BRB No. 98-1557 BLA

DONNIE ISON)
)
Claimant-Petitioner)
)
v.)
)
PINE COAL CORPORATION)
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 11/30/99
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Donnie Ison, Cornettsville, Kentucky, *pro se.*

David H. Neeley (Neeley & Reynolds Law Offices, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1316) 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 Act). Claimant filed his initial application for benefits on December 7, 1987. Director's Exhibit 35-298. This claim was denied by Administrative Law Judge J. Michael O'Neill in a Decision and Order dated April 20, 1993, on the ground that claimant failed to establish any of the elements of entitlement. Director's Exhibit 35. Claimant filed the present duplicate claim for benefits on April 9, 1996, which was denied by the district director on August 23, 1996, October 16, 1996, February 26, 1997, and May 29, 1997, again on the ground that claimant had failed to establish any element necessary for entitlement. Director's Exhibits 1, 20, 21, 34, 36. In a Decision and Order issued on July 27, 1998, the administrative law judge credited claimant with eighteen years of coal mine employment, but found that the evidence of record was insufficient to establish the presence of pneumoconiosis at 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge further found that claimant was precluded from establishing a material change in conditions pursuant to 20 C.F.R. §725.309, and the holding in *Sharondale Corp. v. Ross,* 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[1]

On appeal, claimant generally contends that he is entitled to benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.,* 12 BLR 1-176 (1989); *Stark v. Director, OWCP,* 9 BLR 1-36 (1986(. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra.*

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

Where a claimant 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 there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against him. *Ross, supra.*

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of pneumoconiosis was not established by the newly submitted evidence pursuant to Section 718.202(a). The administrative law judge rationally found that the presence of pneumoconiosis was not established by the newly submitted x-ray readings of record based on his crediting of the greater number of negative readings by the more qualified physicians. As the record supports this determination since all six of the negative x-ray readings were interpreted by physicians who were either board-certified radiologists, or B-readers,[2] and the reader of the single positive film had no special qualifications, we hold that substantial evidence supports the administrative law judge's finding. Director's Exhibits 17, 18, 30-33. *See Staton v. Norfolk & Western Railway 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, supra.* The administrative law judge also properly found that claimant could not establish the presence of pneumoconiosis pursuant to Section 718.202(a)(2),(3), since the record contains no biopsy or autopsy evidence, and the presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306, are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 12; *Dixon v. North Camp Coal Co.,* 8 BLR 1-344 (1985).

Pursuant to Section 718.202(a)(4), the administrative law judge noted that treating physicians are entitled to deference, and therefore accorded some weight to the opinions of Drs. Bjawa and Sandlin, both of whom diagnosed coal workers' pneumoconiosis, but nevertheless, rationally determined that they did not establish a worsening of claimant's condition since their newly submitted treatment notes contained the same diagnoses as their earlier notes. *Tussey v. Island Creek Coal Co.,* 982 F.2d 1036, 17 BLR 2-16 (6th Cir.

[2] A 'B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., of Virginia v. Director, OWCP,* 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985).

1993); *Flynn v. Grundy Mining Co.,* 21 BLR 1-40 (1997). The administrative law judge also permissibly determined that the evidence was in equipoise, therefore claimant had not satisfied his affirmative burden of proof, based on the administrative law judge's finding that the opinions of claimant's treating physicians were outweighed by the opinions of Drs. Wicker and Broudy, both of whom found no evidence of coal worker's pneumoconiosis, based on these physician's superior qualifications[3] Director's Exhibits 13-15, 23, 30,31. As the administrative law judge has provided a rational basis for his decision, we affirm the finding that the existence of pneumoconiosis has not been established. *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994); *Scott v. Mason Coal Co.,* 14 BLR 1-37 (1990); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985).

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[3]The record indicates that Dr. Wicker is a b-reader, and Dr. Broudy is board-certified in internal medicine and pulmonary diseases. Director's Exhibits 13-15, 18, 30

We also affirm the administrative law judge's finding that total disability was not NOT established at Section 718.204(c)(1)-(3). The administrative law judge properly found that claimant failed to establish total disability under Section 718.204(c)(1), since of the five newly submitted pulmonary function studies of record, only the post-bronchodilator results of the July 17, 1995 study, and the pre-bronchodilator results of the April 19, 1996 study, produced qualifying values. The remainder producing non-qualifying values.[4] Thus, the preponderance of the evidence did not establish this required element. Director's Exhibits 11, 12, 23, 30, 31. The administrative law judge also rationally found that total disability could not be established at Section 718.204(c)(2),(3), since all of the newly submitted arterial blood gas studies produced non-qualifying values, and the record contains no evidence of cor pulmonale with right sided congestive heart failure. Director's Exhibits 12, 16, 23, 30, 31. *See generally Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991).

We also hold that substantial evidence supports the administrative law judge's findings pursuant to Section 718.204(c)(4). The newly submitted medical reports include the opinions of Drs. Sandlin, Bjawa and Wicker, all of whom failed to address the issue of disability, Dr. Sundaram's report which stated that claimant was unable to work on a sustained basis due to his extreme shortness of breath, and Dr. Broudy's opinion which stated that claimant retained the respiratory capacity to perform his usual coal mine employment, or similarly arduous work. Director's Exhibits 13-15, 23, 30, 31. The administrative law judge rationally accorded little weight to those reports which failed to address the issue of disability, and also to that of Dr. Sundaram, since this physician was unaware of claimant's lengthy smoking history, and did not address the cause of claimant's disabling respiratory impairment. The administrative law judge permissibly accorded determinative weight to Dr. Broudy's report due to his status as a board-certified pulmonologist. As it is within the administrative law judge's discretion to accord greater weight to a doctor's report based on that physician's superior qualifications, we affirm the finding that claimant failed to establish the presence of a totally disabling respiratory impairment at Section 718.204(c). *Scott, supra; Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987); *Dillon, supra; Wetzel, supra.*

Pursuant to 20 C.F.R. §718.204(b), the administrative law judge found, based on the holding in *Flynn, supra,* that claimant could not show a worsening of his condition at this section since he had failed to establish the existence of pneumoconiosis, or a totally disabling respiratory impairment. Accordingly, the administrative law judge rationally found that claimant had failed to establish a material change in conditions, which precluded an award of benefits. As the administrative law judge has properly considered and weighed all the evidence of record, and provided a rational basis for his findings, we hold that

[4]A "qualifying" pulmonary function or blood gas study is one that yields values equal to or less than the values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718,

substantial evidence supports his determination. We therefore affirm the administrative law judge's findings at Section 718.204(b), and Section 725.309(d), and hold that claimant is ineligible for benefits. *Ondecko, supra; Ross, supra; Flynn, supra.*

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