BRB No. 99-0156 BLA

JAMES BRASSFIELD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BENHAM COAL, INCORPORATED	)	DATE ISSUED: 10\28\99
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglas, Harlan, Kentucky, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (97-BLA-1477) of Administrative Law Judge Robert L. Hillyard with respect to 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). In his Decision and Order, the administrative law judge credited claimant with nineteen years of coal mine employment and noted that the claim before him was the fourth application for benefits filed by claimant.[1] The administrative law judge initially considered, therefore, whether claimant

[1]Claimant filed his initial application for benefits on August 13, 1973. Director's Exhibit 32. This claim was finally denied when the Board affirmed Administrative Law Judge Donald W. Mosser's Decision and Order Denying Benefits on March 31, 1987. *Brassfield v. Benham Coal, Inc.*, BRB No. 88-0553 BLA (Mar. 31, 1987)(unpub.). Claimant took no further action until filing a second claim on May 23, 1989. Director's Exhibit 33. On November 3, 1989, the district director issued a Proposed Decision and

established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge determined that inasmuch as the record contained newly submitted evidence which, if fully credited, could establish the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant, claimant had established a material change in conditions. The administrative law judge then considered entitlement to benefits on the merits, based upon a consideration of all of the evidence of record, and determined that claimant did not demonstrate the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge should have applied the rebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.305. Claimant also contends that the administrative law judge did not properly weigh the medical opinions of record under Section 718.202(a)(1) and (a)(4) and Section 718.204(b). Neither the Director, Office of Workers' Compensation Programs (the Director), nor employer has filed a brief 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 supported by substantial evidence, is rational, and is in accordance with applicable 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).

Order of No Material Change in Condition and Denial of Claim. *Id.*. Claimant subsequently filed a third application for benefits on June 14, 1991. Director's Exhibit 34. The Board affirmed Administrative Law Judge Robert M. Glennon's finding that claimant did not prove the existence of pneumoconiosis and, therefore, affirmed the denial of benefits in a Decision and Order issued on January 30, 1995. *Brassfield v. Benham Coal, Inc.*, BRB No. 94-0874 (Jan. 30, 1995)(unpub.). Claimant filed the claim that is the subject of the present appeal on August 15, 1996. Director's Exhibit 1.

[2]We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(c)(1)-(4), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to claimant's argument concerning Section 718.305, claimant's assertion that the rebuttable presumption of total disability due to pneumoconiosis is available to him in this case is without merit. Inasmuch as the administrative law judge determined that the newly submitted evidence supported a finding of a material change in conditions, the claim filed on August 15, 1996 was before the administrative law judge for decision.[3] 20 C.F.R. §718.309(d). Section 718.305 specifically provides that the presumption is not available in claims filed on or after January 1, 1982. 20 C.F.R. §718.305(e). The administrative law judge did not err, therefore, in considering whether claimant established, by a preponderance of the evidence, that he has pneumoconiosis and is totally disabled by the disease, rather than applying the Section 718.305 presumption.

Turning to the administrative law judge's findings on the merits, claimant argues that the administrative law judge erred in determining that the x-ray evidence of record does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts specifically that the positive readings proffered by Drs. Baker, Vuskovich, and Mathur are sufficient to prove that he has pneumoconiosis and that in light of employer's superior financial resources, it was fundamentally unfair for the administrative law judge to rely upon the preponderance of negative readings. Claimant's contentions are without merit. In resolving the conflict in the x-ray evidence

[3]The administrative law judge indicated that the relevant standard for determining whether claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309 is set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In *Ross*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, a claimant must prove at least one of the elements previously adjudicated against him. In considering the newly submitted evidence, however, the administrative law judge did not determine whether claimant actually proved the element of entitlement previously adjudicated against him. The administrative law judge merely determined that the record contained new evidence which, if fully credited, could demonstrate that claimant has pneumoconiosis. Decision and Order at 16. Nevertheless, inasmuch as the administrative law judge's finding that claimant established a material change in conditions has not been challenged on appeal, it is affirmed. *See Skrack*, *supra*.

of record, the administrative law judge acted within his discretion in according greatest weight to the interpretations submitted by physicians who are both Board-certified radiologists and B readers. The administrative law judge also rationally determined that inasmuch as the preponderance of these readings is negative for pneumoconiosis, the existence of the disease was not established under Section 718.202(a)(1). Decision and Order at 17; *see Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994); *Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). In light of the fact that the administrative law judge did not rely solely upon the numerical superiority of the readings submitted by employer, but also considered the qualifications of the physicians submitting the interpretations, claimant's allegation of error regarding employer's superior resources is also without merit. *See Woodward*, *supra*. We affirm, therefore, the administrative law judge's finding under Section 718.202(a)(1).

Regarding Section 718.202(a)(4), claimant alleges that the administrative law judge erred in finding that the opinion in which Dr. Baker diagnosed pneumoconiosis is entitled to little weight on the ground that it is equivocal. Claimant also maintains that the administrative law judge should have rejected the opinion in which Dr. Dahhan determined that claimant does not have either clinical or statutory pneumoconiosis, as Dr. Dahhan relied upon an assumption that is contrary to the Act. We reject these allegations of error. Dr. Baker examined claimant on September 6, 1996, at the request of the Department of Labor, and concluded that claimant is suffering from pneumoconiosis based upon a chest x-ray that he classified as 1/0 and a significant history of coal dust exposure. Director's Exhibit 9. Dr. Baker also diagnosed chronic obstructive pulmonary disease and chronic bronchitis and identified cigarette smoking and coal dust exposure as the sources of these conditions. *Id.*. In response to questions submitted to him by a claims examiner, Dr. Baker reiterated that he felt that both smoking and coal dust exposure played a role in the etiology of claimant's obstructive airway disease. *Id.*. In a letter dated November 1, 1996, Dr. Baker indicated that based upon his review of evidence suggesting that claimant's chest x-rays were not positive for pneumoconiosis, perhaps a more accurate reading of the film that he obtained would be 0/1. *Id.*. Regarding the cause of claimant's disabling obstructive impairment, Dr. Baker stated that:

> When one has had a significant history of dust exposure as Mr. Brassfield has of 18 years or more, I can only conclude that his dust exposure may have had some role in [the] production of his respiratory impairment. In this case, I feel that his cigarette smoking is probably predominant, but I cannot rule out his coal dust exposure having some etiological role.

Id..

The administrative law judge rationally determined that Dr. Baker's diagnosis of clinical pneumoconiosis is of little probative value, on the ground that it was based

solely upon an x-ray interpretation that was contradicted by readers who are dually qualified as B readers and Board-certified radiologists. Decision and Order at 18; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Vance*, *supra*. In addition, the administrative law judge acted within his discretion in finding that Dr. Baker's final statement concerning the cause of claimant's obstructive impairment was equivocal as to whether the doctor believed that coal dust exposure actually contributed to claimant's impairment and was, therefore, entitled to diminished weight. *Id.*; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

With respect to Dr. Dahhan's opinion, the administrative law judge rationally credited it with substantial weight on the grounds that it is better supported by the objective evidence of record, that Dr. Dahhan examined claimant on several occasions over a period of twenty-two years, and that Dr. Dahhan provided a thorough rationale for his conclusions. Decision and Order at 18; Director's Exhibits 28, 32-34; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Contrary to claimant's contention, Dr. Dahhan did not state that simple pneumoconiosis does not progress after coal dust exposure ceases; he merely indicated that it was unlikely. Director's Exhibit 32 (Deposition Transcript at 30). Similarly, Dr. Dahhan did not indicate that coal dust exposure cannot be a contributing cause of an obstructive impairment. Rather, he explained that based upon the absence of x-ray evidence of dust retention in the lungs and the partial reversibility of claimant's impairment, attribution of the impairment to coal dust exposure is not warranted in this case. *Id.* (Deposition Transcript at 23-24). Finally, Dr. Dahhan stated that a diagnosis of pneumoconiosis does not depend upon a positive x-ray.[4] *Id.* (Deposition Transcript at 30). The administrative law judge did not err, therefore, in crediting Dr. Dahhan's opinion and in determining that the medical opinion evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Thus, we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4).

[4]Claimant is also incorrect in stating that Dr. Dahhan did not term claimant totally disabled. After his examination of claimant July 8, 1991, Dr. Dahhan found that claimant was suffering from a totally disabling respiratory impairment. Director's Exhibit 34. The fact that Dr. Dahhan stated during his deposition, which was taken on September 7, 1984, that claimant was not totally disabled did not require the administrative law judge to discredit Dr. Dahhan's statements regarding whether claimant suffered from clinical or statutory pneumoconiosis, as Dr. Dahhan acknowledged that claimant exhibited some respiratory impairment. Director's Exhibit 32 (Deposition Transcript at 23-24); *see Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Inasmuch as the administrative law judge's findings of no pneumoconiosis under Section 718.202(a)(1)-(4) have been affirmed, we must also affirm the denial of benefits under 20 C.F.R. Part 718 on the ground that claimant failed to establish an essential element of entitlement. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge