BRB No. 00-0146 BLA

EDD BEGLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Harold Rader, Manchester, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0054) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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). This case is before the Board for a second time. Initially, Administrative Law Judge Michael P. Lesniak determined that because claimant's prior claim was finally denied in 1980, the claim before him constituted a duplicate claim. Judge Lesniak found that claimant was a miner under the Act who had worked twenty-two years in coal mine employment, and that employer was the responsible operator based on the parties' stipulation at the hearing. However, Judge Lesniak concluded that claimant did not establish any of the elements of entitlement in his duplicate claim that he had failed to establish in his

prior claim,[1] *i.e.*, the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b) or a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §§718.204(c), (b). Thus, Judge Lesniak found that claimant failed to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309, and denied benefits. On appeal, the Board affirmed the findings of Judge Lesniak at Sections

[1] Claimant filed his initial application for benefits with the Social Security Administration (SSA) on April 2, 1973. *See* Director's Exhibit 31. SSA denied the claim on July 2, 1973 and after reconsideration, on March 27, 1974 and May 11, 1974. *Id.* An administrative law judge also denied the claim on April 15, 1975, and the SSA Appeals Council affirmed the denial on May 29, 1975. *Id.*

Claimant filed a second application for benefits with the Department of Labor (DOL) on August 1, 1975 which the district director denied on February 3, 1976. *See* Director's Exhibit 30. On April 4, 1979, claimant elected SSA review under the 1977 Amendments to the Act. *Id*. SSA denied the claim on April 10, 1979. *See* Director's Exhibit 31. DOL also denied the claim, after review, on March 31, 1980. *See* Director's Exhibit 30. Claimant took no further action.

On November 17, 1994, claimant filed his third application for benefits which the district director denied on April 4, 1995, and after conference on August 3, 1995. *See* Director's Exhibits 1, 16, 29. Claimant requested a hearing which was held on June 13, 1996 before Administrative Law Judge Michael P. Lesniak. *See* Director's Exhibits 18, 37.

718.202(a)(1), (4), 718 203(b), 718.204(c). The Board also affirmed his finding that the evidence of record was insufficient to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309 and the denial of benefits. *See Begley v. Shamrock Coal Co, Inc.*, BRB No. 97-0684 BLA (Jan. 21, 1998)(unpub.).

Claimant timely requested modification which the district director denied on June 30, 1998, on the grounds that claimant had not established a change in conditions or a mistake in a determination of fact. Director's Exhibit 60. Following a hearing on the merits, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4) or a totally disabling respiratory impairment at Section 718.204(c), and thus, insufficient to establish a change in condition or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant challenges the findings of the administrative law judge on the existence of pneumoconiosis and the presence of a totally disabling respiratory impairment. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate 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 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 prove that he suffers from pneumoconiosis, that the

[2] Since the parties stipulated to twenty-two years of coal mine employment at the hearing, and employer conceded to its designation as responsible operator, we affirm these findings of the administrative law judge. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 to establish any one of these elements precludes entitlement.[3] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 that there is no reversible error. In finding the newly submitted evidence insufficient to meet claimant's burden of proof, the administrative law judge concluded, at Section 718.202(a)(1), that the new evidence of record contained two x-rays which were interpreted six times.[4] *See* Director's Exhibits 55-59; Employer's Exhibit 1; Decision and Order at 6-7. Based on his review of the x-ray evidence, the administrative law judge properly found that five of the newly submitted x-ray readings were interpreted as negative for pneumoconiosis by qualified readers[5] while the only x-ray reading positive for pneumoconiosis was interpreted by a physician with no radiological qualifications. *Id*. Contrary to claimant's assertion, the administrative law judge permissibly deferred to the interpretations of the more qualified readers in assessing the x-ray evidence of record. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The administrative law judge, thus, properly found that claimant failed to establish the existence of pneumoconiosis or a change in conditions by x-ray as he correctly determined that the preponderance of the newly submitted x-ray interpretations by the qualified readers was negative for the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *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). Likewise, the administrative law judge properly found that the new evidence considered in conjunction with the previous x-ray evidence failed to establish that a mistake in determination of fact was made in the prior Decision and Order. We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.202(a)(1) as supported by substantial evidence.[6]

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[4] The record contains six x-ray interpretations of two x-rays dated March 9, 1998 and February 24, 1999. *See* Director's Exhibits 55-59; Employer's Exhibit 1. Dr. Bushey, who has no radiological qualifications, interpreted the March 9, 1998 x-ray as positive for pneumoconiosis . Director's Exhibit 55. Drs. Sargent, Wiot, Spitz, and Barrett, who are Board-certified Radiologists and B-readers, interpreted this x-ray as negative for pneumoconiosis. *See* Director's Exhibits 56-59. Dr. Broudy, who is a B-reader, interpreted the x-ray he performed on February 24, 1999 as negative for pneumoconiosis. *See* Employer's Exhibit 1.

[5] Qualified readers of x-rays are physicians who are NOISH certified B-readers, Board-certified radiologists, or Board-certified radiologists and B-readers.

[6] The administrative law judge also correctly determined that since the record contained no biopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), and that claimant, a living miner, was not entitled to the presumptions

In finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge did not err when he accorded little probative value to the report of Dr. Bushey because he found that Dr. Bushey based his diagnosis of pneumoconiosis primarily on his positive x-ray interpretation. Although it is inappropriate for the administrative law judge to reject Dr. Bushey's diagnosis of pneumoconiosis because the weight of x-ray evidence is negative for pneumoconiosis, the administrative law judge correctly stated that Dr. Bushey's medical report did not contain additional documentation, either explicitly or implicitly, which supported his conclusion on the presence of pneumoconiosis. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *cf. Cornett v. Benham Coal Inc.*, 227 F.3d 569, No. 99-3469 (6th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Furthermore, contrary to claimant's argument, the administrative law judge neither misinterpreted Dr. Bushey's medical tests nor substituted his opinion for that of Dr. Bushey when he determined that Dr. Bushey failed to provide an additional basis for his diagnosis of pneumoconiosis other than his positive x-ray interpretation. *See Perry*, *supra*. The administrative law judge also properly concluded that Dr. Broudy did not diagnose any lung disease or respiratory impairment related to claimant's coal mine employment, and that this report was, therefore, insufficient to meet claimant's burden of proving the existence of pneumoconiosis as defined by the Act. *See* 20 C.F.R. §§718.202(a)(4), 718.201; *Cornett*, *supra*; *Perry*, *supra*. We, therefore, affirm the finding of the administrative law judge at Section 718.202(a)(4) and his finding that the newly submitted evidence, considered in conjunction with the previous evidence, was insufficient to demonstrate a change in conditions or a mistake in a determination of fact at Section 725.310 as the evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

At Section 718.204(c)(1),(2), the administrative law judge properly found that the pulmonary function studies performed on March 9, 1998, and February 24, 1999 and the blood gas study performed on February 24, 1999 were non-qualifying under the regulatory criteria, and thus, insufficient to demonstrate the presence of a totally disabling respiratory

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at Section 718.202 (a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306. We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.202(a)(2)-(3) as supported by substantial evidence.

impairment. *See* 20 C.F.R. §718.204(c)(1)-(2), Appendices B and C; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); Director's Exhibit 55; Employer's Exhibit 1; Decision and Order at 7. Likewise, at Section 718.204(c)(3), the administrative law judge correctly concluded that the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure necessary to establish total disability. *See* 20 C.F.R. §718.204(c)(3).

At Section 718.204(c)(4), the administrative law judge properly found that claimant did not meet his burden of proof as the medical opinion evidence did not establish the presence of a totally disabling respiratory impairment. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-139 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Carson, supra*; *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). In so doing, the administrative law judge properly found that medical opinions of Dr. Bushey, who did not address the presence or absence of a respiratory impairment, and Dr. Broudy, who opined that claimant did not have a respiratory impairment which would prevent claimant from performing his usual coal mine employment, were insufficient to meet claimant's burden of proof.[7] *Id.* We, therefore, affirm the administrative law judge's finding that the newly submitted evidence failed to establish the presence of a totally disabling respiratory impairment at Section 718.204(c), and, thus, the administrative law judge's finding that claimant did not establish a change in condition or a mistake in a determination of fact at 20 C.F.R. §725.310 is also affirmed.[8] *See*

[7] Because these medical opinions did not diagnose a pulmonary or respiratory disability or otherwise assess the severity of a pulmonary or respiratory impairment, the administrative law judge was not required, as claimant asserts, to consider the exertional requirements of claimant's usual coal mine employment and compare these findings to the physicians' disability diagnoses. *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

[8] Claimant argues that the administrative law judge should have considered his age, education and work experience when making his disability findings. These factors, however,

Consolidation Coal Co. v. Worrell, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

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are relevant in determining whether claimant can perform comparable and gainful employment, not whether he can perform his usual coal mine employment. *See Taylor v. Evans and Gambrel, Inc.*, 12 BLR 1-83 (1988).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge