BRB No. 00-0171 BLA

BILLY SIMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Harold Rader (Law Offices of Neville Smith), Manchester, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0050) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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 the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310.[1] Further, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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[1]Claimant filed a claim for benefits on April 5, 1994. Director's Exhibit 1. On January 27, 1997, Administrative Law Judge J. Michael O'Neill issued a Decision and Order denying benefits. Director's Exhibit 49. The bases of Judge O'Neill's denial were claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. The Board affirmed Judge O'Neill's denial of benefits. *Simpson v. Shamrock Coal Co.*, BRB No. 97-0648 BLA (Dec. 23, 1997)(unpub.). Claimant filed a request for modification on February 9, 1998. Director's Exhibits 56, 59.

[2]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Initially, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We disagree. Of the nine newly submitted x-ray interpretations of record, seven readings are negative for pneumoconiosis, Director's Exhibits 61-64; Employer's Exhibit 1, and two readings are positive, Director's Exhibits 58, 59. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians.[3] *See Woodward v. Director,*

[3]The record consists of nine interpretations of the three, newly submitted x-rays dated August 14, 1996, January 18, 1997 and February 24, 1999. The administrative law judge stated, "I give the greatest weight to the physicians with special radiographic qualifications." Decision and Order at 5, 6. Whereas Dr. Baker, who is a B-reader, read the August 14, 1996 x-ray as positive for pneumoconiosis, Director's Exhibit 58, Drs. Sargent, Spitz and Wiot, who are B-readers and Board-certified radiologists, reread the same x-ray as negative, Director's Exhibits 61, 63, 64. Further, whereas Dr. Wright, who is not a B-reader or a Board-certified radiologist, read the January 18, 1997 x-ray as positive for pneumoconiosis, Director's Exhibits 58, 59, Drs. Sargent, Spitz and Wiot reread the same x-ray as negative, Director's Exhibits 62-64. Lastly, Dr. Broudy, who is a B-reader, read the February 24, 1999 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Thus, we reject claimant's assertions that the administrative law judge erred by relying almost solely on the qualifications of the physicians who provided negative x-ray readings, and that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray readings. Moreover, we reject claimant's assertion that the administrative law judge selectively analyzed the newly submitted x-ray evidence of record. Therefore, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Woodward, supra*; *Fitts, supra*.

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge considered the newly submitted opinions of Drs. Baker, Broudy and Wright. Whereas Drs. Baker and Wright opined that claimant suffers from pneumoconiosis, Director's Exhibits 58, 59, Dr. Broudy opined that claimant does not suffer from pneumoconiosis, Employer's Exhibit 1. The administrative law judge properly discredited the opinions of Drs. Baker and Wright because their diagnoses of pneumoconiosis were based in part on a positive interpretation of an x-ray that was subsequently reread as negative by physicians with superior qualifications.[4] *See Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the opinions of Drs. Baker and Wright. Moreover, since the administrative law judge, within a proper exercise of his discretion, discredited the only medical opinions of record that could establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Claimant further contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R.

[4]As previously noted, whereas Dr. Baker, who is a B-reader, read the August 14, 1996 x-ray as positive for pneumoconiosis, Director's Exhibit 58, Drs. Sargent, Spitz and Wiot, who are B-readers and Board-certified radiologists, reread the same x-ray as negative, Director's Exhibits 61, 63, 64. Further, whereas Dr. Wright, who is not a B-reader or a Board-certified radiologist, read the January 18, 1997 x-ray as positive for pneumoconiosis, Director's Exhibits 58, 59, Drs. Sargent, Spitz and Wiot reread the same x-ray as negative, Director's Exhibits 62-64.

§718.204(c)(4). We disagree. The administrative law judge considered the newly submitted opinions of Drs. Baker, Broudy and Wright and stated that "[a]ll three physicians who examined the [c]laimant after the prior denial found [that] he retained the pulmonary capacity to perform his previous coal mine employment." Decision and Order at 7-8. Dr. Baker opined that claimant "has a nondisabling degree of respiratory insufficiency." Director's Exhibits 58, 59. Similarly, Dr. Broudy opined that claimant "retains the respiratory capacity to perform the work of an underground coal miner." Employer's Exhibit 1. Lastly, Dr. Wright opined that claimant "does have sufficient pulmonary capacity to perform the work of a coal miner."[5] Director's Exhibits 58, 59. Since Drs. Baker, Broudy and Wright each opined that claimant does not suffer from a totally disabling respiratory or pulmonary impairment, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with the disability assessments in the newly submitted medical reports. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

[5]Dr. Wright's report reflects that claimant's usual coal mine employment was that of a surface coal miner. Director's Exhibits 58, 59.

In addition, since the administrative law judge properly considered the newly submitted medical evidence at 20 C.F.R. §718.204(c)(4), we reject claimant's assertion that the administrative law judge erred by failing to consider claimant's age, education and work experience in his total disability analysis because these factors affect claimant's ability to obtain gainful employment. *See* 20 C.F.R. §718.204(c)(4). The fact that a miner would not be hired does not support a finding of total disability.[6] *See Ramey v. Kentland-Elkhorn*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Since none of the physicians who submitted reports subsequent to the final denial of claimant's initial claim opined that claimant suffers from a total respiratory disability, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Finally, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The administrative law judge's finding of "no mistake of fact" is based on his review of all of the evidence of record. Decision and Order at 5, 7, 8.

[6]We reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(c)(4).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge