BRB No. 04-0252 BLA

VIRGIL E. BOLTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APPLE COAL COMPANY, INCORPORATED	)	
	)	
	)	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 - Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Thomas M. Cole (Arnett, Draper & Hagood), Knoxville, Tennessee, for claimant.

Francesca L. Maggard and W. Barry Lewis (Lewis & Lewis Law Offices), Hazard, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (02-BLA-0056) of Administrative Law Judge Richard T. Stansell-Gamm rendered 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 initial application for benefits, filed on March 27, 1995, was denied by the district director on August 10, 1995 for failing to establish any element of entitlement. Director's Exhibit 31. On January 2, 2001, claimant filed his current application for benefits, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d) (2000). The district director denied benefits and claimant requested a hearing, Director's Exhibits 27, 28, which the administrative law judge held on January 14, 2003.

In the Decision and Order - Denial of Benefits, the administrative law judge accepted the parties' stipulation that claimant has "at least 15.75 years" of coal mine employment.[2] Decision and Order at 3. The administrative law judge found that the evidence developed since the previous denial established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d) (2000) and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Considering all the evidence of record, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of either the chest x-ray or medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), respectively. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Claimant has filed a reply brief reiterating his contentions.

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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 last coal mine employment occurred in Kentucky. Director's Exhibit 2. 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*).

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).

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge relied solely on the quantity of readings to determine whether the x-rays were positive or negative for pneumoconiosis. Claimant's contention lacks merit. The administrative law judge properly considered the x-ray readers' radiological qualifications and reasonably weighed the conflicting x-ray readings in this case. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995). Specifically, the administrative law judge considered all thirty-nine readings of thirteen x-rays that were taken between 1988 and 2001, and listed each reader along with his or her radiological qualifications. Decision and Order at 11-13. For each x-ray that received conflicting readings, the administrative law judge considered whether better qualified readers classified that x-ray as positive or negative for pneumoconiosis. Decision and Order at 13. Thus, the administrative law judge conducted a qualitative analysis of the x-ray readings, as required. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Through that qualitative analysis of the readings, the administrative law judge determined that four x-rays were positive for pneumoconiosis, eight x-rays were negative, and one x-ray was inconclusive. A review of the record supports the administrative law judge's analysis of the x-ray readings and the readers' qualifications. Therefore, we reject claimant's argument that the administrative law judge relied solely on the quantity of readings to determine the positive or negative status of each x-ray.

Claimant also argues that even if the administrative law judge properly determined that there were eight negative and four positive x-rays, he committed legal error by lending no significance to the time gap between the negative x-rays from claimant's prior claim and the later, positive x-rays associated with his current claim. Based on the circumstances of this case, we disagree. First, the administrative law judge had found that a material change in conditions was established at 20 C.F.R. §725.309(d) (2000). Thus, he could not ignore the earlier x-rays; rather, he had to "consider whether all of the medical evidence, including that submitted with the previous claims, support[ed] a

finding of entitlement to benefits." *Ross*, 42 F.3d at 998, 19 BLR at 2-18-19. Second, claimant does not demonstrate how the administrative law judge, on this record, erred in considering claimant's eight negative x-rays and four positive x-rays to be conflicting. Specifically, the record as weighed by the administrative law judge reflects that claimant's old x-rays are both positive and negative for pneumoconiosis, as are his new x-rays. Third, and contrary to claimant's suggestion, an administrative law judge may, but is not required, to credit more recent, positive x-rays. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279 (observing that "it may be appropriate to give greater weight" to later positive x-rays); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988). Because the administrative law judge herein considered both the quantity and quality of the x-ray evidence in determining that a preponderance of the x-rays did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we reject claimant's argument and affirm the administrative law judge's finding.

Pursuant to Section 718.202(a)(4), claimant alleges several errors in the administrative law judge's determination that the medical opinion evidence did not establish the existence of pneumoconiosis. Claimant, however, presents no reason to disturb the administrative law judge's finding. Contrary to claimant's assertion, the administrative law judge permissibly assigned diminished probative weight to the opinions of Drs. Baker, Anderson, and Isber, because these physicians' diagnoses of pneumoconiosis were based on positive x-rays inconsistent with the preponderance of the x-ray evidence. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003). Claimant argues that, in so doing, the administrative law judge failed to give "proper weight" to Dr. Isber's opinion as claimant's treating physician. Claimant's Brief at 20. The administrative law judge, however, validly concluded that, although Dr. Isber is claimant's treating doctor, his opinion did not merit greater weight because it was not well documented or reasoned. *See Williams*, 338 F.3d at 512-13, 22 BLR at 2-644-47. Additionally, the administrative law judge acted within his discretion when he found that Dr. Seargeant did not adequately explain his diagnosis of pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

By contrast, the administrative law judge found that Dr. Fino's opinion, that claimant does not have pneumoconiosis, was "better reasoned, more consistent with all the medical evidence in the record, and consequently, the most probative medical opinion on whether Mr. Bolton has pneumoconiosis." Decision and Order at 22. Claimant asserts that the administrative law judge should not have credited Dr. Fino's "flawed" opinion over Dr. Rasmussen's contrary opinion that claimant has pneumoconiosis. Claimant's Brief at 25-33. We disagree, as the administrative law judge provided valid reasons for giving Dr. Fino's opinion greater weight.

Specifically, the administrative law judge found that Dr. Fino reasonably explained how the specific pattern of claimant's FEV1 values, diffusing capacity test results, and lung volume tests were consistent with a smoking-related lung disease and not a coal dust-related disease. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 22-23. In making that finding, the administrative law judge properly discussed the documentation and reasoning underlying both Dr. Rasmussen's and Dr. Fino's opinions. Decision and Order at 18-20, 21-23. An administrative law judge "may evaluate the relative merits of conflicting physicians' opinions and choose to credit one opinion over the other." *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). Based on the foregoing, we reject claimant's contention that the administrative law judge erred in giving greatest weight to Dr. Fino's opinion as "the most probative" of record regarding whether claimant has pneumoconiosis. Decision and Order at 22. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis by a preponderance of the medical opinion evidence pursuant to Section 718.202(a)(4).[3]

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[3] Because we affirm the administrative law judge's weighing of the medical opinion evidence on these grounds, with determinative weight accorded to Dr. Fino's opinion, we need not address further claimant's allegations of error in the administrative law judge's analysis of the medical opinions. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge