BRB No. 04-0148 BLA

JOHN C. HOSKINS	)	
	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 10/29/2004
	)	
BLEDSOE COAL CORPORATION	)	
	)	
	)	
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 – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts (Baird & 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 – Denial of Benefits (03-BLA-5180) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge), 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 involves a

subsequent claim filed on June 25, 2001.[1] Director's Exhibit 4. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge found, therefore, that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1988 claim became final. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at Section 718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The newly submitted x-ray evidence consists of six interpretations of three films taken on July 11, 2001, September 7, 2001 and December 13, 2001. The July 11, 2001 film was read as positive for pneumoconiosis by Dr. Baker. Director's Exhibit 12. It was read as negative for pneumoconiosis by Dr. Wiot, who the administrative law judge noted was a B reader and a Board-certified radiologist. Director's Exhibit 13. The September 7, 2001 film was read as negative for

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[1]Claimant filed previous claims with the Department of Labor on October 26, 1988 and May 12, 2000. Director's Exhibits 1, 2.

[2] Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(2)-(3), and fails to establish total respiratory disability pursuant to 20 C.F.R § 718.204(b)(2)(i)-(iii), we affirm these findings. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis by Drs. Hussain and Wiot. Director's Exhibits 11, 13. The December 13, 2001 film was read as negative for pneumoconiosis by Drs. Broudy and Wiot. Employer's Exhibits 2, 3. The administrative law judge weighed each film separately and correctly concluded that the September 7, 2001 and the December 13, 2001 films were negative for pneumoconiosis. Decision and Order at 6. The administrative law judge stated that the "third film generated professional dispute." Decision and Order at 7. He weighed Dr. Baker's positive interpretation of the July 11, 2001 film against Dr. Wiot's negative interpretation of that film and permissibly gave greater to Dr. Wiot's reading based upon Dr. Wiot's superior credentials.[3] *See Worhach v. Director, OWCP,* 17 BLR 1-105 (1993); *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom.* Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989); *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1).[4]

Claimant next contends that the administrative law judge erred in finding the opinion of Dr. Baker insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Contrary to claimant's assertion, in considering the medical

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[3] The administrative law judge noted that Dr. Baker was not a Board-certified radiologist and that his B reader status expired in January of 2001. Director's Exhibit 12; Decision and Order at 7, n. 12.

[4] In challenging the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that the administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* In this case, the administrative law judge properly considered both the quality and the quantity of the newly submitted x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The United Sates Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge may not rely solely on the quantity of the evidence, but may consider it along with the qualifications of the readers. *See Staton v. Norfolk & Western Railroad Co.,* 65 F. 3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP,* 991 F. 2d 314, 17 BLR 2-77 (6th Cir. 1993); *see also Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994). Moreover, claimant has not provided any support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

opinions pursuant to Section 718.202(a)(4), the administrative law judge permissibly accorded less weight to the diagnosis of pneumoconiosis rendered by Dr. Baker because the x-ray that he interpreted as positive for pneumoconiosis was interpreted by Dr. Wiot, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of his opinion. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983), *aff'd* No. 83-3538 (3d Cir. June 21, 1984)(unpub.); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 10-11; Director's Exhibit 12. Moreover, the administrative law judge permissibly credited Dr. Broudy's opinion that claimant does not suffer from pneumoconiosis, as the best documented opinion.[5] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc); McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 10-11. Further, the administrative law judge rationally found Dr. Broudy's opinion to be better supported by the objective evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[6]

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[5]Dr. Baker relied upon a physical examination that indicated normal heart and lung functions, an x-ray that he read as positive for pneumoconiosis, and a pulmonary function study and a blood gas study that yielded non-qualifying values. Director's Exhibit 12. Dr. Hussain conducted a physical examination wherein he detected coughing, wheezing, and occasional dypsnea. He further relied upon an x-ray that he read as negative for pneumoconiosis and a pulmonary function study and a blood gas study that yielded non-qualifying values. Director's Exhibit 11. Dr. Broudy also examined the miner, and found normal heart and lung functions. Dr. Broudy read both an x-ray and a CT scan as negative for pneumoconiosis, and utilized a pulmonary function study and a blood gas study that yielded non-qualifying values. Further, Dr. Broudy reviewed the opinions of Drs. Baker and Hussain. Employer's Exhibit 2.

[6]The administrative law judge additionally weighed all of the evidence at 20 C.F.R. §718.202(a)(1)-(4) together in accordance with the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F. 3d 203 (4th Cir. 2000). The instant claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. The Board has consistently limited the application of *Compton* and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) to cases arising within the Fourth and the Third Circuits. Any error committed by the administrative law judge in his application of *Compton* to the instant claim is harmless, however, because the administrative law judge initially found the evidence insufficient to establish the existence of pneumoconiosis at each individual subsection of 20 C.F.R. §718.202(a).

Claimant's remaining statements pertaining to the administrative law judge's findings at Section 718.202(a)(4) neither raise any substantive issues nor identify any specific error on the part of the administrative law judge in determining that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis. We affirm, therefore, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Cox v. Benefits Review Board,* 791 F. 2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP,* 10 BLR 1-119(1987).

Claimant next contends that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge found that Dr. Baker's opinion is insufficient to establish total respiratory disability, and further properly noted that Drs. Hussain, Rosenberg and Broudy all opined that claimant did not have a totally disabling respiratory impairment.[7] Director's Exhibit 11; Employer's Exhibits 1, 2. In fact, Dr. Baker specifically opined that claimant has an impairment:

> based upon … the Guidelines to the Evaluation of Permanent Impairment, 5th Ed., which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply that the patient is 100% occupationally disabled in the coal mine industry or similar dusty conditions.

Director's Exhibit 12. A doctor's recommendation that further coal dust exposure is contraindicated is insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). *See Zimmerman v. Director, OWCP,* 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel*

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[7] The administrative law judge did not determine whether the doctors who found that claimant was totally disabled due to a respiratory impairment were aware of the physical requirements of claimant's usual coal mine employment, as required by the United States Court of Appeals for the Sixth Circuit. *See Cornett v. Benham Coal, Inc.,* 227 F. 3d 569, 22 BLR 2-107 (6th Cir. 2000). We hold, however, that any error committed by the administrative law judge in this regard is harmless, as the administrative law judge properly found that Dr. Baker's opinion, the only opinion which in any way supports a finding of total respiratory disability, was inadequate to support claimant's burden at 20 C.F.R. §718.204(b)(2)(iv). *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Co., 12 BLR 1-83 (1988); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). We affirm, therefore, the administrative law judge's finding that Dr. Baker's opinion is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), and therefore, that the newly submitted medical opinion evidence of record is insufficient to establish a totally disabling respiratory impairment at Section 718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) and total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the newly submitted evidence fails to establish that one of the applicable conditions of entitlement has changed since the date that the last denial became final, pursuant to Section 725.309(d).[8]

[8] Claimant argues that the administrative law judge erred in failing to identify claimant's usual coal mine work or the physical requirement of that work. The administrative law judge, however, noted that claimant "engaged in heavy manual labor during his coal mine employment due to the physical requirements associated with his work as a roof bolter and scoop and shuttle car operator." Decision and Order at 12. Further, contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education, and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988).

Accordingly, the administrative law judge's Decision and Order – Denial of 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