BRB No. 05-0601 BLA

JEFFREY ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLUE DIAMOND COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 04/27/2006
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-0125) of Administrative Law Judge Daniel J. Roketenetz on a request for modification of the denial of a duplicate 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 at least thirty years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1]

The administrative law judge found that there was no mistake in fact in the previous denials of benefits, and found that none of the elements of entitlement had been established in his previous decision. The administrative law judge found that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), but sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Thus, as total disability, an element of entitlement previously adjudicated against claimant, was established, the administrative law judge found a "material chance [sic] in condition" had been established. Upon review of all the evidence of record, the administrative law judge found it insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), but sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge also

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[1] Claimant filed his first claim for benefits on August 15, 1991. It was denied by Administrative Law Judge Frank D. Marden by Decision and Order dated May 25, 1994, based on claimant's failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202. Director's Exhibit 36. The Board affirmed the denial of benefits in *Asher v. Blue Diamond Coal Co.*, BRB No. 94-2571 BLA (Mar. 20, 1995) (unpub). *Id.* Claimant's second claim for benefits was received on June 23, 2000, and denied by the district director on October 3, 2000. Director's Exhibits 1, 11. Claimant appealed, and on March 27, 2002, the district director awarded benefits in a Proposed Decision and Order Memorandum of Conference. Director's Exhibit 33. Administrative Law Judge Daniel J. Roketenetz denied benefits by Decision and Order dated July 29, 2002, finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, the element of entitlement previously adjudicated against claimant, and thus, failed to establish a material change in conditions under 20 C.F.R. §725.309 (2000). Director's Exhibits 34, 45. The Board affirmed the denial of benefits in *Asher v. Blue Diamond Coal Co.*, BRB No. 02-0773 BLA (June 13, 2003) (unpub). Claimant requested modification on September 4, 2003. Director's Exhibit 59. The district director denied benefits on March 4, 2004. Director's Exhibit 75. A formal hearing before the administrative law judge was held on February 15, 2005.

found, *assuming arguendo* that claimant had established the existence of pneumoconiosis, the evidence is insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis on the merits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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).

On the merits of the claim,[2] claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[3] It is claimant's burden to specify error in the decision below. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). However, review of claimant's brief discloses no allegation of error in the administrative law judge's consideration of the x-ray evidence, other than the failure to consider the prior x-rays, which do not support claimant's case.[4] Thus, claimant has provided no basis for the

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[2] While the administrative law judge in this case did not follow the proper procedure for modification of a duplicate claim, no party contests the administrative law judge's findings at 20 C.F.R. §§725.309 and 725.310 (2000). We therefore affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The administrative law judge properly found that there is no evidence relevant to pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) in this case.

[4] Claimant specifically contends that the presence of pneumoconiosis is supported by the x-ray evidence from the prior claim and that the administrative law judge erred by failing to consider the prior evidence equally with the newly submitted evidence. There are three newly submitted x-rays of record. The x-ray dated August 8, 2003, was read as positive by Dr. Simpao, a physician with no special qualifications. Director's Exhibits 59, 62. The x-ray dated October 24, 2003 was read as negative by Dr. Dahhan, a B reader. The x-ray dated January 7, 2003 was read as negative by Dr. Broudy, a B reader.

Board's review. 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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically contends that the administrative law judge erred in according greater weight to the opinion of Dr. Fino, who never examined claimant, than to the opinions of Drs. Cornett and Younes. Likewise, claimant contends that the administrative law judge erred by failing to consider the opinions of Drs. Anderson, Myers, Clarke and Dineen.[5]

The newly submitted medical opinion evidence of record consists of reports by Drs. Dahhan, Broudy and Simpao. Dr. Dahhan found no pneumoconiosis and diagnosed chronic obstructive pulmonary disease due to cigarette smoking. Director's Exhibit 69. Dr. Broudy found no pneumoconiosis and diagnosed chronic obstructive airways disease due to claimant's long smoking history. Employer's Exhibit 1. Dr. Simpao diagnosed pneumoconiosis. Director's Exhibit 59. The administrative law judge found all three opinions were well reasoned and well documented. The administrative law judge further properly found that the opinions of Drs. Broudy and Dahhan were insufficient to establish legal pneumoconiosis as both physicians attributed their diagnoses of chronic obstructive disease to claimant's cigarette smoking, and not his coal mine employment. *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317, 1-322 (1985). The administrative law judge permissibly accorded greater weight to the opinions of Drs. Dahhan and Broudy, both

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The administrative law judge properly found the newly submitted x-ray evidence negative for pneumoconiosis, based on the preponderance of negative x-ray readings by better qualified physicians. *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); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc)*. The administrative law judge also found, "In my prior Decision and Order dated July 29, 2002, the evidence of record dates from 2000 to 2002. The medical evidence of record and my findings contained in my previous Decision, which was affirmed by the Board on June 13, 2003, is adopted herein and will not be unduly repeated. In that Decision, I reviewed three x-rays that were interpreted by all ten physicians as negative for pneumoconiosis in 2000. (Dxs. 8-10, 20-22, 30-32, 42). The prior evidence is supportive of my finding with respect to pneumoconiosis under Section 718.202(a)(1) in the current claim." Decision and Order at 15.

[5] All of these opinions were submitted with claimant's previous claim.

Board-certified in Internal Medicine and Pulmonary Diseases, than to Dr. Simpao, based on their superior qualifications. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Thus, the administrative law judge rationally found the new medical opinions insufficient to establish the existence of pneumoconiosis based on the preponderance of well reasoned and well documented opinions by physicians with superior qualifications. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

The administrative law judge also noted, pursuant to 20 C.F.R. §718.202(a)(4), that "[T]hree physicians' medical reports from Drs. Wicker, Dahhan, and Fino; a set of hospital records from Appalachian Regional Health Care; two letters for Drs. Cornett and Younes; and Dr. Dahhan's deposition were considered in my previous opinion in deciding if the Claimant established pneumoconiosis per Section 718.202(a)(4). (Dx 8-9, 27-29, 42)." Decision and Order at 15. The administrative law judge stated, "I continue to grant the evidence the same weight that I afforded it in my prior Decision for the reasons stated therein. I rely on the well-reasoned opinions of Drs. Fino and Wicker that are in accordance with the reports of Drs. Dahhan and Broudy in this claim, to find that the Claimant has not proven pneumoconiosis, by a preponderance of the evidence, pursuant to Section 718.202(a)(4). In sum, I maintain my findings above that the Claimant has not established pneumoconiosis."[6] *Id*.

We find no error in the administrative law judge's reliance on his prior weighing of the medical opinions, a finding the Board affirmed in our Decision and Order dated June 13, 2003. Moreover, we hold that the prior evidence, as weighed by the administrative law judge, is consistent with the new evidence, as the administrative law judge found. We therefore affirm the administrative law judge's finding that the medical

[6] Contrary to claimant's contention, the administrative law judge permissibly accorded the opinion of Dr. Cornett, claimant's treating physician, little weight as the administrative law judge rationally found the opinion was not well reasoned or well documented as the physician failed to consider claimant's smoking history or indicate what specific tests or results she relied on. 20 C.F.R. §718.104(d); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Further, the administrative law judge was not required to accord Dr. Fino's opinion less weight merely because the physician did not examine claimant. *See generally Jericol Mining Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7]

As the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement under Part 718, entitlement thereunder is precluded. *Trent v. Director, OWCP*, 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986) (*en banc*).

In light of the foregoing, we need not reach claimant's arguments regarding the administrative law judge's findings at 718.204(c), as any error therein would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Although, as claimant notes, the district director awarded benefits in a Proposed Decision Order based on this evidence, the Board affirmed the administrative law judge's subsequent denial of benefits. Director's Exhibits 33, 34, 45.

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge