BRB No. 99-1079 BLA

RUBEN SHEPHERD	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Helen H. Cox (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 (99-BLA-0202) of Administrative Law Judge Joseph E. Kane on 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 that claimant established eight and one half years of coal mine employment and, based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. Claimant filed his first claim for benefits on April 17, 1973, which was denied by Administrative Law Judge Bernard J. Gilday on June 16, 1988. Director's Exhibit 36. Claimant filed the instant duplicate claim on February 2, 1993, which was denied by Administrative Law Judge Daniel J. Roketenetz May 18, 1995. Director's Exhibits 1, 39. Claimant appealed, and in *Shepherd v. Director, OWCP*, BRB No. 95-1566 BLA (Mar. 15, 1996)(unpub.), the Board vacated the denial and remanded the case for further consideration. Director's Exhibit 47. On remand, Judge

Roketenetz found that claimant established a material change in conditions, but found that the evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 48. Claimant again appealed, and in *Shepherd v. Director, OWCP*, BRB No. 96-1786 BLA (Aug. 27, 1997)(unpub.), the Board again vacated and remanded the case for further consideration. Director's Exhibit 53. On remand, Judge Roketenetz remanded the case to the district director for a complete pulmonary examination of claimant. Director's Exhibit 57. The claim was denied again July 17, 1998. Director's Exhibit 61. Subsequent to a hearing, Administrative Law Judge Joseph E. Kane found that claimant failed to establish a material change in conditions at Section 725.309 pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find that the newly submitted evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (a)(4), and total disability at 20 C.F.R. §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 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).

[1] We affirm the administrative law judge's finding of eight and one-half years of coal mine employment, and his finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3), and failed to establish total disability at 20 C.F.R. §718.204(c)(1)-(3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in failing to find that the x-ray evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(1). We disagree. The evidence submitted since the previous denial of benefits consists of ten x-ray readings, only one of which is positive for the existence of pneumoconiosis. The single positive reading was made by Dr. Sunduram, who possesses no special credentials in reading x-rays. Director's Exhibit 19; Decision and Order at 11. The administrative law judge determined, however, that his x-ray film was reread as negative by two other readers, Drs. Barrett and Sargent, both of whom are dually qualified as B readers and Board certified radiologists.[2] Director's Exhibits 17, 18, 19; Decision and Order at 6-7; 11-12. We therefore reject claimant's contention that the administrative law judge impermissibly based his decision on the numerical superiority of the negative readings, as he clearly stated that he was considering the weight of the negative x-ray readings in conjunction with the superior qualifications of the readers who submitted negative readings. The administrative law judge permissibly accorded greater weight to the readings of the better qualified readers and therefore rationally found that the weight of the x-ray evidence was negative for the existence of pneumoconiosis. *See Staton v. Norfolk & Western Railway Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Further, as claimant fails to explain how the administrative law judge "selectively analyzed" the evidence, we decline to address this contention. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant next contends that the administrative law judge erred in failing to credit the medical opinion of Dr. Sunduram at Section 718.202(a)(4). The evidence of record contains three medical opinions submitted since the denial of the previous claim. Dr. Sunduram was the only physician to diagnose the existence of pneumoconiosis, while Drs. So and Wicker failed to diagnose pneumoconiosis within the meaning of 20 C.F.R. §718.201. Director's Exhibits 12, 13, 31, 33, 59. The administrative law judge permissibly accorded greater

[2] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, n. 16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

weight to Dr. Wicker's opinion as he found it better supported by the underlying documentation. *See Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983); *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Duke v. Director, OWCP*, 6 BLR 1-1673 (1983). The administrative law judge permissibly accorded less weight to Dr. Sunduram's opinion, as he found that the opinion was based "mainly, if not entirely," on his own positive x-ray reading and was not supported by other underlying objective evidence. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988). We therefore reject claimant's contention that the administrative law judge impermissibly rejected Dr. Sunduram's opinion because it was based on a positive x-ray, and erred in failing to find Dr. Sunduram's opinion reasoned. *Worhach*, *supra*; *Anderson*, *supra*; *Taylor*, *supra*. Accordingly, we affirm the administrative law judge's determination that the evidence in insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Claimant also contends that the administrative law judge erred in failing to find that Dr. Sunduram's opinion established total disability at Section 718.204(c)(4). The administrative law judge weighed all the newly submitted evidence together and found that it failed to establish total disability. *See Rafferty v. Jones & Laughlin Steel Corp*. 9 BLR 1-231 (1987). Although, as claimant contends, Dr. Sunduram's opinion, of a class II respiratory impairment indicative of a 10 to 25 percent disability under the AMA guidelines, could when compared to the exertional requirements of claimant's usual coal mine employment establish total disability, the administrative law judge permissibly found this opinion unsupported by underlying documentation and not as well reasoned as the opinion of Dr. Wicker, which found that claimant had the respiratory capacity to adequately perform his usual coal mine employment. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Moreover, in determining that total disability was not established, the administrative law judge properly weighed the medical reports along with the nonqualifying pulmonary function studies and blood gas studies. *See Rafferty*, *supra*. *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 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 general 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*. Accordingly, we affirm the administrative law judge's weighing of the medical reports at Section 718.204(c)(4) along with the other relevant evidence and his finding that claimant has not established total disability.

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 material change in conditions pursuant to Section 725.309(d). *See Ross*, *supra*.

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