BRB No. 06-0287 BLA

DANNY S. MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL COMPANY	)	DATE ISSUED: 09/26/2006
	)	
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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6446) of Administrative Law Judge Edward Terhune Miller 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).[1] The administrative law judge credited claimant with at

[1]Claimant filed his first claim on February 26, 2000. Director's Exhibit 1. This claim was denied by the district director on June 12, 2000, because the evidence did not show the presence of pneumoconiosis, that the disease was caused at least in part by coal mine work and that claimant was totally disabled by the disease. *Id*. On August 24, 2000, the district director administratively closed this claim, on the ground that it was abandoned, based on

least twenty years of coal mine employment based on employer's concession and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the newly submitted evidence insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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

Section 725.309 provides that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The administrative law judge

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claimant's failure to respond to the June 12, 2000 denial. *Id.* Claimant filed his second claim on February 22, 2001. *Id.* On August 22, 2001, the district director administratively closed this claim, on the ground that it was abandoned. *Id.* In a questionnaire provided by the district director, claimant indicated that he did not intend for his February 22, 2001 application to represent an appeal of the June 12, 2000 denial, specifically, he did not intend to request modification. *Id.* Claimant filed his most recent claim on September 25, 2001. Director's Exhibit 2.

[2]Since the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

correctly stated that "[claimant's first claim] was denied by the [d]istrict [d]irector on June 12, 2000 with a finding that [c]laimant had failed to establish that he had pneumoconiosis or that he was totally disabled." Decision and Order at 2; Director's Exhibit 1. The administrative law judge also stated that "in order to qualify for benefits, [c]laimant must establish that there has been a change in his condition since this denial." *Id.* at 7.

Claimant initially contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The record consists of five interpretations of three x-rays, dated November 3, 2001,[3] February 19, 2002 and January 21, 2004. Of the five x-ray interpretations of record, two readings are positive for pneumoconiosis, Director's Exhibits 11, 24, and three readings are negative for pneumoconiosis, Employer's Exhibits 2-4, 6. Dr. Baker, who is neither a B reader nor a Board-certified radiologist, read the November 3, 2001 x-ray as positive for pneumoconiosis. Director's Exhibit 11. Similarly, Dr. Alexander, a B reader and a Board-certified radiologist, read the November 3, 2001 x-ray as positive for pneumoconiosis. Director's Exhibit 24. In contrast, Dr. Wiot, a B reader and Board-certified radiologists, read the November 3, 2001 x-ray as negative for pneumoconiosis. Employer's Exhibits 2, 3. Dr. Broudy, a B reader, read the February 19, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 6. Lastly, Dr. Repsher, a B reader, read the January 21, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 4. The administrative law judge weighed the newly submitted x-ray evidence and found it insufficient to establish the existence of pneumoconiosis.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *Staton v. Norfolk & Western Railroad 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). In this case, the administrative law judge properly accorded greater weight to the x-ray readings by physicians who are qualified as B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge specifically stated that "the x-ray evidence reflects a failure of proof of pneumoconiosis because the qualifications of the negative readers equal or outweigh those of the positive readers." Decision and Order at 8. Hence, based on his consideration of the readings by the physicians qualified as B readers and/or Board-certified radiologists, the administrative law judge found that the preponderance of the newly submitted x-ray evidence is negative for pneumoconiosis. Since the administrative law judge reasonably considered

[3]Dr. Sargent, a B reader and a Board-certified radiologist, read the November 3, 2001 x-ray only for quality. Director's Exhibit 11.

the quantitative nature and the qualitative nature of the conflicting x-ray readings, we reject claimant's assertion that the administrative law judge's reliance on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings was improper.[4] *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Further, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the newly submitted reports of Drs. Baker, Broudy and Repsher. In a November 3, 2001 report, Dr. Baker diagnosed coal workers' pneumoconiosis. Director's Exhibit 11. In contrast, Dr. Broudy, in a February 19, 2002 report and a July 14, 2004 deposition, opined that claimant does not have coal workers' pneumoconiosis or any chronic lung disease related to coal dust inhalation. Employer's Exhibits 6, 11. Similarly, in a February 23, 2004 report and a May 24, 2004 deposition, Dr. Repsher opined that claimant does not have coal workers' pneumoconiosis, or any other pulmonary or respiratory disease or condition related to coal dust exposure. Employer's Exhibits 4, 10.

The administrative law judge found that the opinions of Drs. Broudy and Repsher outweighed Dr. Baker's contrary opinion, on the grounds that Drs. Broudy and Repsher have superior qualifications, their opinions are better reasoned, and their opinions support each other.

Claimant asserts that the administrative law judge erred in discounting the opinion of Dr. Baker. Specifically, claimant asserts that the administrative law judge substituted his opinion for that of Dr. Baker. Dr. Baker's opinion that the miner suffered from coal workers' pneumoconiosis was based on a positive x-ray and a coal mine employment history. Director's Exhibit 11. Contrary to claimant's assertion, the administrative law judge properly discounted Dr. Baker's diagnosis of coal workers' pneumoconiosis because the x-ray Dr. Baker relied upon to support his diagnosis was re-read by a better qualified physician as negative for pneumoconiosis.[5] *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4

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[4]Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the newly submitted x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 8. Thus, we reject claimant's suggestion.

[5]Dr. Baker read the November 3, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 11, while Dr. Wiot re-read this x-ray as negative for pneumoconiosis, Employer's Exhibits 2, 3. As discussed *supra*, Dr. Baker was neither a B reader nor a Board-

(1984). In addition, the administrative law judge properly discounted Dr. Baker's opinion that the miner suffered from pneumoconiosis in the context of Section 718.202(a)(4) because it is based only on an x-ray reading and a history of coal dust exposure. *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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion.

Since the administrative law judge properly discounted the only newly submitted medical opinion of record that could support a finding of the existence of pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Claimant additionally contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The relevant evidence consists of the newly submitted reports of Drs. Baker, Broudy and Repsher. The administrative law judge stated that "[a]ll three physicians concluded that [c]laimant retains the respiratory capacity to do the arduous manual labor of a coal miner, based on the lack of physical symptoms on examination and normal spirometry and arterial blood gas test results." Decision and Order at 10. In a November 3, 2001 report, Dr. Baker opined that claimant's impairment is minimal. Director's Exhibit 11. In an attached form, Dr. Baker checked both a box indicating that claimant has no impairment and a box indicating that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id*. Similarly, in a February 19, 2002 report and a July 14, 2004 deposition, Dr. Broudy opined that claimant retained the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Employer's Exhibits 6, 11. Further, in a May 24, 2004 deposition, Dr. Repsher opined that, from a respiratory capacity, claimant should have no trouble performing any job in a coal mine. Employer's Exhibit 10.

Claimant asserts that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's

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certified radiologist at the time he read the November 3, 2001 x-ray. However, Dr. Wiot was dually qualified as a B reader and a Board-certified radiologist. Although the November 3, 2001 x-ray relied upon by Dr. Baker was also re-read by Dr. Alexander, a dually qualified B reader and Board-certified radiologist, as positive for pneumoconiosis, the administrative law judge reasonably found that Dr. Alexander's positive reading failed to prove the existence of pneumoconiosis, because an equally qualified physician, Dr. Wiot, re-read the same x-ray as negative for pneumoconiosis. Decision and Order at 8.

opinion. In considering the evidence with regard to claimant's usual coal mine work, the administrative law judge stated:

> Claimant worked for…[e]mployer as a shuttle car driver, scoop operator and roof bolter *and the last couple of years as a line foreman*. (D-3, 4, 18). Claimant's coal mining work involved varied heavy manual labor, and extensive coal dust exposure, as all of his work was at or near the face. (D-18: Tr. 12).

Decision and Order at 2 (emphasis added). Claimant has offered no evidence to establish that the minimal impairment diagnosed by Dr. Baker would prevent him from performing his primary work as a line foreman. Thus, we hold that claimant has failed to prove that this diagnosis would support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). Furthermore, since Dr. Baker's opinion is insufficient to support a finding of total disability at Section 718.204(b)(2)(iv), we reject claimant's assertion that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.[6] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Moreover, in view of the foregoing, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability overall at 20 C.F.R. §718.204(b).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. 725.309.

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

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[6]We reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge