BRB No. 97-0900 BLA

LENVILLE ADAMS Claimant-Petitioner v. RED FOX COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (95-BLA-1728) of Administrative Law Judge J. Michael O'Neill on a duplicate claim[1] filed pursuant to the

[1]Claimant filed the instant claim on February 5, 1994. Director's Exhibit 1. He filed a prior claim on December 22, 1980. Director's Exhibit 48 at 252. By Decision and Order dated November 26, 1984, Administrative Law Judge Daniel Lee Stewart denied benefits in

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 twenty-one years of coal mine employment, and found that employer is the properly designated responsible operator. The administrative law judge further found that the claim is not subject to the transfer of liability provisions of the Act. On the merits of the claim, the administrative law judge found that the new evidence, submitted since Administrative Law Judge Daniel Lee Stewart's denial of the prior claim, is insufficient to establish a material change in conditions under 20 C.F.R. §725.309 pursuant to the standard enunciated by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Specifically, the administrative law judge weighed all the new evidence, favorable and unfavorable, and determined that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or total disability under 20 C.F.R. §718.204(c). The administrative law judge indicated that since claimant failed to establish the existence of pneumoconiosis and total disability, he cannot establish that he is totally disabled due to pneumoconiosis, and thus, failed to establish a material change in conditions under Section 725.309. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge performed a selective analysis of the evidence in finding that claimant failed to establish the existence of pneumoconiosis and that he is totally disabled. Claimant argues that the administrative law judge considered only whether the x-ray evidence establishes the presence of clinical pneumoconiosis, without considering whether claimant is disabled by pneumoconiosis as defined in the Act under 20 C.F.R. §718.201. Claimant thus argues that the administrative law judge's decision does not comport with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Claimant also asserts that the Act is remedial in nature and that a rational evaluation of the medical evidence shows that claimant is totally disabled due to occupational pneumoconiosis and thus entitled to benefits. Claimant urges the Board to enter an award of benefits, or, alternatively, to remand the case. Employer responds, and seeks affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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,*

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the prior claim based on claimant's failure to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) and total disability under 20 C.F.R. §718.204(c). Director's Exhibit 48 at 255.

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant claim arises, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), held in *Ross* that in order to determine whether a material change in conditions is established, the administrative law judge must consider all the new evidence and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes that element, he has demonstrated, as a matter of law, a material change in conditions under Section 725.309. In the instant case, Judge Stewart denied the prior claim based on claimant's failure to establish the existence of pneumoconiosis at Section 718.202(a) and total disability under Section 718.204(c), Director's Exhibit 48 at 255. Claimant may thus establish a material change in conditions by proving one of these elements of entitlement. *Ross, supra*.

We affirm, as supported by substantial evidence, the administrative law judge's finding that the new evidence, submitted since the prior denial, fails to establish the existence of pneumoconiosis at Section 718.202(a) and total disability under Section 718.204(c). Claimant's contention that the administrative law judge considered only the issue of the existence of pneumoconiosis with regard to the x-ray evidence is refuted by the record. The administrative law judge specifically indicated that the issue is whether the presence of pneumoconiosis, as defined in Section 718.201, is established under Section 718.202(a). Decision and Order at 10. In this regard, at Section 718.202(a)(1), the administrative law judge properly found that the preponderance of the x-ray interpretations rendered by better qualified physicians is negative. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *see also Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 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).

He correctly noted that there is no biopsy or autopsy evidence, 20 C.F.R. §718.202(a)(2), and properly found that the presumptions provided at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable to the instant claim, 20 C.F.R. §718.202(a)(3).

The administrative law judge next determined that the new medical opinions fail to establish the existence of pneumoconiosis under Section 718.202(a)(4). The administrative law judge found that the opinions of Drs. Sundaram and Caudill, the only medical opinions submitted since the prior denial which include a diagnosis of pneumoconiosis, are not credible. Specifically, the administrative law judge found that the opinions of Drs. Sundaram and Caudill are not due any greater weight based on their status as treating physicians because Dr. Sundaram failed to provide a comprehensive discussion of claimant's condition and both Drs. Sundaram and Caudill summarily diagnosed coal workers' pneumoconiosis without explaining the basis for their diagnoses. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also determined that the physicians' reliance upon positive x-ray readings goes against the

weight of the medical evidence. He further found that the x-ray findings of both Drs. Sundaram and Caudill fail to comply with the applicable regulatory quality standards, 20 C.F.R. §718.102(c). The administrative law judge also noted that the two radiologists who took x-rays on March 8, 1994 and February 28, 1995 at Dr. Sundaram's request read these x-rays as negative, while Dr. Sundaram, who has no special radiological qualifications, read them as positive. Director's Exhibits 12, 22, 47. The Board has held that while an administrative law judge may not discredit a medical opinion at Section 718.202(a)(4) merely because it relies, in part, on a positive x-ray reading, *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), the administrative law judge here, in a proper exercise of his discretion, discredited the opinions of Drs. Sundaram and Caudill because he found them to be unsupported by their underlying documentation and unreasoned. *See Clark, supra*; *see also Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985). The administrative law judge further noted that Dr. Caudill's progress reports dated April 15, 1994 and June 8, 1994 are mostly illegible, Director's Exhibit 12, and that Dr. Caudill's June 8, 1994 diagnosis of probable black lung disease is an equivocal diagnosis. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Spradlin v. Island Creek Coal Co.,* 6 BLR 1-716 (1984). The administrative law judge thus properly found that the new medical opinions, including the opinions of Drs. Fino, Broudy, Todd and Wicker, who found that claimant does not have pneumoconiosis, fail to establish the existence of pneumoconiosis at Section 718.202(a)(4). Substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) -(4) and a material change in conditions under Section 725.309 on this basis. We thus affirm the administrative law judge's findings.

Further, we reject claimant's assertion that the administrative law judge selectively analyzed the evidence in finding that claimant failed to establish total disability at Section 718.204. The administrative law judge properly found that none of the new pulmonary function study evidence and blood gas study evidence resulted in qualifying values,[2] 20 C.F.R. §718.204(c)(1), (c)(2). He also correctly noted that there is no evidence that claimant has cor pulmonale with right sided congestive heart failure, 20 C.F.R. §718.204(c)(3).

[2]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Considering the new medical opinions pursuant to Section 718.204(c)(4), the administrative law judge accorded little weight to the opinion of Dr. Sundaram, who alone found that claimant is unable to return to his former coal mine employment due to his respiratory or pulmonary condition.[3] In this regard, the administrative law judge determined, *inter alia,* that Dr. Sundaram did not explain the meaning of his finding that claimant's level of functioning is level II, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). The administrative law judge further properly found that the pulmonary function studies and blood gas studies underlying Dr. Sundaram's opinion did not result in qualifying values. *Lucostic, supra.* Rather, the administrative law judge, within his discretion, accorded substantial weight to the opinions of Drs. Broudy, Wicker, and Fino that claimant retains the respiratory or pulmonary capacity to perform his former coal mine employment, Director's Exhibits 12, 13, based on the administrative law judge's finding that these opinions are well reasoned and well documented. *Clark, supra*; *see also Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987). The administrative law judge thus properly found that claimant failed to establish total disability by a preponderance of the newly submitted medical opinion evidence at Section 718.204(c)(4). *Ondecko, supra*. Substantial evidence thus supports the administrative law judge's finding that the new pulmonary function study, blood gas study, and medical opinion evidence, considered together, fails to establish total disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). We thus affirm the administrative law judge's findings at Section 718.204(c)(1) - (4).

Accordingly, the administrative law judge properly determined that claimant cannot establish that he is totally disabled due to pneumoconiosis in light of his failure to show the presence of pneumoconiosis and total disability. 20 C.F.R. §718.204(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Further, substantial evidence supports the administrative law judge's determination that claimant failed to prove at least one of the elements of entitlement previously adjudicated against him. We, therefore, also affirm the administrative law judge's finding that claimant has not established a material change in conditions under Section 725.309. *Ross, supra*. We thus affirm the administrative law judge's denial of benefits in the instant duplicate claim.

[3]Dr. Broudy found that claimant did not have an occupational lung disease caused by coal mine employment and that claimant retained the pulmonary capacity to perform his usual coal mine employment or comparable and gainful work. Director's Exhibit 12. Dr. Broudy found, however, that claimant's vision impairment due to his retinitis pigmentosa would preclude him from doing any type of work in the coal mining industry. *Id.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge