BRB No. 99-1109 BLA

DENNIS H. FELTNER	)	
	)	
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 - Rejection of Claim of Rudolf L. Jansen, 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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Rejection of Claim (98-BLA-0795) of Administrative Law Judge Rudolf L. Jansen denying benefits on a duplicate claim[1] 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). The administrative law judge credited claimant with sixteen years of coal mine employment. The administrative law judge further

[1]Claimant filed the instant claim on April 23, 1997. Director's Exhibit 1; Claimant's prior claim, filed on December 20, 1993, was denied on July 26, 1994. Director's Exhibit 30 at 47-50, 88. Claimant did not pursue the denial of his prior claim.

found that the evidence submitted subsequent to the denial of claimant's prior claim was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202 and total respiratory or pulmonary disability under 20 C.F.R. §718.204(c). The administrative law judge thus determined that the new evidence was insufficient to establish a material change in conditions under 20 C.F.R. §725.309(d) pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). He, therefore, denied benefits in the instant duplicate claim.

On appeal, claimant challenges the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4), and total disability under 20 C.F.R. §718.204(c)(4). Employer responds, and seeks affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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 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 under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§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 establish any element of entitlement will result in the denial of benefits.

In the instant duplicate claim, it is claimant's initial burden to establish, based on the new evidence, one of the elements of entitlement previously adjudicated against him. *Ross, supra.* If claimant proves one of these elements of entitlement, then claimant will have established a material change in conditions under Section 725.309(d) as a matter of law. The administrative law judge must then consider all the evidence of record, including that evidence submitted with the prior claim, to determine claimant's entitlement to benefits on the merits of the claim. *Id.* The administrative law judge correctly noted that the prior denial was based on claimant's failure to establish any element of entitlement. Director's Exhibit 30 at 47-50.

Claimant contends that the administrative law judge erred in finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). Claimant argues that the administrative law judge relied "almost

solely" on the readers' qualifications and placed substantial weight on the numerical superiority of the x-ray interpretations. Claimant's Brief at 4. Claimant also asserts, without more, that "it appears that Judge Jansen may have 'selectively analyzed' the evidence." *Id.*

Contrary to claimant's contention, the administrative law judge did not err in finding that the sole positive x-ray reading submitted since the prior denial was insufficient to establish the existence of pneumoconiosis. The new evidence consists of six x-ray readings interpreting two x-ray films, with Dr. Baker interpreting the May 29, 1997 x-ray as positive. Director's Exhibits 13, 14, 18; Employer's Exhibits 1-3. The administrative law judge properly considered both the qualifications of the readers as well as the relative quantity of these interpretations, in finding that Dr. Baker's positive reading was outweighed by the negative interpretations. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Further, inasmuch as claimant offers no argument in support of his assertion that the administrative law judge may have selectively analyzed the evidence, we decline to address further this bald assertion. *See generally Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR2-46 (6th Cir. 1986).

Claimant next contends, as to the two physicians' opinions submitted subsequent to the prior denial, that the administrative law judge erred in according greater weight to Dr. Dahhan's opinion finding no evidence of occupational pneumoconiosis, over Dr. Baker's report diagnosing, *inter alia*, coal workers' pneumoconiosis. Employer's Exhibit 1; Director's Exhibit 11. Claimant argues that the administrative law judge credited Dr. Dahhan's report without providing a reasoning as to why Dr. Baker's opinion was less probative. Employer responds that the administrative law judge properly accorded greater weight to Dr. Dahhan's opinion. Employer also argues that Dr. Baker's opinion is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) since, employer asserts, the regulation requires that the diagnosis of pneumoconiosis be rendered in spite of a negative x-ray reading.

In finding that the weight of the medical opinion evidence does not show that claimant now has pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge properly accorded greater probative weight to Dr. Dahhan's opinion over Dr. Baker's contrary opinion based on his findings that Dr. Dahhan is better qualified, *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and that Dr. Dahhan conducted a more recent examination, *see Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). Dr. Dahhan's *curriculum vitae* shows that he is Board-certified in internal medicine and pulmonary medicine, Employer's Exhibit 1, while Dr. Baker's *curriculum vitae* is not of record. Further, Dr. Dahhan's examination of claimant on June 18, 1998 was, in fact, more recent than Dr. Baker's examination on May 29, 1997. Employer's Exhibit 1; Director's Exhibit 11. Substantial evidence supports the administrative law judge's stated reasons for according Dr. Dahhan's opinion greater probative weight over the

contrary opinion of Dr. Baker, and thus, we reject claimant's challenge to the administrative law judge's finding at Section 718.202(a)(4).

Further, contrary to employer's assertion, there is no requirement that a physician "acknowledge[] that the miner cannot show pneumoconiosis by x-ray" in order for his or her diagnosis of pneumoconiosis, based on other evidence, to support a finding of the existence of the disease under Section 718.202(a)(4).[2] The Board has interpreted the clause "notwithstanding a negative x-ray" in Section 718.202(a)(4) to mean that even if there is a negative x-ray, the physician's report may establish the existence of pneumoconiosis thereunder. *Taylor v. Director, OWCP,* 9 BLR 1-22 (1986).

The administrative law judge further found that even if the evidence had established the existence of pneumoconiosis, it fails to prove that claimant is disabled under 20 C.F.R. §718.204(c). In challenging the administrative law judge's finding, claimant contends that when the exertional requirements of his usual coal mine work are compared with the medical opinion of Dr. Baker, that claimant has a mild impairment, Director's Exhibit 11, it is rational to conclude that claimant's condition prevents him from engaging in his usual coal mine

[2] The regulation at 20 C.F.R. §718.202(a)(4) provides, in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201.

work.[3] Claimant asserts that the administrative law judge did not discuss his age and limited education and work experience or discuss his usual coal mine work in conjunction with Dr. Baker's report, in finding that claimant is not totally disabled. Lastly, claimant asserts that, given the amount of time that has passed since his initial diagnosis of pneumoconiosis, claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work.[4]

Notwithstanding claimant's contentions, we affirm the administrative law judge's finding that the evidence fails to establish total disability under 20 C.F.R. §718.204(c)(4) as it is rational, supported by substantial evidence and consistent with applicable law. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), recently held, in *Cornett v. Benham Coal, Inc.*, F.3d , BLR , 2000 WL 1262464 (6th Cir. Sept. 7, 2000), that it was error for the administrative law judge not to consider that even a mild respiratory impairment may preclude the performance of a miner's usual employment duties, depending on the exertional requirements of his usual coal mine employment. In his Decision and Order in the instant case, which was issued approximately fourteen months prior to *Cornett*, the administrative law judge discussed the exertional requirements of claimant's usual coal mine employment as a repairman in an underground coal mine. Decision and Order at 4. Both Dr. Baker and Dr. Dahhan acknowledged that claimant's usual coal mine employment was as a repairman in an underground coal mine. Director's Exhibit 11; Employer's Exhibit 1. Dr. Baker diagnosed a mild impairment and indicated that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free

[3]The exertional requirements of claimant's usual coal mine employment as a repairman are contained in Director's Exhibit 3, and Director's Exhibit 30 at 77.

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings of ten years of coal mine employment, and that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) and total disability under 20 C.F.R. §718.204(c)(1) through (c)(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

environment, Director's Exhibit 11, while Dr. Dahhan found no evidence of pulmonary disability secondary to coal dust exposure and opined that claimant retains the respiratory capacity to continue his previous coal mine work or job of comparable physical demand, Employer's Exhibit 1. Given these physicians' findings, we hold that the administrative law judge properly determined that the medical opinions rendered by Drs. Baker and Dahhan are insufficient to carry claimant's burden to establish total respiratory or pulmonary disability at Section 718.204(c)(4). Because the medical opinion evidence in the instant claim is insufficient to meet claimant's burden to establish total disability under the Act, remand pursuant to *Cornett* is unnecessary in this case.

Further, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

We, therefore, affirm the administrative law judge's determination that the medical opinion evidence is insufficient to meet claimant's burden to establish a totally disabling respiratory or pulmonary impairment at Section 718.204(c)(4). *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). In light of the foregoing, we further affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c).

We thus affirm the administrative law judge's finding that claimant failed to establish a material change in conditions under Section 725.309(d) pursuant to *Ross*, and we affirm the administrative law judge's denial of benefits in the instant duplicate claim.

Accordingly, the administrative law judge's Decision and Order - Rejection of Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge