BRB No. 04-0411 BLA

HAROLD MORGAN Claimant-Petitioner v. EASTERN MOUNTAIN CONTRACTORS, INCORPORATED and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/07/2005 DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs) Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2003-BLA-5412) of Administrative Law Judge Jeffrey Tureck on a subsequent claim[1] 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). After crediting claimant with fifteen to sixteen years of coal mine employment, the administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and thus did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that the existence of pneumoconiosis was not established. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs has filed a letter stating that he will not file a response brief on the merits of 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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[1] Claimant's initial claim filed on September 18, 1991, was denied by Administrative Law Judge Frank D. Marden because the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. The Board affirmed the denial of benefits. *Morgan v. Eastern Mountain Contractor, Inc.*, BRB No. 94-2887 BLA (Mar. 29, 1995)(unpub.). On February 27, 2001, claimant filed this subsequent claim. Director's Exhibit 3.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with fifteen to sixteen years of coal mine employment, or his findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge "selectively analyzed" the x-ray evidence and improperly relied on the "qualifications of the physicians" and the "numerical superiority of x-ray interpretations" to find that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant's Brief at 3. The administrative law judge did not selectively analyze the x-ray evidence. The administrative law judge noted accurately that the newly submitted x-ray evidence of record consists of six readings of four x-rays. The administrative law judge found that the only positive interpretations were by Drs. Hussain and Baker, neither of whom possessed any special radiological qualifications, while the four remaining x-ray readings by B-readers, Drs. Broudy, Dahhan and Poulos, were negative for the existence of pneumoconiosis. Decision and Order Denying Benefits at 4; Director's Exhibits 9, 17, 19; Employer's Exhibits 1-3. Contrary to claimant's contention, the administrative law judge conducted a proper qualitative analysis of the x-ray readings. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Thus, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge erred in finding the medical opinion evidence of record insufficient to establish the existence of pneumoconiosis. Claimant contends that the reports of Drs. Baker and Hussain are well-reasoned, and that the administrative law judge erroneously stated that their opinions were based merely upon their x-ray interpretations. Claimant further contends that when the administrative law judge interpreted the medical tests, he substituted his own conclusions for those of a physician and failed to take into consideration Dr. Baker's status as claimant's treating physician pursuant to 20 C.F.R. §718.104(d).

Claimant's arguments lack merit. The administrative law judge acknowledged that Drs. Baker and Hussain are Board-certified in pulmonary medicine, that both examined and tested claimant, and that Dr. Baker was claimant's treating physician. Decision and Order Denying Benefits at 4, 5. However, the administrative law judge permissibly discredited the diagnosis of "coal workers' pneumoconiosis" rendered by Dr. Baker because he found that it was merely a restatement of an x-ray, noting that Dr. Baker did not offer any explanation for his diagnosis of pneumoconiosis other than his

own x-ray interpretation and claimant's length of coal dust exposure.[3] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003). Further, although Dr. Baker additionally diagnosed "chronic obstructive airway disease with mild obstructive defect," and attributed "any pulmonary impairment" to coal dust exposure, Director's Exhibit 19 at 3, 4, the administrative law judge reasonably accorded the opinion less weight because Dr. Baker reported inconsistent and exaggerated coal mine employment histories, he relied on minimal smoking histories, and was unaware of claimant's asbestos exposure.[4] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Similarly, the administrative law judge permissibly found Dr. Hussain's opinion "not credible," because Dr. Hussain relied on an "erroneous positive x-ray interpretation," Decision and Order Denying Benefits at 5, he assumed that claimant had never smoked, and was unaware of claimant's asbestos exposure. *See Williams*, 338 F.3d at 514, 22 BLR at 2-648-49; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Moreover, the administrative law judge acted within his discretion in according greater weight to the contrary opinions of Drs. Broudy and Dahhan because these physicians were both Board-certified in pulmonary medicine, they had examined claimant, and had "ground[ed] their opinions in sound medical foundations." Decision and Order Denying Benefits at 6; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Substantial evidence supports the administrative law judge's findings. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

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[3] Dr. Baker diagnosed "Coal Worker's Pneumoconiosis, Category 1/0, on basis of 1980 ILO Classification-based on abnormal x-ray and significant history of dust exposure," with "no other condition to account for x-ray changes." Director's Exhibit 19 at 2, 3.

[4] The administrative law judge noted that Dr. Baker relied on a history of twenty-seven years of coal mine employment in his 2001 report, whereas the administrative law judge found fifteen to sixteen years of coal mine employment. Decision and Order Denying Benefits at 5. Dr. Baker also reported that claimant smoked one-half to three-fourths of a pack of cigarettes a day for two to four years, and Dr. Baker did not record claimant's exposure to asbestos. Director's Exhibit 19. By contrast, the administrative law judge found that claimant smoked a pack a day for at least twenty–two years and was exposed to asbestos while working as a carpenter and roofer for ten years between 1956 through 1971. Decision and Order Denying Benefits at 2-5; 2003 Hearing Transcript at 28-29; Employer's Exhibit 3.

(a)(4).

Because the administrative law judge properly found that the newly submitted medical evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Sections 718.202(a), we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge