BRB No. 07-0606 BLA

B.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TROJAN MINING	)	
	)	
and	)	
	)	
TRAVELER'S INSURANCE COMPANY	)	DATE ISSUED: 03/27/2008
	)	
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

B.R., Kodak, Tennessee, *pro se*.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the March 21, 2007 Decision and Order (2005-BLA-05871) of Administrative Law Judge Janice K. Bullard (the administrative law judge), denying benefits 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).[1] Claimant's prior claim was denied because claimant failed to establish pneumoconiosis. Addressing the subsequent claim, the administrative law judge found that nineteen years of qualifying coal mine employment had been established, but that the evidence submitted in support of the subsequent claim failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the element of entitlement previously adjudicated against claimant.[2] The administrative law judge, therefore, found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Benefits were, accordingly, denied.

On appeal, claimant generally challenges the administrative law judge's findings. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis at 20 C.F.R.

[1] This claim was filed on September 19, 2001.

[2] The administrative law judge also found that the evidence failed to establish that pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), that claimant was totally disabled, 20 C.F.R. §718.204(b), or that pneumoconiosis was totally disabling, 20 C.F.R. §718.204(c).

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable, because the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

§718.202(a). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge accurately determined that the December 14, 2001 x-ray, which was interpreted as positive by Dr. Hussain, who had no radiological qualifications, and as negative by Dr. Wiot, a Board-certified radiologist, was negative based on Dr. Wiot's superior qualifications. Decision and Order at 11; 20 C.F.R. §718.202(a)(1); *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Additionally, the administrative law judge correctly found that the negative readings of a January 19, 2002 x-ray and a March 10, 2004 x-ray were uncontradicted. Decision and Order at 11. Thus, considering all of the x-ray evidence together, the administrative law judge found that it failed to establish pneumoconiosis at Section 718.202(a)(1). *See 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). As the administrative law judge's findings at Section 718.202(a)(1) are rational and supported by substantial evidence, her findings thereunder are affirmed.

In considering the medical opinion evidence of record at Section 718.202(a)(4), the administrative law judge addressed the new opinions of Drs. Hussain, Rosenberg, and Repsher. The administrative law judge found that Dr. Hussain's diagnosis of pneumoconiosis was based on an x-ray and claimant's history of coal dust exposure. The administrative law judge, however, properly accorded the opinion little weight as the x-ray Dr. Hussain relied on was subsequently reread as negative by a better qualified physician and he provided little other support for his diagnosis. Decision and Order at 12; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Conversely, the administrative law judge accorded greater weight to the new opinions of Drs. Rosenberg and Repsher, who both found that pneumoconiosis was not present and that claimant's respiratory impairment was in no way caused by coal dust exposure, as they were better explained and documented. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). The administrative law judge found that the opinions of Drs. Rosenberg and Repsher were better supported by claimant's objective testing and his history of smoking. Decision and Order at 12-13; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Additionally, the administrative law judge properly found that their opinions were entitled to greater weight based on their credentials as pulmonary specialists. Decision and Order at 12-13; *Dillon*, 11 BLR at 1-114. Accordingly, the

administrative law judge's finding that the new medical opinion evidence did not establish pneumoconiosis at Section 718.202(a)(4) is affirmed.

Additionally, the administrative law judge properly found that pneumoconiosis could not be established at 20 C.F.R. §718.202(a)(2)-(3) as there was no biopsy evidence, and none of the presumptions contained at 20 C.F.R. §718.202(a)(3) was applicable. The administrative law judge's findings at Section 718.202(a)(2) and (3) are accordingly affirmed. *See* Decision and Order at 11. Because the administrative law judge properly found that the new evidence failed to establish pneumoconiosis at Section 718.202(a)(1)-(4), she also properly found that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d)(2).[4]

[4] The administrative law judge erred in also considering the evidence submitted with the prior claim in finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a), and that a change in an applicable condition of entitlement was not established at 20 C.F.R. §725.309. Since the administrative law judge properly found that the new evidence did not establish the existence of pneumoconiosis, however, this error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, since the prior claim was denied because claimant failed to establish pneumoconiosis, the administrative law judge erroneously considered whether the other elements of entitlement were established in determining whether a change in an applicable condition of entitlement was established. 20 C.F.R. §725.309. However, since the administrative law judge properly found that the existence of pneumoconiosis was not established, the only element previously adjudicated against claimant, the administrative law judge's error in considering all of the elements is harmless. *Larioni*, 6 BLR at 1278.

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