BRB No. 05-0353 BLA

FOSTER V. ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BENT MOUNTAIN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/30/2005
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

David H. Neeley (Neeley Law Office, P.S.C.), Prestonsburg, Kentucky, for employer and carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-BLA-5083) of Administrative Law Judge Robert L. Hillyard denying benefits on a subsequent 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). The administrative law judge credited

claimant with 14.5 years of qualifying coal mine employment, and, based on the date of filing, adjudicated the claim pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's previous claim had been denied because the evidence was insufficient to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis, and that the present claim, filed on April 16, 2002, was subject to the provisions at 20 C.F.R. §725.309(d).[1] The administrative law judge reviewed the new evidence submitted in support of this subsequent claim, and determined that it was insufficient to establish any element of entitlement, thus claimant failed to demonstrate a change in one of the applicable conditions of entitlement at Section 725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally maintains that he is now suffering from totally disabling pneumoconiosis. Claimant specifically challenges the administrative law judge's weighing of the x-ray and medical opinion evidence at 20 C.F.R. §718.202(a)(1), (4), and asserts that he has demonstrated a change in one of the applicable conditions of entitlement at Section 725.309(d) by establishing the existence of pneumoconiosis through Dr. Baker's medical opinion and positive x-ray interpretation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response in this appeal.

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.[2] 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,

[1] Claimant's original claim for benefits, filed on June 26, 1989, was denied by Administrative Law Judge Alfred Lindeman in a Decision and Order issued on October 8, 1991, and the Board affirmed the denial of benefits on May 26, 1993. Director's Exhibit 1. Claimant took no further action until he filed the present claim for benefits on April 16, 2002. Director's Exhibit 3.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

718.204. Failure to establish any one of these elements precludes 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).

Claimant initially contends that the administrative law judge erred in finding that the weight of the newly-submitted x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), as Dr. Baker's positive x-ray interpretation of a March 19, 2003 film was entitled to greater weight based on the physician's status as a B reader. Claimant's Brief at 7. Claimant's arguments lack merit. The administrative law judge accurately reviewed the new x-ray evidence and the qualifications of the readers, and determined that films taken on August 29, 2002 and June 26, 2002 were interpreted as negative for pneumoconiosis, while the March 19, 2003 film was read as positive by Dr. Baker and as negative by Dr. Halbert.[3] Decision and Order at 9; Director's Exhibits 9-10, 19; Employer's Exhibit 1. Because Dr. Halbert possessed superior credentials as a dually-qualified Board-certified radiologist and B reader, the administrative law judge permissibly found that the weight of the evidence was negative for pneumoconiosis. Decision and Order at 9-10; *see Staton v. Norfolk & Western Ry. 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). The administrative law judge's findings pursuant to Section 718.202(a)(1) are supported by substantial evidence, and thus are affirmed.

Claimant next maintains that Dr. Baker's diagnosis of pneumoconiosis, based on x-ray, physical examination and objective testing, constitutes a reasoned medical opinion and establishes the existence of pneumoconiosis at Section 718.202(a)(4). Claimant's arguments are without merit, and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR 1-111. In evaluating the newly-submitted medical opinions of record, the administrative law judge considered the underlying documentation and the relative qualifications of the physicians, and properly accorded little weight to Dr. Baker's diagnosis of clinical pneumoconiosis based on abnormal x-ray and coal dust exposure, as a better-qualified physician had refuted Dr. Baker's x-ray interpretation, and the administrative law judge found that the diagnosis was merely a restatement of a positive x-ray rather than a reasoned medical opinion sufficient to meet claimant's burden at Section 718.202(a)(4). Decision and Order at 11; Director's Exhibit 19; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson*, 12 BLR at 1-113. Noting Dr. Baker's lack of pulmonary specialty credentials,

[3] Dr. Fino, a B reader, interpreted the August 29, 2002 film as negative, and Dr. Hussain, who possessed no special radiological qualifications, interpreted the June 26, 2002 film as negative. Decision and Order at 9; Director's Exhibits 9, 10.

the administrative law judge also acted within his discretion in according little weight to the physician's diagnosis of legal pneumoconiosis as defined at 20 C.F.R. §718.201(a)(2),[4] since Dr. Baker relied upon an inaccurate length of coal mine employment,[5] *see Worhach*, 17 BLR at 1-110, and failed to explain how he reached his conclusion that claimant's respiratory condition was attributable in part to coal dust exposure. Decision and Order at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge permissibly gave greater weight to the contrary opinion of Dr. Fino, that claimant had no respiratory impairment and did not suffer clinical or legal pneumoconiosis, on the grounds that the physician possessed superior qualifications as a Board-certified internist and pulmonologist, and that his opinion was well-reasoned and better explained. Decision and Order at 12; Director's Exhibit 10; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's findings pursuant to Section 718.202(a)(4) are affirmed, as they are supported by substantial evidence.

As claimant has not identified any specific legal or factual error in the administrative law judge's findings with regard to the length of claimant's coal mine employment, or in his finding that the new evidence submitted in support of this subsequent claim was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(2)-(3), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm these findings as unchallenged on appeal. Decision and Order at 4, 9-16; *see Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm the administrative law judge's finding that claimant is precluded from entitlement to

[4] Dr. Baker diagnosed chronic obstructive pulmonary disease (COPD), hypoxemia and chronic bronchitis, and attributed these conditions to a combination of coal dust exposure and smoking. Decision and Order at 6-7; Director's Exhibit 19. Dr. Baker's report indicated that the diagnosis of COPD was based on pulmonary function testing; the diagnosis of hypoxemia was based on PO_2 results; and the diagnosis of chronic bronchitis was based on claimant's history of cough, sputum production and wheezing. Director's Exhibit 19. As the regulations provide that "a determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony," 20 C.F.R. §718.202(c), the administrative law judge properly discounted the diagnosis of chronic bronchitis based upon claimant's self-reported symptoms. Decision and Order at 12.

[5] Dr. Baker listed a coal mine employment history of 28 years, whereas the administrative law judge determined that claimant had 14.5 years of qualifying coal mine employment. Decision and Order at 4; Director's Exhibit 19.

benefits pursuant to Section 725.309(d) because the new evidence submitted in support of this subsequent claim was insufficient to establish at least one of the applicable conditions of entitlement upon which the prior denial was based. Decision and Order at 16; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-64 (2004)(*en banc*).

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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BETTY JEAN HALL
Administrative Appeals Judge