BRB No. 06-0474 BLA

FRANK BRUNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK RIVER COAL COMPANY	)	DATE ISSUED: 11/29/2006
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-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.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, 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 (04-BLA-5362) of Administrative Law Judge Rudolf L. Jansen 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] Claimant's prior application for benefits, filed on July 2, 1997, was finally denied on March 22, 2000 because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b), (c) (2000).[2] Director's Exhibit 1. On March 6, 2002, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order dated February 15, 2006, the administrative law judge credited the miner with ten years of coal mine employment,[3] as stipulated by the parties and supported by the record, and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

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[1] The Department of Labor 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's first claim, filed on November 3, 1986, was denied on August 1, 1989 by Administrative Law Judge Bernard J. Gilday, Jr. Director's Exhibits 22-350, 22-24. Claimant appealed, and in *Bruner v. Shamrock Coal Co., Inc.*, BRB No. 89-2741 BLA (Jan. 29,1991)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 22-1. Claimant filed a duplicate claim on February 14, 1994, Director's Exhibit 1, which was denied by Administrative Law Judge Rudolf L. Jansen (the administrative law judge), on February 16, 1996. Director's Exhibit 36. Claimant appealed, and in *Bruner v. Shamrock Coal Co., Inc.*, BRB No. 96-0703 BLA (Nov. 20, 1996)(unpub.), the Board affirmed the denial. Director's Exhibit 44. On July 2, 1997, claimant filed a request for modification, which was denied by the administrative law judge in a decision dated on January 28, 1999. Claimant appealed, and in *Bruner v. Shamrock Coal Co., Inc.*, BRB No. 99-0650 BLA (Mar. 22, 2000)(unpub.), the Board affirmed the denial. Director's Exhibit 1. On March 6, 2002, claimant filed his current application for benefits. Director's Exhibit 3.

[3] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Claimant asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray

[4] The administrative law judge's finding of ten years of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. We disagree. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly found that the newly submitted x-ray evidence consists of five readings of four x-rays.[5] Decision and Order at 8, 13. A May 6, 2002 x-ray was read as positive by Dr. Simpao, a physician with no specialized qualifications for the reading of x-rays. Director's Exhibit 12; Decision and Order at 8, 13. An August 17, 2002 x-ray was read once as positive by Dr. Baker, a B-reader, and once as negative by Dr. Poulos, who is a dually qualified B-reader and Board-certified radiologist, and thus possesses superior qualifications to Dr. Baker. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Director's Exhibit 14; Employer's Exhibit 5; Decision and Order at 8, 13. In addition, a December 16, 2002 x-ray was read once as negative by Dr. Broudy, a B-reader. Director's Exhibit 16; Decision and Order at 8, 13. Finally, a February 3, 2005 x-ray was read once as negative by Dr. Rosenberg, who is also a B-reader. Employer's Exhibit 3; Decision and Order at 8, 13. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that the preponderance of negative readings by B-readers and dually qualified readers outweighs the positive x-ray readings of record. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 13-14. Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence. In addition, we reject claimant's comment that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004).

Claimant also challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), specifically asserting that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Simpao and Baker. We disagree.

In considering the medical opinion evidence, the administrative law judge properly noted that in his May 6, 2002 report, Dr. Simpao diagnosed coal workers' pneumoconiosis and a severe respiratory impairment, both due to coal dust exposure. Director's Exhibit 12; Decision and Order at 9-10, 14. Similarly, in an August 17, 2002 report, Dr. Baker diagnosed coal workers' pneumoconiosis and chronic bronchitis, and

[5] The record contains an additional reading for quality only (Quality 2), by Dr. Barrett, of the May 6, 2002 x-ray. Director's Exhibit 13.

stated that claimant's lung disease was due to coal dust exposure. Director's Exhibit 14. In addition, Dr. Baker stated that claimant had a Class III impairment, also caused by his coal dust exposure. Director's Exhibit 14; Decision and Order at 10, 14. Contrary to claimant's arguments, the administrative law judge did not reject the opinions of Drs. Simpao and Baker, but permissibly found their conclusions outweighed by the more comprehensive opinions of Drs. Rosenberg and Broudy, who considered all of the other medical opinions and test results of record before concluding that claimant does not have clinical or legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD) due entirely to smoking. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 12, 14, 16; Employer's Exhibit 2; Decision and Order at 14.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, we affirm the administrative law judge's finding that the evidence submitted since the prior denial of benefits does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

With respect to the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), claimant generally asserts that the administrative law judge erred in failing to accord greater weight to the medical opinions of Drs. Simpao and Baker. Again, we disagree.

Contrary to claimant's arguments, a review of the administrative law judge's decision indicates that he permissibly accorded greatest weight to the opinions of Drs. Broudy and Rosenberg, that claimant does not suffer from a totally disabling respiratory or pulmonary impairment due to coal dust exposure, but rather suffers from COPD, chronic bronchitis and emphysema due entirely to smoking, because he again found their opinions based on a more comprehensive review of the medical opinion and objective evidence of record than the contrary opinions of Drs. Simpao and Baker. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR

at 1-149; *Fields*, 10 BLR at 1-19; Director's Exhibits 12, 14, 16; Employer's Exhibit 2; Decision and Order at 16.

Therefore, as the administrative law judge again examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained his rational for according greater weight to the opinions of Drs. Broudy and Rosenberg, we affirm the administrative law judge's determination that the evidence submitted since the prior denial of benefits fails to establish the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120.

Consequently, as we have affirmed the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge