BRB No. 02-0456 BLA

LEE BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant. Helen H. Cox (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-0749) of Administrative Law Judge Thomas F. Phalen, Jr. on a duplicate claim[1] filed pursuant to the

[1] Claimant, Lee Baker, filed his first application for benefits with the Social Security Administration (SSA) on April 17, 1973, which was subsequently denied by the SSA Appeals Council. Director's Exhibit 19. Claimant did not appeal the denial. On August 19, 1975, claimant filed a duplicate claim with the Department of Labor (DOL), which Administrative Law Judge Daniel J. Roketenetz denied on the merits in a Decision and Order dated December 30, 1983 and on reconsideration in a Decision and Order dated February 9, 1984. *Ibid*. By Decision and Order dated March 20, 1986, the Board dismissed claimant's appeal because, although claimant timely filed a notice of appeal of Administrative Law Judge Roketenetz's decision on the merits, claimant failed to file a new notice of appeal after Administrative Law Judge Roketenetz's disposition of the Motion for Reconsideration. *Baker v. Director, OWCP*, BRB No. 84-0353 BLA (Mar. 20, 1986) (unpub.); Director's

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).[2] The administrative law judge initially credited claimant with eight years and nine months of qualifying coal mine employment. Next, the administrative law judge considered the newly submitted evidence and found that it was insufficient to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b), elements previously adjudicated against claimant. Therefore, the administrative law judge determined that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Sections 718.202(a)(1) and (a)(4) and total respiratory disability under Section 718.204(b). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.[3]

Exhibit 19. Claimant did not appeal this decision. Subsequently, on April 27, 2000, claimant filed another application for benefits, which is the subject of the instant appeal. Director's Exhibit 1.

[2] 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.

[3] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the x-ray interpretations and by relying exclusively on the qualifications of the physicians providing the x-ray interpretations because an administrative law judge is not required to defer to physicians with superior qualifications.

Section 718.202(a)(1) provides, in pertinent part, "...where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1). Accordingly, the administrative law judge considered the radiological expertise of the physicians, and within a proper exercise of his discretion, accorded greater weight to the negative interpretations of Drs. Sargent and Baker because these physicians were Board-certified radiologists and B-readers, and therefore, possessed superior radiological qualifications than Dr. Wicker. Decision and Order at 9; Director's Exhibits 7-10; 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1).

Relevant to Section 718.202(a)(4), claimant avers that the administrative law judge erred by failing to credit the opinion of Dr. Wicker, who diagnosed the presence of pneumoconiosis. Specifically, claimant asserts that the administrative law judge erred in finding Dr. Wicker's opinion less probative based on Dr. Wicker's reliance on a coal mine employment history of twelve years in light of the administrative law judge's finding of only eight years and nine months of qualifying coal mine employment. Claimant contends that the discrepancy of only three years and three months did not affect Dr. Wicker's opinion.

BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 9-11.

The administrative law judge found that Dr. Wicker's opinion was entitled to less weight because Dr. Wicker relied on an erroneous length of coal mine employment history (twelve years), which was inconsistent with the Social Security Administration records indicating a history of eight years and nine months. Decision and Order at 10. It is well established that the administrative law judge must note the existence of any significant discrepancy between his finding regarding claimant's history of coal mine employment and that relied upon by a physician, and explain how the discrepancy affects the credibility of that physician's opinion. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307-308 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985). Although the administrative law judge correctly observed that Dr. Wicker relied upon an inaccurate history of coal mine employment, we agree with claimant that the twelve year history relied on by Dr. Wicker and the eight years and nine months of coal mine employment demonstrated by the Social Security records and relied on by administrative law judge, is not a significant discrepancy. *See Sellards*, *supra*; *Fitch*, *supra* (10-11 year difference is significant); *Hall*, *supra* (16-19 year disparity is significant); *Long v. Director, OWCP*, 7 BLR 1-254 (1984) (7-½ year discrepancy is significant); *Gouge*, *supra* (2 year discrepancy not significant). Although the administrative law judge improperly relied on this determination as a basis for finding that Dr. Wicker's opinion was less probative; because he nevertheless provided alternate, valid bases upon which to discount Dr. Wicker's opinion, the error, if any, in this case was harmless. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-383 n.4 (1983); Decision and Order at 10.

The administrative law judge further found that Dr. Wicker's finding that claimant stopped smoking forty years prior to his June 13, 2000 examination of claimant was inconsistent with claimant's testimony that he smoked for thirty years and quit smoking ten to twelve years prior to the June 20, 1983 hearing, at most twenty-nine years. Decision and Order at 10. Similarly, the administrative law judge determined that while Dr. Wicker recorded when claimant ceased smoking, the physician failed to indicate the duration of claimant's cigarette smoking history. Decision and Order at 10. Accordingly, the administrative law judge properly determined that Dr. Wicker's opinion was not well-reasoned and documented because Dr. Wicker relied on an inaccurate cigarette smoking history and failed to specify the length of claimant's smoking history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). The administrative law judge further found that Dr. Wicker failed to adequately explain his conclusion that claimant suffers from pneumoconiosis due to coal dust exposure rather than a pulmonary impairment due to cigarette smoking or tuberculosis, especially in light of the inaccuracies in his report. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984).

Furthermore, the administrative law judge noted that the record was devoid of evidence demonstrating whether Dr. Wicker had any specialized qualifications in pulmonary medicine. Decision and Order at 10; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Claimant additionally avers that the administrative law judge erred in interpreting medical evidence and substituting his conclusion for the opinion of the physician when he discredited Dr. Wicker's opinion because it was based on a positive x-ray interpretation, contrary to the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis. Contrary to claimant's argument, however, an administrative law judge may consider evidence which calls into question the reliability of evidence upon which a physician's opinion is based because such evidence is relevant in assessing whether a report is documented and reasoned. *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Carpeta*, *supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *compare Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Church v. Eastern Association Coal Corp.*, 20 BLR 1-8 (1996); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Thus, the administrative law judge permissibly accorded less weight to the opinion of Dr. Wicker, a B-reader, because he interpreted the June 13, 2000 x-ray as positive while Drs. Sargent and Barrett, B-readers and Board-certified radiologists, interpreted the same x-ray as negative. Decision and Order at 8; *Winters*, *supra*; *Fuller*, *supra*. Because these determinations are rational and supported by substantial evidence, we affirm the administrative law judge's finding regarding Dr. Wicker's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

Claimant next asserts that, in rendering his finding that claimant was not totally disabled, the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work or to consider that claimant's disability, age, and limited education and work experience would preclude claimant from obtaining gainful employment outside of the coal mine industry. The administrative law judge properly found that the newly submitted medical opinion of Dr. Wicker was insufficient to demonstrate total respiratory disability because Dr. Wicker opined that claimant had the respiratory capacity to perform his previous duties in the coal mining industry. Decision and Order at 11; Director's Exhibit 5. Contrary to claimant's assertion, consideration of the exertional requirements of his usual coal mine work and other factors affecting claimant's ability to obtain gainful employment was "unnecessary" because Dr. Wicker found that claimant retained the respiratory capacity to perform his usual coal mine employment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Taylor v. Evans and Gambrel Co., Inc.*,

12 BLR 1-83, 1-87 (1988); *Compare Cornett, supra*.[4] Accordingly, we affirm the administrative law judge's determination that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W. G. Moore & Son*, 9 BLR 1-4 (1986) (*en banc*).

Consequently, because we affirm the administrative law judge's determinations that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability pursuant to Section 718.204(b) as these findings are rational, contain no reversible error, and are supported by substantial evidence, we must affirm the administrative law judge's determination that claimant failed to a material change in conditions pursuant to Section 725.309 (2000). *See* 20 C.F.R. §725.309 (2000); *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL

[4] Dr. Wicker's report indicates that Form CM-911a listing claimant's coal mine employment history and duties was considered by Dr. Wicker. Director's Exhibit 5.

Administrative Appeals Judge