BRB No. 05-0746 BLA

RAY LAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BROWNIES CREEK COLLIERIES	)	DATE ISSUED: 05/11/2006
	)	
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 of Edward Tehrune Miller, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5637) of Administrative Law Judge Edward Tehrune Miller denying benefits on a subsequent 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 claimant with eleven years of coal mine employment and adjudicated this subsequent claim[2] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] On the merits, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.203. The administrative law judge also found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Both employer and the Director, Office of Workers' Compensation

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[1]The Department of Labor (the DOL) 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his first claim with the Social Security Administration (SSA) on January 28, 1970. Director's Exhibit 1. This claim was denied by the SSA on November 13, 1970, August 2, 1973, October 2, 1973, May 15, 1974, and September 11, 1974, and it was denied by the DOL on January 24, 1979 and August 20, 1980. *Id*. The DOL denied the claim because the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that claimant is totally disabled by the disease. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim with the DOL on August 15, 1985. *Id*. On January 28, 1986, the DOL denied this claim because claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his third claim with the DOL on April 13, 1989. *Id*. The DOL denied this claim on October 3, 1989 and February 24, 1994 because claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *Id*. Since claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was received by the DOL on June 7, 2001. Director's Exhibit 3.

[3]The revisions to the regulation at 20 C.F.R. §725.309 apply to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

Programs, respond, urging affirmance of the administrative law judge's denial of benefits.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge considered the reports of Drs. Baker, Fino, Repsher, and Dahhan. Dr. Baker, in a July 21, 2001 report, opined that claimant has clinical and legal pneumoconiosis.[5] Director's Exhibit 19. In contrast, Dr. Fino, in an April 1, 2002 report, opined that claimant does not have clinical or legal pneumoconiosis. Employer's Exhibit 3. Similarly, Dr. Repsher, in a November 25, 2002 report, opined that claimant does not have clinical or legal pneumoconiosis. Employer's Exhibit 2. Lastly, Dr. Dahhan, in an October 5, 2001 report, opined that claimant does not have legal pneumoconiosis. Employer's Exhibit 1. Based on his determination that Dr. Baker's opinion is not reasoned, the administrative law judge found that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. Decision and Order at 7-9.

Claimant initially asserts that the administrative law judge erred in discounting Dr. Baker's opinion that claimant has clinical and legal pneumoconiosis because Dr. Baker relied on a thirty to thirty-five year coal mine employment history. Claimant's Brief at 4. The administrative law judge permissibly discounted Dr. Baker's opinion because it is based on an inaccurate length of coal mine employment history. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). As discussed *supra*, the administrative law judge credited claimant with eleven years of coal mine employment. Claimant does not challenge this finding. Dr. Baker, however, erroneously noted that claimant had thirty to thirty-five years of underground coal mine employment. Director's Exhibit 19. The administrative law judge rationally found that "Dr. Baker's reliance on a coal mine history of thirty to

[4]Because no party challenges the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§725.309 and 718.202(a)(1)-(3), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]Dr. Baker diagnosed coal workers' pneumoconiosis, based on a chest x-ray and a history of coal dust exposure. Director's Exhibit 19. Dr. Baker also diagnosed chronic obstructive pulmonary disease, chronic bronchitis, and hypoxemia caused by coal dust exposure and cigarette smoking. *Id.*

thirty-five years impairs the credibility of his opinion since [c]laimant has only proved eleven years of coal mine employment." Decision and Order at 8. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion that claimant has clinical and legal pneumoconiosis because Dr. Baker relied on a thirty to thirty-five year coal mine employment history.

Claimant next asserts that the administrative law judge erred in discounting Dr. Baker's opinion that claimant has legal pneumoconiosis on the basis that the weight of the x-ray evidence is insufficient to establish the existence of pneumoconiosis. Claimant's Brief at 4. Specifically, claimant argues that "far from being a subjective opinion based solely on a history and an x-ray review, [Dr. Baker's] conclusion was derived from objective measurement and a review of all factors that would cause or contribute to an obstructive lung dysfunction." *Id*. at 4-5. In his report, Dr. Baker indicated that the only bases for his diagnoses of clinical and legal pneumoconiosis were an abnormal chest x-ray and coal dust exposure. Director's Exhibit 19. Although Dr. Baker's report reflects that he examined claimant and obtained a pulmonary function study and an arterial blood gas study, Dr. Baker did not explain how the examination findings or objective tests supported a diagnosis of legal pneumoconiosis.[6] *Id*. In considering Dr. Baker's opinion, the administrative law judge stated that "Dr. Baker's only remaining rationale [besides the positive x-ray reading] is [c]laimant's coal dust exposure."[7] Decision and Order at 8. As the record supports the administrative law judge's determination that Dr. Baker's diagnoses of both clinical and legal pneumoconiosis are based exclusively on an abnormal chest x-ray and coal dust exposure, and lacked sufficient discussion or analysis to support the diagnoses of those diseases, the administrative law judge permissibly discounted Dr. Baker's opinion at Section 718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Claimant raises no other argument at Section 718.202(a)(4). Claimant has the burden of producing evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of

[6]The administrative law judge rationally found that there is no medical evidence of record that establishes a causal link between the diagnosed conditions and coal dust exposure. Decision and Order at 7-8.

[7]The administrative law judge further stated that coal dust exposure is not certain to cause pneumoconiosis. Decision and Order at 8.

entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Since the administrative law judge permissibly discounted the only medical opinion of record that could support a finding of pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), as supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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