

BRB No. 99-0919 BLA

J. SAMUEL BROWN)
)
 Claimant-Petitioner)
)
 v.)
)
 STRAIGHT CREEK MINING COMPANY) DATE ISSUED:
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 and)
)
 CYPRUS AMAX MINERALS COMPANY)
)
 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 - Rejection of Claim of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Rejection of Claim (98-BLA-554) of Administrative Law Judge Rudolf L. Jansen 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 ten years of coal mine employment and, based on the filing date of the claim,

applied the regulations found at 20 C.F.R. Part 718.¹ The administrative law judge reviewed the newly submitted evidence pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), and determined that claimant failed to establish any element of entitlement previously found against him pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 718.204(c).² Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

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).

Claimant contends that the administrative law judge erred in relying "almost solely" upon the qualifications of the x-ray readers, and improperly relied upon the numerical superiority of the negative x-ray interpretations pursuant to Section 718.202(a)(1). We

¹ Claimant filed an earlier claim for benefits on February 21, 1995, which was denied by the district director on March 4, 1996, as claimant failed to establish any element of entitlement. Director's Exhibit 29. Claimant filed this claim on March 5, 1997, Director's Exhibit 1, submitting new evidence relevant to the issues of total disability and the existence of pneumoconiosis.

² We affirm the administrative law judge's findings of ten years of coal mine employment, and that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) and 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).

disagree. The newly submitted evidence contains five x-ray readings, by highly-qualified readers, all of which were negative for the existence of pneumoconiosis. Director's Exhibits 11, 12, 24, 25, 26. Therefore, as none of the readings could support claimant's burden of establishing the existence of pneumoconiosis by x-ray, we affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis at Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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); *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).

Claimant next contends that the administrative law judge erred in failing to find that the medical opinions of Drs. Hays and Baker are sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The newly submitted evidence contains three medical opinions. Dr. Hays diagnosed the existence of pneumoconiosis, while Dr. Baker diagnosed bronchitis partially due to coal dust exposure, which the administrative law judge properly found constitutes statutory pneumoconiosis. Director's Exhibits 7, 9; Decision and Order at 7-8; 20 C.F.R. §718.201; *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996). The record also contains the opinion of Dr. Dahhan, who found no evidence of pneumoconiosis on the basis of an examination and x-ray evidence, as well as other objective tests. Director's Exhibit 26; Decision and Order at 7-8.

The administrative law judge permissibly accorded greater weight to Dr. Dahhan's opinion as he found Dr. Dahhan to be the most qualified physician in pulmonary disease, and accorded greater weight to his opinion on the basis of his superior credentials. The administrative law judge also rationally found that his opinion was entitled to greater weight as it was better supported by the objective evidence than the opinions of Drs. Hays and Baker. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 8. We therefore affirm the administrative law judge's finding that the medical evidence at Section 718.202(a)(4) is insufficient to establish the existence of pneumoconiosis.

Claimant next contends that the administrative law judge erred in failing to find that the medical evidence was sufficient to establish total disability at Section 718.204(c)(4). We reject claimant's contention. The administrative law judge properly found that none of the three medical opinions termed claimant totally disabled or made a sufficient physical assessment from which the administrative law judge could infer total disability. *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*).³ Contrary to claimant’s argument, the administrative law judge is not required to consider age, education or work history in determining whether claimant is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988). Nor, contrary to claimant’s contention, does a mere diagnosis of simple pneumoconiosis give rise to a presumption of total disability, or the inadvisability of a return to coal mine dust exposure establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Gee, supra*. We therefore affirm the administrative law judge’s finding that claimant failed to establish total disability at Section 718.204(c).

As we affirm the administrative law judge’s finding that claimant failed to establish the existence of pneumoconiosis or total disability, we affirm the administrative law judge’s finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). *See Ross, supra*.

Accordingly, the Decision and Order - Rejection of Claim of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

³ Claimant contends that Dr. Baker’s diagnosis of minimal impairment due to chronic bronchitis along with the inadvisability of claimant returning to work in a dusty atmosphere prevents him from engaging in his usual coal mine employment. The administrative law judge, however, found that Dr. Baker opined that claimant had no impairment and retained the [respiratory] capacity to perform his previous coal mine work. Decision and Order at 9.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge