to Section 718.202(a)(1) because it was based on the now-invalid true doubt rule. *Melton v. Harlan Central Coal Co.*, BRB No. 92-2072 BLA (Sept. 16, 1994)(unpub.). Thereafter, claimant filed this duplicate claim on July 26, 1996. Director's Exhibit 1.

[2]Inasmuch as the parties on appeal do not challenge the administrative law judge's finding of fifteen and one-half years of coal mine employment and his finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2) and (a)(3), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.,* 380 U.S. 359 (1965).

In challenging the administrative law judge's finding under Section 718.202(a)(1), claimant contends that the administrative law judge erred because he "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 x-ray evidence. We disagree. The administrative law judge considered all the relevant evidence of record, and properly determined that only the interpretations of the x-ray taken on August 14, 1996 were classified in accordance with Section 718.102(b).[3] Decision and Order at 6, 7; Director's Exhibit 13. The administrative law judge noted that this x-ray was read by Dr. Sargent, a Board-certified radiologist and B reader, as positive for pneumoconiosis, but classified as a profusion of 0/1. The administrative law judge also noted that Dr. Wicker, a B reader, interpreted this same x-ray as negative for pneumoconiosis. The administrative law judge properly found that a reading of 0/1 or below does not constitute evidence of pneumoconiosis pursuant to Section 718.102(b), and therefore, the x-ray taken on August 14, 1996, the only x-ray classified in accordance with the regulations, was unanimously interpreted as negative. Decision and Order at 7. We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

[3]The administrative law judge noted that the x-rays taken on December 29, 1992, March 11, 1996, April 18, 19, 21, 22 and 24, 1996, and July 10, 1996 were not read for the purpose of determining the existence of pneumoconiosis and were not classified pursuant to 20 C.F.R §718.102(b). Claimant's Exhibit 1. Accordingly, the administrative law judge found these x-rays neither prove nor disprove the existence of pneumoconiosis. Decision and Order at 7.

Under Section 718.202(a)(4), claimant argues that the administrative law judge erred in giving no weight to the opinions of claimant's treating physician, in discrediting the opinion of a physician because it is based on a positive x-ray which is contrary to the administrative law judge's findings, and in substituting his own conclusion for those of a physician. We disagree. The administrative law judge determined that the newly submitted medical opinion evidence consisted of various medical records from the Family Practice Center and the Appalachian Regional Healthcare Medical Center, as well as the medical opinion of Dr. Wicker. Decision and Order at 8; Claimant's Exhibits 1, 2; Director's Exhibit 11. The administrative law judge properly found that the records of the Family Practice Center and Appalachian Regional Healthcare are not probative because claimant's treating physicians never related claimant's chronic obstructive pulmonary disease or chronic bronchitis to coal dust exposure. Decision and Order at 8. Further, the administrative law judge properly determined that an entry dated November 25, 1992 noted that claimant had a history of black lung, but that there was no documentation as to the basis for this statement. *Id.* In contrast, the administrative law judge properly found that Dr. Wicker, based on normal objective studies,[4] concluded that claimant did not suffer from pneumoconiosis. *Id.* Therefore, the administrative law judge properly relied on Dr. Wicker's opinion to find that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4). *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Under Section 718.204(c), claimant argues that the administrative law judge erred because he did not mention claimant's usual coal mine employment, and did not mention claimant's age, education or work experience in conjunction with his assessment that claimant was not totally disabled. Additionally, claimant notes 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 "claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 10. We disagree. Under Section 718.204(c)(4), the administrative law judge found that Dr. Wicker, the only physician to render an opinion on claimant's ability to perform his previous coal mine employment, opined that claimant retained the capacity to perform such coal mine work. Decision and Order at 10, 11; Director's Exhibit 11. Claimant does not challenge this finding by the administrative law judge under Section 718.204(c)(4) or his finding that the newly submitted evidence under Section 718.204(c)(1)-(3) did not establish total disability.

[4]Dr. Wicker concluded that claimant's x-ray, pulmonary function study, blood gas study and electrocardiogram were normal.

Decision and Order at 10. Consequently, we affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because we affirm the administrative law judge's finding that the only medical opinion relevant at Section 718.204(c)(4) submitted with this claim concluded that claimant can perform his usual coal mine employment, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment with his condition. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon*, 9 BLR 1-104 (1986). Further, 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. *See Ramey v. Kentland Elkhorn Coal Corp.,* 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Finally, contrary to claimant's contention, although pneumoconiosis is characterized as a progressive disease, the mere existence of the disease for a period of time does not, in and of itself, establish that the condition is totally disabling.

Thus, the administrative law judge properly weighed all the new evidence of record, and found that claimant failed to establish both the existence of pneumoconiosis under Section 718.202(a) and total disability under Section 718.204(c), and consequently, that claimant failed to establish a material change in conditions under Section 725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge