BRB No. 03-0781 BLA

JIMMY D. KERR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/28/2004
	)	
CARTER BRANCH MINING COMPANY, INCORPORATED	)	
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

John T. Chafin (Chafin & Davis), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2002-BLA-5218) of Administrative Law Judge Rudolf L. Jansen rendered 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

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations

law judge credited claimant with twenty-one years of qualifying coal mine employment based on the evidence of record and a stipulation by the parties and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge considered all of the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge thus found that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[2]

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm the administrative law judge's findings that claimant has not established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

As a preliminary matter, we note that the record reflects that claimant filed his initial claim for black lung benefits on May 7, 1987. Director's Exhibit 1. This claim was denied by Administrative Law Judge Robert L. Cox in a Decision and Order issued on October 28, 1991. *Id.* In that decision, Administrative Law Judge Cox, upon consideration of the conflicting x-ray evidence, gave "the benefit of the doubt" to claimant and found that the existence of pneumoconiosis was established, but further found that the evidence was insufficient to establish total pulmonary or respiratory disability. 1991 Decision and Order at 5. On appeal, the Board affirmed Judge Cox's finding of no total disability and his denial of benefits in *Kerr v. J & H Mining Co.*, BRB No. 92-0466 BLA (June 10, 1993)(unpub.). Director's Exhibit 1. Claimant filed his second claim for benefits on July 17, 1995, which was denied by the district director on December 18, 1995. Claimant took no further action on that claim. Claimant's third claim, filed on February 1, 2001, is currently on appeal.

In this 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. Decision and Order at 10. The administrative law judge then 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 3-7; *see Ross*, 42 F.3d 993, 19 BLR 2-10. We will only address claimant's arguments with respect to the administrative law judge's findings regarding whether claimant has established a total respiratory disability.[3]

[3] We are mindful of the fact that the district director determined that none of the elements of entitlement were established in the 1995 claim. However, in that claim, claimant only needed to establish total disability to establish a material change in conditions. As such, the district director's determination regarding claimant's failure to establish the existence of pneumoconiosis therein was extraneous in that proceeding. In the event that claimant were to establish a material change in conditions, however, a *de novo* evaluation of whether the existence of pneumoconiosis is established would be required since the true doubt rule, relied on by Judge Cox, has been overruled by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

With respect to Section 718.204(b)(2)(iv), claimant argues that the administrative law judge erred in not giving "proper weight" to the medical opinion of Dr. Sundaram, claimant's "treating physician," supported by the opinion of Dr. Hussain, that claimant did not retain the respiratory capacity to perform his usual coal mine employment. Claimant's Brief at 2-5. We disagree. The administrative law judge reasonably accorded Dr. Sundaram's opinion less weight, finding that it was not well documented or reasoned, because the physician failed to explain his conclusion of total disability "in light of" the normal values obtained on the pulmonary function study and blood gas study that he administered. Decision and Order at 10; Claimant's Exhibits 1-2; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-106 (6th Cir. 1983); *Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also acted within his discretion in according little weight to the opinion of Dr. Sundaram, in spite of his status as claimant's "treating physician," since the physician did not adequately explain the rationale for his conclusion or identify the observations, findings or particular objective data he relied on in reaching his conclusion that claimant was totally disabled. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Clark* 12 BLR 1-149; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Furthermore, the administrative law judge permissibly concluded that Dr. Hussain's diagnosis of total disability on the examination report was questionable in light the physician's subsequent deposition testimony that claimant had a mild impairment while noting the pulmonary function study and blood gas study values were normal. Decision and Order at 6-7, 10; Director's Exhibit 15; Employer's Exhibit 1.

In addition, the administrative law judge rationally found that the contrary opinions of Drs. Dahhan and Fino, physicians with superior qualifications, stating that claimant was not suffering from a disabling respiratory or pulmonary impairment, were supported by the objective data and, thus, were well-reasoned and entitled to greater weight.[4] *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Fields*, 10 BLR 1-19; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48

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[4] 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(b)(2)(i)-(iv), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

(1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry*, 11 BLR 1-1; Decision and Order at 5-6, 10-11; Director's Exhibit 22; Employer's Exhibit 2.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(b)(2)(iv). Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), the element of entitlement previously adjudicated against him, we affirm the administrative law judge's finding that the evidence was insufficient to establish a material change in conditions pursuant to Section 725.309(d) (2000). Consequently, we affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law. *Ross*, 42 F.3d 993, 19 BLR 2-10; *see Kirk*, 264 F.3d 602, 22 BLR 2-288.

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge