BRB No. 04-0149 BLA

ARGENE ROARK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	
	)	DATE ISSUED: 10/20/2004
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 – Denying Benefits of Rudolf L. Jansen, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (02-BLA-5174) 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). This case involves a subsequent claim filed on February 21, 2001, which the administrative law judge properly considered pursuant to the applicable regulations at 20 C.F.R. Part 718.[1] After crediting claimant with eleven years of coal

[1]Claimant filed an initial claim for benefits on August 5, 1992. Director's Exhibit 1. In a Decision and Order dated August 19, 1994, Administrative Law Judge Robert L.

mine employment based upon the stipulation of the parties, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis and total disability under 20 C.F.R. §§718.202(a)(1)-(4) and 718.204(b)(2)(i)-(iv), respectively. Accordingly, the administrative law judge determined that claimant failed to establish that one of the applicable conditions of entitlement changed since the prior denial of benefits pursuant to 20 C.F.R. §725.309(d), and he therefore denied benefits. On appeal, claimant challenges the administrative law judge's findings at Sections 718.202(a)(1) and (a)(4), and 718.204(b)(2)(iv). Employer has filed a response brief in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not intend to participate in this appeal.[2]

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).

In challenging the administrative law judge's weighing of the newly submitted x-ray evidence under Section 718.202(a)(1), claimant argues that the administrative law

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Hillyard denied benefits upon determining that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000) and total disability under 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id*. Claimant appealed. The Board subsequently dismissed claimant's appeal as abandoned. *Roark v. Shamrock Coal Co.*, BRB No. 94-3902 BLA (Jan. 13, 1995)(unpublished Order). Claimant filed a request for modification on October 27, 1995. Director's Exhibit 1. In a Decision and Order dated January 29, 1998, Judge Hillyard found the evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) (2000) and total disability under Section 718.204(c)(1)-(4) (2000). *Id*. Accordingly, Judge Hillyard found claimant failed to establish modification by demonstrating a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), and denied benefits. *Id*. Claimant appealed. The Board affirmed Judge Hillyard's findings and the consequent denial of benefits. *Roark v. Shamrock Coal Co.*, BRB No. 98-0682 BLA (Feb. 10, 1999)(unpublished). Claimant took no further action until filing this subsequent claim on February 21, 2001. Director's Exhibit 3.

[2]We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eleven and one-half years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4.

judge erred in finding that the negative x-ray interpretations outweigh the three positive readings, which were submitted by Drs. Hussain and Baker. Claimant argues that the administrative law judge improperly relied on the qualifications of the physicians submitting the negative interpretations, and the numerical superiority of the negative readings. Claimant's contention is without merit. The United States 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). In this case, the administrative law judge found that Dr. Hussain's positive reading of the June 8, 2001 film, and Dr. Baker's positive interpretations of the films dated February 24, 2001 and November 12, 2002, were outweighed by Dr. Broudy's negative reading of a film taken on January 28, 2002, and Dr. Wiot's negative readings of the January 28, 2002 and February 24, 2001 films.[3] Decision and Order at 9; Director's Exhibits 12, 14; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 4. Specifically, the administrative law judge properly found that the interpretations of Drs. Broudy and Wiot were entitled to greater weight since Dr. Broudy is a B reader, Dr. Wiot is a B reader/Board-certified radiologist, and Drs. Hussain and Baker possess neither qualification. *See Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; Decision and Order at 9; Director's Exhibits 12, 14; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 4. Because it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[4] *See Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 5, 9; Director's Exhibits 12-14; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 4.

In challenging the administrative law judge's findings with regard to the medical opinion evidence under Section 718.202(a)(4), claimant argues that the administrative law judge erred in discounting the opinions of Drs. Baker and Hussain, who diagnosed

[3]Dr. Sargent, a B reader/Board-certified radiologist, indicated that the June 8, 2001 film was a "quality two," "overexposed" film, and did not indicate whether the film was positive for pneumoconiosis. Director's Exhibit 13.

[4]Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 5, 9. Thus, we reject claimant's suggestion.

claimant with pneumoconiosis. Specifically, claimant asserts that the administrative law judge erred in discounting the opinions of Drs. Baker and Hussain on the ground that they were based upon a positive x-ray reading which conflicted with the administrative law judge's determination that the weight of the x-ray evidence was negative. Claimant suggests that the administrative law judge thereby improperly substituted his opinion for the opinions of Drs. Baker and Hussain, and asserts that it was error for the administrative law judge not to find the opinions to be reasoned and documented in view of the fact that each of the doctors based his diagnosis of pneumoconiosis not only upon a positive x-ray reading, but also upon a physical examination, pulmonary function study, and medical and work histories. Claimant also contends that the opinions of Drs. Baker and Hussain should have been accorded greater weight since the doctors are Board-certified pulmonary specialists. Finally, claimant argues that Dr. Baker's opinion was entitled to significant weight because he treated claimant on several occasions.

Claimant's contentions lack merit. The administrative law judge properly discounted the opinions of Drs. Baker and Hussain upon correctly finding that neither doctor provided reasons for his diagnosis of pneumoconiosis other than a positive x-ray reading and claimant's eleven and one-half year history of coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 10; Director's Exhibits 12, 14. We thus reject claimant's assertion that the administrative law judge erred in failing to accord substantial weight to Dr. Baker's opinion when considering the factors relevant to treating physicians' opinions under 20 C.F.R. §718.104(d). An administrative law judge must critically analyze the documentation and reasoning of an opinion before according it enhanced weight based upon the factors relevant to treating physicians under Section 718.104(d). *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). In addition, contrary to claimant's contention, the administrative law judge properly considered that Drs. Baker and Hussain are Board-certified in pulmonary disease medicine. Decision and Order at 8. Because Drs. Broudy and Vuskovich, who submitted contrary opinions indicating that claimant does not have pneumoconiosis, are similarly qualified, Board-certified pulmonary specialists, the administrative law judge did not err in failing to credit the opinions of Drs. Baker and Hussain based upon their credentials. Decision and Order at 8, 10-11; Director's Exhibits 12, 13; Employer's Exhibits 1, 2.

Moreover, the administrative law judge properly credited the contrary opinions of Drs. Broudy and Vuskovich as well-documented and reasoned. Decision and Order at 10-11; Employer's Exhibits 1, 2. A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*);

Tackett v. Cargo Mining Co., 12 BLR 1-11 (1988)(*en banc*). As the administrative law judge found, Dr. Broudy based his opinion that claimant does not have pneumoconiosis on his examination findings, the lack of evidence of the disease on both the chest x-ray and the CT scan he administered, and the results of the pulmonary function and arterial blood gas studies he administered, which he indicated were "normal." Employer's Exhibit 1. The administrative law judge correctly found that, similarly, Dr. Vuskovich's opinion, which was based upon his review of the evidence of record, was supported by the negative chest x-ray and CT scan evidence, and claimant's pulmonary function studies, each of which was "normal," according to the respective administering physicians, Drs. Baker, Hussain and Broudy. Decision and Order at 10-11; Director's Exhibits 12, 14; Employer's Exhibits 1, 2. We affirm, therefore, the administrative law judge's finding that the new medical opinion evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). In addition, we affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9-10.

Claimant next contends that the administrative law judge erred in failing to credit the opinions of Drs. Baker and Hussain as well-reasoned and documented, and sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).[5] Claimant's contention lacks merit. We affirm, as rational, supported by substantial evidence, and in accordance with law, the administrative law judge's finding that Dr. Baker's opinion is non-supportive of a finding of total disability pursuant to Section 718.204(b)(2)(iv). In his examination report dated February 24, 2001, Dr. Baker indicated that claimant's objective studies were "normal," and that claimant has a "Class I impairment," with an FEV1 and FVC greater than eighty percent of predicted. Director's Exhibit 14. Dr. Baker also advised that claimant should have no further dust exposure. *Id*. In progress notes dated November 19, 2001, Dr. Baker did not comment on disability or impairment. Director's Exhibit 32. Finally, in a letter dated November 12, 2002, Dr. Baker did not address disability or impairment, except to indicate that claimant's "pulmonary function studies and arterial blood gas studies were normal." Claimant's Exhibit 1. In considering Dr. Baker's opinion, the administrative law judge rationally determined that the doctor merely advised claimant to avoid further coal dust exposure. Decision and Order at 12. The administrative law judge reasonably found that Dr. Baker's opinion is thus insufficient to establish total disability under Section 718.204(b)(2)(iv). *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek*

[5]Claimant suggests that "a single medical opinion [supportive of a finding of total disability] may be sufficient for invoking the presumption of total disability." Claimant's Brief at 8. Claimant has not identified any presumption of total disability that is applicable in this case, however.

Coal Co., 11 BLR 1-91 (1988); Decision and Order at 12; Director's Exhibits 14, 32; Claimant's Exhibit 1.

In addition, contrary to claimant's contention, Dr. Hussain indicated that claimant has a mild impairment, and retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 12. The administrative law judge was thus not required to consider, in conjunction with Dr. Hussain's opinion, the exertional requirements of claimant's usual coal mine work as a belt man. Unlike opinions which address only the degree of impairment, from which an inference of total disability could be drawn by comparing claimant's job duties to the opinion, opinions which specifically address whether a miner is totally disabled need not be discussed in terms of claimant's job duties. Since Dr. Hussain's opinion specifically addressed whether the miner could perform his former job, the administrative law judge was not required to further consider the exertional demands of claimant's job in conjunction with his opinion.[6] *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

We further hold that it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience, since these factors are relevant only in determining claimant's ability to perform comparable and gainful work, not to establishing total disability from performing claimant's usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *Fields*, 10 BLR at 1-22. Additionally, we reject claimant's assertion that, in light of the progressive and irreversible nature of pneumoconiosis, the administrative law judge erred in not finding him totally disabled. Claimant has the burden of submitting evidence to establish entitlement to benefits, and bears the risk of non-persuasion if his evidence is found insufficient to establish a

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[6]The administrative law judge properly found that Drs. Broudy and Vuskovich likewise opined that claimant is able to perform his usual coal mine employment, and that, therefore, the new medical opinions do not include an opinion supportive of a finding of total disability under 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 12. Inasmuch as the administrative law judge did not credit one opinion over another, but rather correctly found that none of the new medical opinion evidence supported a finding of total disability, he was not compelled to discuss the evidence in light of the decision of the United States Court of Appeals for the Sixth Circuit in *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-135 (6th Cir. 2000), wherein the court held that an administrative law judge should consider whether a physician who finds that a claimant is not totally disabled had any knowledge of the exertional requirements of the claimant's last coal mine employment before crediting that physician's opinion.

requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). For the reasons discussed above, we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Additionally, as claimant does not challenge the administrative law judge's findings that the new evidence is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 11-12.

Inasmuch as we herein affirm the administrative law judge's findings that the new evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that one of the applicable conditions has changed since the prior denial of benefits pursuant to 20 C.F.R. §725.309.

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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JUDITH S. BOGGS
Administrative Appeals Judge