BRB No. 03-0511 BLA

CLYDE NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/25/2003
	)	
WOODS CREEK COAL CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCER=S SELF-INSURANCE FUND	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-00186) of Administrative Law Judge Thomas F. Phalen, Jr., 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 administrative law judge credited claimant with at least ten years of

qualifying coal mine employment based on the evidence of record and an agreement by the parties and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[1] 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 due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c). 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) 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 due to pneumoconiosis pursuant to 20 C.F.R. ''718.204(b)(2)(i)-(iv) and 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers= Compensation Programs, has not participated in this 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 into the Act by 30 U.S.C. '932(a);

[1] Claimant filed his initial claim for black lung benefits on October 5, 1989. This claim was denied by Administrative Law Judge Robert L. Hillyard in a Decision and Order issued February 26, 1992. The administrative law judge found the evidence sufficient to establish total pulmonary or respiratory disability, but insufficient to establish the existence of pneumoconiosis and that claimant was totally disabled due to pneumoconiosis. Decision and Order at 3; Director=s Exhibit 40-36. On appeal, the Board affirmed the denial of benefits in *Napier v. Woods Creek Coal Corp.*, BRB No. 92-1330 BLA (Dec. 3, 1993)(unpub.). Decision and Order at 3; Director=s Exhibit 40-1. Claimant took no further action on that claim and filed the instant claim on May 30, 2000.

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).

In the present 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 due to pneumoconiosis. Decision and Order at 10. The administrative law judge then properly 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 10-15; *see Ross*, 42 F.3d 993, 19 BLR 2-10.

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.

Claimant contends that the administrative law judge erred in finding that the x-ray evidence submitted since the previous denial failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge improperly relied on the superior qualifications of the readers that did not interpret the x-rays as positive, that he improperly gave greater weight to the numerical superiority of the x-ray readings that were not positive and selectively analyzed the evidence. We disagree. In his consideration of the relevant x-ray evidence, the administrative law judge noted that there were thirteen readings of three, newly submitted x-rays. Decision and Order at 11; Director=s Exhibits 7-9, 35-39, 43; SF Employer=s Exhibits 1-2. The administrative law judge noted that the July 13, 2000, x-ray was interpreted as positive by one physician, Dr. Vaezy, who possessed no special radiological qualifications, and it was also interpreted as negative by two other dually qualified physicians, i.e., physicians who are Board-certified radiologists and B readers. Decision and Order at 5, 11; Director=s Exhibits 7-9. The administrative law judge next noted that the August 16, 2000, x-ray was interpreted as negative by one B reader, and six dually qualified physicians, while the October 23, 2000, x-ray was interpreted as negative by a B reader. Decision and Order at 5-6, 11; Director=s Exhibits 35-39, 43; SF Employer=s Exhibits 1-2. The administrative law judge thus rationally accorded greater weight to the preponderance of the x-ray interpretations by the readers with superior qualifications and reasonably found that the preponderance of the x-ray

evidence was negative in concluding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). As the administrative law judge weighed all of the x-ray evidence and reasonably concluded that it was insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge=s finding pursuant to Section 718.202(a)(1).

We also reject claimant=s argument that the administrative law judge provided an invalid reason for discounting Dr. Vaezy=s diagnosis of pneumoconiosis at Section 718.202(a)(4). The administrative law judge permissibly found that Dr. Vaezy=s diagnosis of pneumoconiosis did not constitute a reasoned medical opinion because the physician did not indicate what other evidence he relied upon in reaching his conclusion, apart from his own positive x-ray interpretation and claimant=s coal mine employment history. Decision and Order at 7, 12-13; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge then acted within his discretion in according determinative weight to the contrary opinions of Drs. Dahhan, Broudy and, to a lesser extent, Dr. Fino, which he found were well-reasoned and documented. Decision and Order at 6, 8; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge=s finding that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) is supported by substantial evidence, and thus is affirmed.

Claimant also argues that the administrative law judge Aerred in resolving the claimant was not totally disabled.@ Claimant=s Brief at 5. The record reflects that the administrative law judge correctly acknowledged that Administrative Law Judge Robert L. Hillyard concluded that claimant had established he suffered from a totally disabling respiratory or pulmonary impairment in the 1992 Decision and Order denying benefits. The administrative law judge, therefore, stated that he did not need to address that element of entitlement in determining whether claimant established a material change of conditions pursuant to 20 C.F.R. '725.309(d) in the instant claim. Decision and Order at 10 n. 7; *see Ross*, 42 F.3d 993, 19 BLR 2-10; *see also Kirk*, 264 F.3d 602, 22 BLR 2-288. Thus, claimant=s arguments are misplaced. Consequently, we will only consider the administrative law judge=s findings regarding whether claimant established total disability due to pneumoconiosis.

Pursuant to Section 718.204(c)(1), the administrative law judge found that claimant failed to establish that pneumoconiosis contributed to his total disability. Decision and Order at 14. In so finding, the administrative law judge discredited the opinion of Dr. Vaezy and credited the opinions of Drs. Dahhan and Broudy. Dr. Vaezy diagnosed a moderate obstructive and mild restrictive pulmonary impairment due to a combination of coal dust

exposure, smoking and prior surgery for lung cancer which would preclude performance of physical activity, whereas Drs. Dahhan and Broudy attributed the miner=s impairment to smoking and lung cancer surgery. Decision and Order at 7-8, 14; Director=s Exhibits 7, 35, 43. The administrative law judge found that Dr. Vaezy did not explain the basis or rationale for his conclusion. Decision and Order at 21. The administrative law judge acted within his discretion in finding Dr. Vaezy=s conclusion regarding causation inadequately explained, and we affirm his rejection of Dr. Vaezy=s opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *see generally Bobick v. Saginaw Mining* Co., 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Maypray v. Island Creek Coal Co*., 7 BLR 1-683 (1985). We, therefore, affirm the administrative law judge=s findings pursuant to Section 718.204(c) as they are supported by substantial evidence. Because the administrative law judge properly determined that claimant failed to establish any of the elements of entitlement previously adjudicated against him, we affirm the administrative law judge=s finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d), and affirm the denial of benefits. *Ross*, 42 F.3d 993, 19 BLR 2-10.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge