BRB No. 98-1038 BLA

BILLY J. CHISM	)	
	)	
Claimant-Petitioner	)	
	)	
B. G. & M COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
FIRST SOUTHERN INSURANCE COMPANY	)	
	)	
and	)	
	)	
FLORIDA INSURANCE GUARANTY ASSOCIATION	)	DATE ISSUED: 10/27/99
	)	
and	)	
	)	
KENTUCKY INSURANCE GUARANTY ASSOCIATION	)	
	)	
and	)	
	)	
KENTUCKY INSURANCE GUARANTY FUND	)	
	)	
Employer/Carriers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp (Kenneth S. Stepp, P.A., P.S.C.), Inverness, Florida, for claimant.

Roberta K. Kiser (Ferreri Fogle Pohl & Picklesimer), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1134) of Administrative Law Judge J. Michael O'Neill 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's previous application for benefits was denied by the district director on October 4, 1988 for failure to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) or 718.204(b). Director's Exhibit 41. On August 23, 1993, claimant filed the present application, which is a duplicate claim because it was filed more than one year after the prior denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d). The administrative law judge credited claimant with twelve and one-half years of coal mine employment, dismissed Florida Insurance Guaranty Association as a party to the claim, and found that the newly submitted evidence failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b). The administrative law judge concluded, therefore, that a material change in conditions was not established pursuant to 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the x-ray evidence pursuant to Section 718.202(a)(1). Claimant further asserts that remand is required because the administrative law judge failed to discuss the lay testimony of record. Lastly, claimant contends that the administrative law judge erred in his consideration of Dr. Baker's opinion. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

[1] The administrative law judge's findings regarding length of coal mine employment, the dismissal of Florida Insurance Guaranty Association as a party to

this claim, and pursuant to Section 718.202(a)(2) and (a)(3) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

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, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has established at least one of the elements previously decided against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). If so, claimant has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross, supra*.

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge erred in relying on the numerical superiority of the negative x-ray readings. Claimant's Brief at 4 - 5. The record contains eight readings of three x-rays taken since the previous denial of benefits. The administrative law judge initially weighed the readings of the November 9, 1993 x-ray, noting that the x-ray was read positive by two Board-certified B-readers, and read negative by two B-reader and two Board-certified B-readers. Decision and Order at 9; Director's Exhibits 9, 10, 30, 32, 37. The administrative law judge permissibly found this x-ray to be negative for pneumoconiosis based on the weight of the negative readings by qualified readers. Decision and Order at 8 - 9; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge then found that the June 28, 1994 x-ray and the August 18, 1995 x-ray were read only as negative, by Dr. Sargent, a B-reader and Board-certified radiologist. Decision and Order at 9; Director's Exhibits 36, 38. Weighing together all of the readings, the administrative law judge concluded that the weight of the newly submitted x-ray readings was negative for pneumoconiosis. Because the administrative law judge properly weighed the x-ray evidence, relying on the credentials and the numerical superiority of the negative readings, we affirm the administrative law judge's finding that the negative x-ray interpretations outweigh the positive x-ray interpretations pursuant to Section 718.202(a)(1). *See Woodward*, *supra*; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

Claimant also contends that the administrative law judge erred in discrediting Dr. Baker's opinion. In 1993, Dr. Baker determined that claimant suffered from chronic obstructive pulmonary disease with severe obstructive defect, chronic bronchitis, history of cough and hypoxemia, based on physical examination, chest x-ray, objective testing, and an eighteen to twenty year coal mine employment history and thirty-one pack year smoking history. Director's Exhibit 7. Dr. Baker attributed the cause of claimant's conditions to cigarette smoking and coal dust exposure. In 1994, Dr. Baker submitted a letter stating that he reviewed claimant's x-ray and chart, and that because claimant had a greater than thirty pack year history and only five years of coal mine employment, it was unlikely that claimant had significant pneumoconiosis. Director's Exhibit 29. Dr. Baker was subsequently deposed in 1997. Dr. Baker stated that he changed his understanding of the number of years claimant worked in the mines based on a verbal assertion and not on written information provided by the Department of Labor. Director's Exhibit 31. Dr. Baker further stated that based on that verbal assertion, he determined that claimant suffered from bronchitis due predominantly to smoking history, but that coal dust exposure of five to eight years could have contributed to some extent. *Id*.

The administrative law judge acted within his discretion in discrediting Dr. Baker's opinion for several reasons. First, the administrative law judge rationally found that the administrative law judge's initial reliance on eighteen to twenty years of coal mine employment overstated the actual number of years claimant worked in the coal mines. *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986). Second, the administrative law judge permissibly found that Dr. Baker understated claimant's fifty-six pack year history by only noting a thirty-one pack year smoking history. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge also found that Dr. Baker's 1994 opinion was based on unidentified x-rays and charts, and was thus undocumented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Lastly, the administrative law judge permissibly found Dr. Baker's deposition testimony to be unreasoned in that the physician altered his diagnosis based on verbal assertions regarding the miner's length of coal mine employment from an unidentified party. *Clark*, *supra*; *Fields, supra*; *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988). Thus, the administrative law judge permissibly found Dr. Baker's opinions to be equivocal and unreasoned, and entitled to little weight pursuant to Section 718.202(a)(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). As the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, he correctly determined that claimant could not establish that his total disability was due to the disease. 20 C.F.R.

§718.204(b).

Lastly, claimant asserts that we must remand this case for further proceedings because the administrative law judge failed to discuss the hearing testimony of claimant. Claimant's Brief at 5. A finding of the existence of pneumoconiosis or total disability due to pneumoconiosis cannot be based solely on lay testimony in a living miner's claim. 20 C.F.R. §§718.202(c); 718.204(d)(2); *Trent v. Director, OWCP,* 11 BLR 1-26 (1987)*; Fields, supra*. Because the administrative law judge in this case permissibly declined to credit the medical evidence necessary to corroborate the lay testimony, any error in failing to discuss the lay testimony is harmless. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). Therefore, we reject claimant's contention.

In light of the foregoing, we affirm the administrative law judge's findings that the new evidence failed to establish either the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis, and therefore failed to establish a material change in conditions pursuant to Section 725.309(d). S*ee Ross, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge