BRB No. 98-1192 BLA

DANIEL LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLENN'S TRUCKING COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
TRAVELERS/AETNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Stanley S. Dawson (Ferreri, Fogle, Pohl & Picklesimer), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0646) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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). The administrative law judge credited

claimant with nine years and ten months of coal mine employment and adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he worked nine years and ten months in coal mine employment. Claimant also contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Further, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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[1]Claimant filed his initial claim on October 13, 1987. Director's Exhibit 34. This claim was denied by the Department of Labor (DOL) on March 16, 1988 and March 8, 1991 because of claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. Although claimant indicated in a January 28, 1991 letter that he would send additional evidence to the DOL for review, *id*., claimant did not pursue this claim any further. Hence, the DOL's denial became final. Claimant filed his most recent claim on January 10, 1995. Director's Exhibit 1.

[2]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that "[i]n adjudicating the Claimant's original claim, the District Director found that the Claimant failed to establish the existence of pneumoconiosis and that he was totally disabled." Decision and Order at 5. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Initially, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We disagree. The newly submitted x-ray evidence of record consists of nine interpretations of five x-rays. The administrative law judge correctly stated that "[o]nly Dr. Myers and Dr. Baker interpreted an x-ray as positive for pneumoconiosis."[3] Decision and Order at 7. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). The administrative law judge stated that the "two interpretations [provided by Drs. Myers and Baker] are substantially outweighed by the more numerous and better qualified negative interpretations." Decision and Order at 7. Thus, we reject claimant's assertions that the administrative law judge erred by relying almost solely on the qualifications of the physicians who provided negative x-ray readings, and that the

[3]Of the nine newly submitted x-ray interpretations of record, seven readings are negative for pneumoconiosis, Director's Exhibits 19, 20A, 22, 32, 33, 33A, 33B, and two readings are positive, Director's Exhibits 20, 21.

administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray readings. Moreover, we reject claimant's assertion that the administrative law judge selectively analyzed the newly submitted x-ray evidence of record. Therefore, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Woodward, supra*; *Fitts, supra*.

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. Whereas Drs. Baker, Myers and Vaezy[4] opined that claimant suffers from pneumoconiosis, Director's Exhibits 14-16, Dr. Broudy opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 33A. The administrative law judge properly accorded greater weight to the opinion of Dr. Broudy than to the contrary opinions of Drs. Baker and Vaezy because he found Dr. Broudy's opinion to be better supported by the underlying documentation of record.[5] *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Hence, we reject claimant's assertions that the administrative law judge erred in discounting the opinions of Drs. Baker and Vaezy, and that the administrative law judge erred by substituting his opinion for that of the physicians. In addition, the administrative law judge properly discredited the opinion of Dr. Myers because he found it to be "based entirely on his x-ray interpretation."[6] Decision and Order at 9; *see Anderson v. Valley Camp of*

[4]Dr. Vaezy opined that claimant suffers from chronic obstructive pulmonary disease related to cigarette smoking and coal dust exposure. Director's Exhibit 16.

[5]The administrative law judge stated that "the objective medical evidence supports the conclusions reached by Dr. Broudy." Decision and Order at 10. Specifically, the administrative law judge observed that "the chest x-rays, pulmonary function studies and arterial blood gas tests revealed little, if any, abnormalities." *Id*. In contrast, the administrative law judge stated that "Dr. Baker's opinion, premised on exposure, is not as persuasive as that offered by Dr. Broudy which is based on the objective medical evidence." *Id*. The administrative law judge also stated that "the opinion of Dr. Vaezy that the Claimant suffers from chronic obstructive pulmonary disease is undermined by the fact that Dr. Vaezy did not have the results of pulmonary function studies upon which to base this diagnosis." *Id*.

[6]Dr. Myers diagnosed "Silicosis, Category 1/1 - p/s, both mid and upper lung

Utah, Inc., 12 BLR 1-111 (1989); *see generally Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Thus, we reject claimant's assertion that the administrative law judge erred by discrediting the medical opinion of Dr. Myers, which relied, in part, on a positive x-ray reading, since he found the x-ray evidence of record to be negative for pneumoconiosis. Claimant further asserts that the administrative law judge erred by discrediting the medical opinion of Dr. Baker, which relied, in part, on a positive x-ray reading, since he found the x-ray evidence of record to be negative for pneumoconiosis. Contrary to claimant's assertion, the administrative law judge stated that "[i]t is axiomatic that a medical report cannot be discredited merely because the physician relied upon a positive x-ray interpretation that was later found to be negative."[7] Decision and Order at 9. Therefore, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

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zones." Director's Exhibit 15. Dr. Myers also indicated that claimant "does have an occupational lung disease caused by his coal mine employment based upon x-ray (x-ray 1/0, 1/1 or 1/2)." *Id*. Although Dr. Myers also diagnosed chronic obstructive pulmonary disease, he did not indicate that this condition was related to coal dust exposure. *Id*.

[7]The administrative law judge observed that "Dr. Baker, in addition to the chest x-ray, based his diagnosis on significant duration of exposure." Decision and Order at 9.

Finally, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). We disagree. The administrative law judge considered the medical opinions of Drs. Baker, Broudy, Myers and Vaezy.[8] The administrative law judge stated that "[o]f the four physicians who examined the Claimant, only Dr. Baker opined that the Claimant was totally disabled." Decision and Order at 12. The administrative law judge properly found that "Dr. Baker's recommendation that the Claimant avoid further exposure does not constitute a diagnosis of total disability." Decision and Order at 13; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Further, the administrative law judge properly discredited the opinion of Dr. Baker because he found that "Dr. Baker's opinion that the Claimant would have difficulty performing sustained manual labor is not supported by any reasoning or documentation."[9] Decision and Order at 13; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Lucostic, supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject claimant's assertions that the administrative law judge erred in failing to provide an adequate explanation for discrediting Dr. Baker's opinion, and that the administrative law judge erred by substituting his opinion for that of Dr. Baker. Additionally, since the administrative law judge properly discredited Dr. Baker's opinion, the only opinion of record that could support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's assessment of claimant's capabilities. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

In addition, since the administrative law judge properly considered the newly submitted medical evidence at 20 C.F.R. §718.204(c)(4), we reject claimant's assertion that the administrative law judge erred by failing to consider claimant's age, education and work experience in his total disability analysis because these factors affect claimant's ability to obtain gainful employment. *See* 20 C.F.R.

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[8]Dr. Vaezy stated that he was not able to evaluate claimant's respiratory impairment due to claimant's poor effort on his pulmonary function test. Director's Exhibit 16.

[9]Neither the pulmonary function study nor the arterial blood gas study administered by Dr. Baker produced qualifying values. Director's Exhibit 7. In contrast, the administrative law judge observed that "the objective medical evidence of record supports the opinions of Dr. Myers and Dr. Broudy that the Claimant could perform such work." Decision and Order at 13.

§718.204(c)(4). The fact that a miner would not be hired does not support a finding of total disability.[10] *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Therefore, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and insufficient to establish total disability at 20 C.F.R. §718.204(c), we hold that substantial evidence supports the administrative law judge's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309.[11] *See Ross, supra*. Therefore, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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[10]We reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(c)(4).

[11]In view of our disposition of the case at 20 C.F.R. §725.309, we decline to address claimant's contention that the administrative law judge erred in finding that claimant worked nine years and ten months in coal mine employment.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge