BRB No. 99-0816 BLA

JERRY L. 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.

Edmond Collett, Hyden, Kentucky, for claimant.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-1281) of Administrative Law Judge Thomas F. Phalen, Jr., on a 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 parties stipulated to at least nineteen years of coal mine employment, and based on the claim's filing date of June 23, 1994, applied the regulations found at 20 C.F.R. Part 718. Director's Exhibit 1. Administrative Law Judge J. Michael O'Neill determined that claimant failed to establish pneumoconiosis arising from coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 31. Claimant appealed, and in *Baker v. Director, OWCP*, BRB No. 96-1450 BLA (July 11, 1997)(unpub.), the Board affirmed the denial. Director's Exhibit 38. On October 22, 1997, claimant filed a request for modification and submitted

new evidence. Director's Exhibit 39. Administrative Law Judge Thomas F. Phalen, Jr., (the administrative law judge) considered the newly submitted evidence in conjunction with the previously submitted evidence and the prior decisions of denial pursuant to 20 C.F.R. §725.310, and found that claimant failed to establish a basis for modification. Decision and Order at 10; *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Benefits were accordingly denied. Claimant appeals, contending that the administrative law judge erred in failing to find a change in conditions, as he established the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4) and total disability at Section 718.204(c)(4).[1] The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in his consideration of the x-ray evidence at Section 718.202(a)(1), as he mechanically deferred to the x-ray readers with superior qualifications, improperly relied upon the numerical superiority of the negative readings, and selectively analyzed the evidence. We disagree.

[1] We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.203(a)(2) and (3) as unchallenged on appeal. In addition, we also affirm the administrative law judge's finding that the evidence fails to establish total disability at 20 C.F.R. §718.204(c)(1)-(3) as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The newly submitted evidence contains three readings of one x-ray: two negative readings by dually qualified readers,[2] Director's Exhibits 40, 41, and a single positive reading by Dr. Baker, who is qualified only as a B reader. Director's Exhibit 39. We affirm the administrative law judge's accordance of greater weight to the better qualified readers as proper. 20 C.F.R. §718.202(a)(1);[3] *see Staton v. Norfolk & Western Railway Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Furthermore, we reject claimant's contention that the administrative law judge improperly relied on the numerical superiority of the negative readings, as his weighing of the x-ray evidence was also based on the qualifications of the readers. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). We decline to address claimant's contention that the administrative law judge "selectively analyzed" the evidence, as he gives us no basis for this contention. *Fish v. Director, OWCP*, 6 BLR 1-10 (1983). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).[4]

Claimant next contends that the administrative law judge erred in discrediting the newly submitted opinion of Dr. Baker, who found coal workers' pneumoconiosis, based on his x-ray reading and claimant's "significant coal dust exposure." Decision and Order at 5; Director's Exhibit 39. The administrative law judge assigned little weight to this opinion, however, as he found that it was a "mere restatement" of a positive x-ray, and was, therefore, not reasoned. The administrative law judge also found that "a significant amount of exposure

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[2] A reader is dually qualified when he is both a B reader and a Board-certified radiologist. *See* Decision and Order at 4.

[3] Section 718.202(a)(1) provides in relevant part:

> Except as otherwise provided in this section, 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. §718.201(a)(1).

[4] Claimant further argues that the administrative law judge should have found the x-ray evidence in equipoise. However, as the Director notes, the true doubt rule is no longer valid, and therefore claimant's argument is tantamount to a concession that he failed to carry his burden of proof. *See Director, OWCP v. Greenwich Collieries (Ondecko)*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

to coal dust is not enough to prove the existence of pneumoconiosis by a preponderance of the evidence." Decision and Order at 8.

The administrative law judge, within his discretion as fact finder, permissibly determined that Dr. Baker's opinion was merely a restatement of a positive x-ray, and did not, therefore, constitute a reasoned opinion. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994)(a medical report based upon positive x-ray and occupational exposure is not probative evidence of pneumoconiosis); *Worhach*, *supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989). As the administrative law judge found that this opinion was not well reasoned, a finding which is rational and supported by substantial evidence, we affirm his finding that Dr. Baker's opinion is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).

Claimant also contends that the administrative law judge erred in failing to find that Dr. Baker's opinion was sufficient to establish total disability at Section 718.204(c)(4). We disagree. Dr. Baker failed to term claimant totally disabled or to make a sufficient physical assessment from which the administrative law judge could infer total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd* 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Additionally, contrary to claimant's argument, the administrative law judge is not required to consider claimant's age, education and limited work experience in determining whether claimant is totally disabled from his usual coal mine employment inasmuch as these factors are not relevant to establishing total disability pursuant to Section 718.204(c). *See Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee*, *supra*. Nor, contrary to claimant's contention, does a mere diagnosis of simple pneumoconiosis give rise to a presumption of total disability. *See* 20 C.F.R. §718.204(c); *Gee*, *supra*. Therefore, we affirm the administrative law judge's weighing of the medical reports at Section 718.204(c)(4) and his finding that claimant has not established total disability. *Gee*, *supra*.

As we affirm the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a) or total disability at Section 718.204(c), we affirm the administrative law judge's determination that claimant has failed to establish a change in conditions and a basis for modification pursuant to Section 725.310. *See Worrell*, *supra*.[5]

[5] As the Director notes, the administrative law judge determined that claimant failed to

establish a mistake in determination of fact, a finding which claimant fails to challenge. *See Skrack, supra*; Decision and Order at 10.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge