BRB No. 05-0753 BLA

IKIE BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA DIVISION, APOGEE COAL COMPANY	)	DATE ISSUED: 03/28/2006
	)	
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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ikie Bryant, Logan, West Virginia, *pro se.*

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2003-BLA-6107) of Administrative Law Judge Richard A. Morgan 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 administrative law judge found that because the claim before him was filed after January 19, 2001, it must be adjudicated under the revised regulations.[1] The administrative law judge further

[1] The Department of Labor has revised the regulations implementing the Federal Coal Mine Health and Safety Act of 1969 as amended. These regulations became effective on January 19, 2001.

found that because it was a subsequent claim, at least one of the elements previously adjudicated against claimant must be established. The administrative law judge determined that a change in an applicable condition of entitlement was established as new evidence established total respiratory disability, an element previously adjudicated against claimant. Accordingly, the administrative law judge turned to a consideration of all the evidence of record. Finding that claimant failed to establish the existence of pneumoconiosis, and consequently, that disability was due to pneumoconiosis, the administrative law judge denied benefits.[2]

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer, in response, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, stating that he will not address the merits of the administrative law judge's weighing of the evidence, but contends that the administrative law judge erred in treating the current claim as a subsequent claim, pursuant to 20 C.F.R. §725.309, rather than as a request for modification, pursuant to 20 C.F.R. §725.310. The Director stated, however, that he took no position as to whether remand of the case was required for the administrative law judge to determine whether a basis for modifying the prior denial of benefits had been made, *i.e.*, whether the evidence establishes a mistake in fact or a change in conditions.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he has pneumoconiosis, that he is totally disabled due to pneumoconiosis, and that his pneumoconiosis arose 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 of these elements precludes a finding of 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[2] The history of this case is set forth in the Board's prior decisions dated September 29, 2000 and March 26, 1998.

We first address the Director's argument that the administrative law judge erred in treating the current claim as a subsequent claim rather than as a request for modification. As the Director asserts, under 20 C.F.R. §725.310(a), a claimant who has been denied benefits has one year from that date of denial to seek modification. The Board affirmed the prior denial of benefits on September 29, 2000. Decision and Order dated September 29, 2000. Because one year from the date of the Board's decision fell on Saturday, September 29, 2001, claimant had an additional two days, or until October 1, 2001 to file a request for modification. 20 C.F.R. §725.311. The current claim was filed on October 1, 2001, as indicated by the Department of Labor's date stamp. Director's Exhibit 3. As the Director contends, the current claim constitutes a request for modification which merges with the prior claim, filed on December 10, 1993, and is not, therefore, subject to application of the revised regulation at 20 C.F.R. §725.414 which limits the amount of evidence that can be submitted by the parties in claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

Ultimately, however, the administrative law judge's error in treating claimant's current claim as a subsequent claim rather than a request for modification is harmless as the administrative law judge did not apply the revised regulations to exclude any evidence proffered by claimant and on considering all the evidence, properly found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[3]

In addressing the length of coal mine employment, the administrative law judge rationally concluded that claimant established at least eight years and four months of qualifying coal mine employment. Decision and Order at 3-5. Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith*, 7 BLR 1-803; *Miller*, 7 BLR 1-693; *Maggard*, 6 BLR 1-285. In this case, the administrative law judge reasonably relied upon

[3] Any error made by the administrative law judge in precluding some of employer's evidence is also harmless as the administrative law judge found that claimant was not entitled to benefits. *See* Hearing Transcript at 20-29; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

claimant's Social Security Administration and employment records as well as claimant's testimony in determining the length of qualifying coal mine employment. Decision and Order at 4-5. We, therefore, affirm the administrative law judge's finding of at least eight years and four months of qualifying coal mine employment as it is reasonable and supported by substantial evidence. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992).

In considering whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge considered all of the relevant evidence of record together pursuant to the holding of the United States Court of Appeals Fourth Circuit in *Compton*, 211 F.3d 203, 22 BLR 2-162, within whose jurisdiction this claim arises. In considering readings of the x-ray submitted since the prior denial of benefits, the administrative law judge found them to be negative for the existence of pneumoconiosis based on the weight of the negative readings of the more qualified readers. Decision and Order at 4-5, 22-23. Turning to the x-ray evidence submitted with the previous claims, the administrative law judge found that the majority of the readings, by the better qualified physicians, were negative for the existence of pneumoconiosis. The administrative law judge accorded little weight to the positive readings of physicians whose qualifications were not in the record. Decision and Order at 23-24. On considering all the evidence, the administrative law judge concluded that the "overwhelming majority" of the x-rays (read by the better qualified physicians) were read negative for the existence of pneumoconiosis and that claimant failed, therefore, to establish the existence of pneumoconiosis based on the x-ray evidence of record. This was proper. 20 C.F.R. §718.202(a)(1); *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). Accordingly, we affirm the administrative law judge's determination that the x-ray evidence of record fails to support a finding of pneumoconiosis pursuant to Section 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).[4]

Turning to the medical opinion evidence of record, the administrative law judge found that the newly submitted opinions of Drs. Altmeyer, Zaldivar and Crisalli, all of whom opined that claimant did not suffer from pneumoconiosis or any disease arising out of coal dust exposure, were entitled to the greatest weight because they provided the best-

[4] The administrative law judge also found, correctly, that claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3) as there was no autopsy or biopsy evidence or evidence of complicated pneumoconiosis in this living miner's claim filed subsequent to June 1, 1982. 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

reasoned opinions of record. This was proper. Employer's Exhibits 2-4, 13, 17; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative found that the most recent reports of Drs. Ranavaya and Rao, both of whom opined that claimant suffered from pneumoconiosis, were entitled to little weight as the physicians did not fully explain the conclusions they reached and did not provide opinions as detailed and reasoned as those of Drs. Altmeyer, Zaldivar and Crisalli. Director's Exhibits 12, 26; *see Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Stiltner*, 86 F.3d 337, 20 BLR 2-246; *see also Underwood*, 105 F.3d 946, 21 BLR 2-23; *Clark*, 12 BLR 1-149. Further the administrative law judge found that Dr. Ranavaya's opinion was questionable as he relied on an inaccurate smoking history of ten years[5] and inaccurate length of coal mine employment history of twenty-two years in reaching his conclusions. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), *see generally Stark*, 9 BLR 1-36; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

The administrative law judge considered the previously submitted medical opinion evidence, Director's Exhibit 1, and determined that it did not support a finding of the existence of pneumoconiosis, as all of the opinions by Drs. Altmeyer, Zaldivar and Crisalli, concluding that claimant did not suffer from pneumoconiosis, were entitled to the greatest weight as they were the best-reasoned and best supported by objective evidence, *see Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Stiltner*, 86 F.3d 337, 20 BLR 2-246; *see also Underwood*, 105 F.3d 946, 21 BLR 2-23; *Clark*, 12 BLR 1-149, while the opinions of Drs. Acosta, Lesaca, Pelaez and Rao, diagnosing the existence of pneumoconiosis, were entitled to little, if any, weight: Drs. Acosta and Pelaez failed to explain their conclusions; Dr. Lesaca's opinion was from 1973, and the physician was not as well-qualified as those who rendered contrary conclusions, and Dr. Rao provided no support for his conclusion, had no qualifications listed in the record, and equated bullous emphysema with pneumoconiosis, a medical conclusion rejected by the better qualified physicians of record. *Id.* Further, the administrative law judge permissibly found the opinions of Drs. Ranavaya and Rasmussen, diagnosing the existence of pneumoconiosis, to be outweighed by the contrary opinions as Dr. Ranavaya provided no support for his finding of pneumoconiosis and relied on inaccurate smoking and coal mine employment histories, and Dr.

[5] The administrative law judge determined that claimant had a smoking history of at least thirty years. Decision and Order at 4.

Rasmussen provided no explanation for his conclusion. *Id*. Accordingly, we affirm the administrative law judge's determination that the medical opinion evidence of record does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Compton*, 211 F.3d 203, 22 BLR 2-162.

Because the administrative law judge addressed all of the relevant evidence of record and properly concluded that such evidence failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, *see Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1, we must affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge