BRB No. 98-1141 BLA

JAMES D. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOUBLE Q COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier Respondents	)	
	)	
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 Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Timothy P. Coode, Knoxville, Tennessee, for claimant.

Mark E. Solomons and Gregory S. Feder (Arter & Hadden), Washington, D.C., for the employer/carrier.

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

McGRANERY, Administrative Appeals Judge:

This matter is before the Board on the appeal by Thomas D. Wilson ("claimant") of the Decision and Order (96-BLA-1854) of Administrative Law Judge Edward J. Murty, Jr. denying benefits on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). A claimant becomes entitled to benefits under the Act by establishing that he is totally disabled due to coal workers' pneumoconiosis. 30 U.S.C. §901; *Mullins Coal Co., Inc. of Virginia v. Director,*

OWCP, 484 U.S. 135, 141, 11 BLR 2-1, 2-5 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-54 (6th Cir.1989). The failure to establish any element of entitlement precludes an award. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 2-197 (6th Cir. 1997).

Claimant filed the instant claim on May 4, 1995. DX-1. After administrative denials by the district director on October 2, 1995 and January 16, 1996, DXs-19, 31, 33, this claim was referred to the Office of Administrative Law Judges and a formal hearing was conducted by Administrative Law Judge Edward J. Murty, Jr. on March 12, 1998, in Knoxville, Tennessee. 20 C.F.R. §725.421(a).

On April 22, 1998, Judge Murty issued the Decision and Order which is the subject of this appeal. In rendering this decision, the administrative law judge reviewed the administrative record as a whole, determined that claimant failed to establish either the existence of pneumoconiosis or that he is totally disabled due to pneumoconiosis. Benefits were denied and claimant brought this appeal.

On appeal, claimant contests the administrative law judge's findings that he failed to prove the existence of pneumoconiosis or disability causation. 20 C.F.R. §§718.202(a), 718.204(b). Claimant also takes issue with the administrative law judge's finding of ten years of coal mine employment. Employer responds to claimant's appeal, urging that the Board affirm.[1] The Director, Office of Workers' Compensation Programs, has elected not to participate in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and

[1] Employer would have us reject claimant's appeal out of hand on the ground that claimant does no more than recite favorable evidence. Er. Brief at 11. We disagree. While some of claimant's arguments on appeal merit little discussion, each assignment of error has been carefully considered and it is evident that claimant has demonstrated with sufficient specificity why he considers the administrative law judge's decision to be contrary to law. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47 (6th Cir. 1986).

conclusions of law of the administrative law judge 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).

Upon consideration of the administrative record, the decision and order and the arguments presented on appeal, we conclude that the findings of fact rendered by the administrative law judge are supported by substantial evidence and are not marked by reversible error. For the reasons that follow, we therefore affirm the Decision and Order denying benefits.

I

At the outset, we note that the instant filing by claimant constitutes a duplicate claim. Claimant has sought benefits under the Act on three separate occasions. He lodged his first claim on September 13, 1989. DX-43-1. This claim was administratively denied on January 9, 1990. DX-43-17. Claimant did not appeal this disposition but instead filed a second claim for benefits on September 18, 1991. DX-44-1. This claim was rejected by the district director on January 7, 1992 because claimant failed to establish pneumoconiosis or that he was totally disabled due to pneumoconiosis. DX-44-12. Claimant did not respond to this determination until he filed the instant claim.[2]

The Secretary's regulations provide, *inter alia*, that a duplicate claim "shall" also be denied unless claimant proves a material change in conditions. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 996, 19 BLR 2-10, 2-17 (6th Cir. 1994). In order to evaluate whether a claimant has demonstrated a material change, the administrative law judge must consider the new evidence submitted subsequent to the denial of the prior claim and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18-19; *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-73 (1997). Further, because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, *see* DX-2, "a determination that the miner's physical condition has worsened is a requisite part of the duplicate claims analysis ... under *Ross*[.]" *Flynn v. Grundy Mining Company*, 21 BLR 1-40, 1-43 (1997).

[2] Claimant signed this claim on June 7, 1994, but the document was not received by the district director until May 4, 1995. *See* 20 C.F.R. §725.303(a)(1).

The administrative law judge in this case failed to address the duplicate claim issue and proceeded to evaluate the record as a whole.[3] Given the denial of benefits, this oversight, which inures to claimant's benefit, nevertheless constitutes harmless error because it has no bearing on the outcome of this case. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 417 n.8, 21 BLR 2-192, 2-200 n.8 (6th Cir. 1997); *Collins v. Old Ben Coal Co.*, 861 F.2d 481, 489 (7th Cir. 1988); *see generally Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (harmless error analysis in administrative cases).

II

Turning to the merits of this appeal, we initially discern no reversible error in the administrative law judge's findings with respect to the length of claimant's qualifying coal mine employment. The administrative law judge found "little more than ten years and certainly no more than [the 13 years and one month] credited by the Director[,]" and in evaluating the medical opinion evidence, proceeded on the premise that claimant had completed ten years in the mines. Decision and Order at 3. At the formal hearing, claimant agreed with the district director's calculation of slightly over 13 years of coal mine employment, HT-36, and now argues on appeal that the administrative law judge erred in not accepting the figure computed by the district director.[4]

The administrative law judge must make a specific finding regarding the length of a miner's coal mine employment. *Boyd v. Director, OWCP*, 11 BLR 1-39, 1-41 (1988). Although the administrative law judge found that claimant's coal mine employment between

[3] The administrative law judge reported that "twenty-five exhibits [were] submitted by the Director[.]" Decision and Order at 1. In fact, forty-five Director's exhibits appear in evidence, and it appears from the administrative law judge's analysis, that evidence from the earlier denials was not precluded from consideration.

[4] In the proposed Decision and Order, Memorandum of Conference, the district director found that claimant's Social Security earnings records established 13 years and one month of coal mine employment. DX-41 at 10. Claimant did not concur with this finding, and the length of claimant's qualifying coal mine employment was one of the contested issues for resolution before the administrative law judge. DX-45. At the formal hearing, employer argued that claimant was entitled to credit for only 8.4 years of coal mine employment. HT-35. When asked by the administrative law judge the number of years he now "contend[ed]," counsel responded that "[w]e agree with the District Director's finding of 13 years." HT-36. On appeal, claimant asserts that the administrative law judge erred in disregarding the district director's finding of 13 years and one month of qualifying coal mine employment. Claimant's Brief at 8-9.

1966 and 1989 "was sporadic and aggragated [sic] little more than ten years[,]" Decision and Order at 1-2, he failed to articulate the thorough factual analysis required to resolve this often uncertain issue. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 n.1 (1988).

Despite shortcomings in the administrative law judge's analysis with respect to claimant's coal mine employment history, however, we conclude that the administrative law judge's "ten-year" finding constitutes harmless error. First, a work history of 13 years will not provide claimant with any additional presumptions than would otherwise obtain for a claimant who is credited with ten years of coal mine employment.[5] *See, e.g.*, 20 C.F.R. §718.203(b). Second, given the greatly exaggerated coal mine work history of 23 years that was referenced by claimant's experts to diagnose the presence of pneumoconiosis, the discrepancy of three years between the administrative law judge's finding of ten years and the 13 years accepted by claimant at the hearing, and asserted on appeal, is *de minimis*.[6]

III

Claimant contests the administrative law judge's determination that he failed to establish the presence of pneumoconiosis on the basis of either x-ray or medical opinion

[5] Claimant cannot benefit from the presumptions accorded under Section 718.202(a)(3) regardless of length of coal mine employment: the presumption found in Section 718.304 does not apply because there was no evidence of complicated pneumoconiosis, Section 718.305 is foreclosed because this claim was filed after January 1, 1982, *see* 30 U.S.C. §921(c)(4), and Section 718.306 applies to certain death claims.

[6] Drs. Baker, Henschen and Seargeant recorded a coal mine employment history of 23 years. CX-1; DXs-11, 36; 43-13, 44-8. The ten year difference between their work histories and the employment record accepted by claimant at the hearing is significant. *See generally Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 27-29, 3 BLR 2-36, 2-52-54 (1976).

evidence. 20 C.F.R. §718.202(a)(1), (4). We find his argument to be without merit.

Claimant initially assails the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis.[7] Claimant, citing the opinions of Dr. Baker, CXs-1, 2, maintains that the administrative law judge erred by disregarding "evidence presented of the effect of hyper-inflation on X-rays." Claimant's Brief at 7. Claimant acknowledges that the x-ray evidence in this case "was almost universally read as negative," and at the hearing conceded that the x-ray evidence is negative, but contends that Dr. Baker has effectively explained away the negative x-ray interpretations in this case. As a result, claimant implies that the negative x-rays lack probative value.

This argument lacks merit. Regardless of the accuracy, *vel non*, of Dr. Baker's conclusions, his explanation of the effects of pulmonary hyperinflation on the interpretation of x-rays is insufficient to carry claimant's affirmative burden of proving the existence of pneumoconiosis on the basis of x-ray evidence in this instance, because Dr. Baker does not present a radiographic diagnosis of pneumoconiosis that is classified pursuant to Section 718.102. We therefore affirm the administrative law judge's findings at Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1).

IV

Claimant assails the administrative law judge's decision to discount the probative value of the medical opinions of three of his physicians, specifically contesting the administrative law judge's evaluations of the conclusions of Drs. Baker, Henschen and Seargeant, CX-1; DXs-11, 36, 43-13, 44-8, under Section 718.202(a)(4).

We discern no error in the administrative law judge's evaluation of the medical opinions of these experts. Each physician relied upon a greatly exaggerated history of coal mine employment, *viz*. 23 years,[8] to find that claimant's chronic obstructive pulmonary

[7] A claimant may establish the existence of pneumoconiosis at Section 718.202(a)(1) on the basis of a positive x-ray interpretation which is classified in accordance with the quality standard set forth at Section 718.102. 20 C.F.R. §718.102; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 18 BLR 2-A1 (1994).

[8] Claimant points out that, other than the Social Security earnings record, "there is no other evidence that Claimant was not physically working in the mines for 23 years." Claimant's Brief at 14. This contention ignores his agreement with the district director's computation of thirteen years of coal mine employment as well as his affirmative burden to substantiate his claim of 23 years. HT-36.

disease and emphysema were related in part to his coal mine employment, and the administrative law judge was entitled to assign their diagnoses little probative weight because of this fact. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 & n.6, 5 BLR 2-99, 2-103 & n.6 (6th Cir. 1983); *see also Risher v. Director, OWCP*, 940 F.2d 327, 331, 15 BLR 2-186, 2-191 (8th Cir. 1991). Because the administrative law judge's finding that claimant failed to prove the existence of pneumoconiosis on the basis of medical opinion evidence is supported by substantial evidence, we affirm his finding at Section 718.202(a)(4).

In view of our decision to affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, we will uphold the denial of benefits in this case.[9]

[9] We have carefully considered the other arguments raised by claimant, and find them either to be without merit or to demonstrate harmless error. For example, we concur with claimant that the administrative law judge's "primary cause" standard for disability causation in incorrect, and that claimant need only show that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling pulmonary or respiratory impairment. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180, 2-186 (6th Cir. 1997); *see also Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-54 (6th Cir. 1989). Nevertheless, given the administrative law judge's finding, which we affirm, that claimant did not prove the existence of pneumoconiosis, this mistake is harmless error because it has no bearing on the outcome of this case. *Cf. Trumbo v. Reading Anthracite Company*, 17 BLR 1-85, 1-88 (1993)(claimant must prove existence of pneumoconiosis as prerequisite for establishing death due to pneumoconiosis).

Because there is no showing that Dr. Fino in this case held to the view that an obstructive disease may *never* constitute coal workers' pneumoconiosis, *see Stiltner v. Island*

Creek Coal Co., 86 F.3d 337, 341, 20 BLR 2-246, 2-253 (4th Cir. 1996)(opinions not based on erroneous assumption that coal mine employment can *never* cause obstructive disease), his opinion cannot, on this record, be judged to be hostile to the Act. We also conclude that, given the administrative law judge's finding that the medical opinion diagnoses of pneumoconiosis were flawed as based on an incorrect coal mine dust exposure history, claimant has failed to demonstrate that the failure to explicitly address Dr. Baker's finding of a restrictive impairment warrants a remand.

Accordingly, we affirm the Decision and Order denying benefits.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

JAMES F. BROWN
Administrative Appeals Judge

I concur in the result only.

ROY P. SMITH
Administrative Appeals Judge