BRB No. 04-0774 BLA

CHARLES COLLINS	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
RIVER PROCESSING, INCORPORATED	)	DATE ISSUED: 06/22/2005
	)	
and	)	
	)	
FLORIDA PROGRESS CORPORATION	)	
	)	
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 Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Barry H. Joyner (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5300) of Administrative Law Judge Alice M. Craft (the administrative law judge) 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 found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2), elements previously adjudicated against claimant, and thereby, failed to establish a change in a condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied the subsequent claim.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence and the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4) and that the medical opinion evidence failed to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv). Claimant also contends that, since the administrative law judge found that the opinion of Dr. Hussain was not reasoned, the Director, Office of Workers' Compensation Programs, (the Director) failed to provide claimant with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). *See* 20 C.F.R. §725.406. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director responds, asserting that Dr. Hussain's examination satisfied his obligation to provide claimant with a complete and credible pulmonary evaluation and that the administrative law judge's denial of benefits should be affirmed.[1]

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).

In order to establish entitlement to benefits under 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 totally disabling. *See* 20 C.F.R. §§718.3,

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[1] The administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3) and that the evidence fails to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) and affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc*).

Claimant first contends that the administrative law judge erred in relying almost solely on the superior qualifications of the physicians who read x-rays as negative and in placing substantial weight on the numerical superiority of the negative x-ray evidence 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. Claimant's contentions are rejected.

In considering the x-ray evidence, the administrative law judge determined that the April 25, 2001 x-ray was negative, despite Dr. Hussain's positive reading, because Dr. Hussain had no special radiographic qualifications and the same x-ray was read negative by Dr. Wiot, a Board-certified radiologist and B-reader. The administrative law judge also considered the August 15, 2001 x-ray to be negative for pneumoconiosis as it was read negative by both Drs. Paulos, a dually qualified physician, and Dr. Rosenberg, a B-reader. Decision and Order at10; Director's Exhibits 12, 14; Employer's Exhibit 3. This was a proper qualitative and quantitative analysis of the x-ray interpretation evidence. 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk and Western Railway 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); *Worhach v. Director, OWCP*, 17 BLR 1- 105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 10. In addition, claimant's contention that the administrative law judge "may" have "selectively analyzed" the x-ray evidence is rejected as claimant cites to nothing in the record to support his speculation. *See Cox v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988). We, therefore, affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant next asserts that because the administrative law judge did not credit Dr. Hussain's April 25, 2001 medical opinion which was provided by the Director, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. In response, the Director argues that he "is only required to provide claimant with a complete and credible examination, not a dispositive one." Director's Brief at 2.

Dr. Hussian conducted an examination and a full range of testing on claimant. He addressed each element of entitlement of the Department of Labor examination form. 20 C.F.R. §§718.101(a); 718.104, 725.406(a); Director's Exhibit 10. In considering the medical opinion evidence at Section 718.202(a)(4), the administrative law judge found that Dr.

Hussain's opinion that claimant suffered from pneumoconiosis was outweighed by Dr. Rosenberg's opinion, that he did not, because Dr. Rosenberg possessed superior qualifications, *i.e.*, he was Board-certified in internal medicine, pulmonary disease, and occupational medicine, and because his explanation and reasoning in support of his conclusions was "more complete and thorough" than that provided by the physicians who found that claimant had pneumoconiosis, including Dr. Hussain. Decision and Order at 10. Further, the administrative law judge credited Dr. Hussain's opinion that claimant could perform the work of a coal miner at Section 718.204(b)(2)(iv). Decision and Order at 12. Thus, the administrative law judge did not reject Dr. Hussain's opinion. Instead, the administrative law judge found it not as well-reasoned as Dr. Rosenberg's opinion. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-644 (6th Cir. 2003). As the Director asserts, the mere fact that the administrative law judge found another medical opinion more persuasive does not mean that the Director failed to satisfy his statutory obligation of providing claimant with a complete, credible pulmonary evaluation. 30 U.S.C. §923(b); *Cline v. Director, OWCP*, 917 F. 2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Newman v. Director, OWCP*, 745 F. 2d 1162, 1166, 7 BLR 2-25 2-31 (8th Cir. 1984). In the instant case, Dr. Hussain's report was complete, but the administrative law judge found it not as well-reasoned as the opinion of Dr. Rosenberg. Decision and Order at 11. We reject, therefore, claimant's contention that the Director has not fulfilled his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

Finally, claimant contends that the administrative law judge should have found a total respiratory disability established pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 4-6. Specifically, claimant asserts that the administrative law judge should have determined the exertional requirements of claimant's usual coal mine employment and compared them with a physician's assessment of claimant's respiratory impairment. Claimant contends that, taking his work as a shuttle car operator and miner helper and his respiratory condition into consideration, it would be rational to conclude that claimant's respiratory condition prevented him from engaging in his usual coal mine employment since such employment took place in a dusty environment and involved exposure to dust on a daily basis. Claimant also contends that the administrative law judge should have considered his age, education, and work experience in determining whether he was totally disabled. Additionally, claimant contends that, in light of the fact that pneumoconiosis is a progressive and irreversible disease and a considerable amount of time has passed since his initial diagnosis of pneumoconiosis, it can be concluded that claimant is now totally disabled by his pneumoconiosis.

An administrative law judge cannot infer total disability absent physical limitations set forth in the medical evidence. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Aleshire v. Central Coal Co.*, 8 BLR 1-70 (1985). Dr.

Hussain did not set forth claimant's physical limitations; rather, he opined that claimant could perform his usual coal mine work or coal work in a dust free environment. Director's Exhibit 10. Moreover, the administrative law judge correctly found that Dr. Koura did not render an opinion as to whether claimant was totally disabled, Dr. Rosenberg concluded that claimant did not have any respiratory impairment whatsoever, and the blood gas and pulmonary function studies were non-qualifying. Director's Exhibit 16; Employer's Exhibits 1, 3, 4. As such, the administrative law judge properly found that the medical opinion evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See McMath*, 12 BLR at 1-7-8; *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Additionally, contrary to claimant's argument, the fact that claimant should not work in a dusty environment does not establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor*, 12 BLR at 1-88. Moreover, contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education, and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 6-7 (2004); *Taylor*, 12 BLR at 1-87. Nor, does a diagnosis of pneumoconiosis automatically lead to a finding of total disability. *White*, 23 BLR at 1-7 n.8. We, therefore, affirm the administrative law judge's finding that the evidence fails to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Further, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20(1988); *Short v. Westmoreland Coal Co.*, 1- BLR 1-127 (1987). Because the evidence failed to establish the existence of pneumoconiosis and total respiratory disability, essential elements of entitlement, claimant has failed to establish a change in a condition of entitlement and has failed to establish entitlement to benefits. *See Kirk v. Director, OWCP*, 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Trent*, 11 BLR 1-26; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry*, 9 BLR 1-1.

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