BRB No. 00-0564 BLA

CHARLIE HOLLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	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.

Jennifer U. Toth (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0480) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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).[1] The administrative law judge credited the miner with eleven and

[1]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

one-half years of qualifying coal mine employment, as stipulated by the parties, and determined that this claim, filed on February 26, 1998, was subject to the duplicate claim provisions at 20 C.F.R. §725.309(d) (1999),[2] as it was not filed within one year of the final denial of an earlier claim.[3] The administrative law judge found that the new evidence

[2]The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

[3]Claimant's first claim for benefits was filed with the Social Security Administration (SSA) on September 22, 1972, and was denied on September 20, 1973. Director's Exhibit 14. Claimant filed a second claim with the Department of Labor (DOL) on September 22, 1972, which was denied on June 16, 1977. *Id.* Claimant then elected SSA review of his claim, which was denied on February 1, 1979. *Id.* Following claimant's request for a formal DOL hearing, Administrative Law Judge Donald W. Mosser issued a Decision and Order

submitted in support of this duplicate claim was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000), or total disability stemming therefrom pursuant to 20 C.F.R. §718.204 (2000), thus claimant failed to establish a material change in conditions pursuant to Section 725.309(d) (1999). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4) (2000) and 718.204 (2000). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.[4]

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denying benefits on October 9, 1986, which was affirmed by the Board on March 22, 1989. *Id.* Claimant subsequently sought modification, which was denied by the district director, and claimant filed another claim for benefits on January 3, 1992. *Id.* On July 13, 1993, Administrative Law Judge Richard K. Malamphy issued a Decision and Order denying benefits, which was affirmed by the Board on March 14, 1995. *Id.* Judge Malamphy denied claimant's request for modification in a Decision and Order issued on February 22, 1996, which was affirmed by the Board. *Id.; Holland v. Director, OWCP*, BRB No. 96-0723 BLA (Aug. 29, 1996)(unpub.). Claimant filed the present claim for benefits on February 26, 1998. Director's Exhibit 1.

[4]The administrative law judge's findings that the evidence was insufficient to establish both the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[5] Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d) (1999). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in order to assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against the miner. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1985). In the present case, the administrative law judge determined that claimant's previous claim was denied on the ground that claimant did not establish the presence of pneumoconiosis or that he was totally disabled

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

due to pneumoconiosis. Decision and Order at 3-5. The administrative law judge then properly reviewed all of the evidence submitted subsequent to the date of the prior denial to determine whether claimant had proven at least one of the elements of entitlement previously adjudicated against him. Decision and Order at 5-10; *Ross*, *supra*.

Claimant initially contends that the administrative law judge erred by selectively analyzing the newly submitted x-ray evidence of record and by improperly according greater weight to the numerical superiority of the x-ray readings that were negative . We disagree. In finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000) by a preponderance of the newly submitted x-ray evidence, the administrative law judge accurately reviewed the qualifications of the readers and acted within his discretion in finding that the positive interpretation of a film dated September 9, 1997 by Dr. Bushey, who possesses no special radiological qualifications, was outweighed by the negative interpretations of a film dated March 23, 1998 by Drs. Wicker and Sargent, who possess superior qualifications. Decision and Order at 6-7; *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). Inasmuch as the administrative law judge's findings pursuant to Section 718.202(a)(1) (2000) are supported by substantial evidence and in accordance with law, they are affirmed.

We also reject claimant's argument that the administrative law judge provided an invalid reason for discounting Dr. Bushey's diagnosis of pneumoconiosis at Section 718.202(a)(4) (2000). The administrative law judge permissibly found that Dr. Bushey's diagnosis of "chronic lung disease with pulmonary emphysema and fibrosis, compatible with coalworker's pneumoconiosis 2/1, p/s, em," Director's Exhibit 4, did not constitute a reasoned medical opinion inasmuch as the physician did not indicate what other evidence he relied upon in reaching his conclusion, apart from his own positive x-ray interpretation. Decision and Order at 6, 8; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge then acted within his discretion in according determinative weight to Dr. Wicker's contrary opinion, which he found to be well-reasoned. Decision and Order at 6, 8; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's finding that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) (2000) is supported by substantial evidence, and thus is affirmed.

Lastly, we reject claimant's contention that the administrative law judge erred in finding that the newly submitted evidence was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204 (2000). The administrative law judge properly concluded that the evidence was insufficient to establish total disability, as the pulmonary function study and blood gas study results were non-qualifying, there was no evidence of cor

pulmonale with right sided congestive heart failure, and no physician offered an opinion sufficient to establish a totally disabling respiratory or pulmonary impairment, thus the administrative law judge was not required to address the exertional requirements of claimant's usual coal mine duties .[6] Decision and Order at 10; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, contrary to claimant's arguments, the administrative law judge was not required to address vocational factors such as claimant's age, work experience and education since the medical opinions do not establish the existence of a totally disabling respiratory impairment.[7] *See* 20 C.F.R. §718.204 (2000); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp*., 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1995). The administrative law judge's findings pursuant to Section 718.204 (2000) are supported by substantial evidence and are affirmed. Inasmuch as the administrative law judge properly determined that claimant failed to establish any of the elements of entitlement previously adjudicated against him pursuant to Section 725.309(d) (1999), we affirm the administrative law judge's denial of benefits. *Ross, supra.*

[6]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2) (2000); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

[7]Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at 20 C.F.R. §410.426(a) (2000) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (2) (2000).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge