BRB No. 99-0566 BLA

STEVE GILBERT	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
LYNN CONSTRUCTION COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in -Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Colettt, Hyden, Kentucky, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-0760) of Administrative Law Judge Thomas F. Phalen, Jr., 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*.[1] The administrative law judge

[1]Claimant is Steve Gilbert, the miner, who filed his original claim with the Department of Labor on December 18, 1993, which was denied on September 2,

found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(c) and thus found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1), (a)(4), and 718.204(c)(1). Claimant also asserts that the administrative law judge, in determining whether total respiratory disability was established, should have considered the exertional requirements of claimant's usual coal mine employment and other factors such as age, education, work experience and the progressive nature of pneumoconiosis. Employer has not responded to the instant appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief in the instant appeal.[2]

The Board's scope of review is defined by statute. 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. 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).

1994. Director's Exhibit 66. Claimant took no further action and the denial became final. Claimant then filed the instant duplicate claim on June 7, 1996. Director's Exhibit 1.

[2]We affirm as unchallenged on appeal the administrative law judge's finding that the evidence establishes 17.55 years of coal mine employment, that employer is the putative responsible operator, and his findings under 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(c)(2)-(c)(4). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant initially maintains that in weighing the newly submitted x-ray interpretations of record at Section 718.202(a)(1), the administrative law judge selectively analyzed the evidence and failed to properly evaluate the interpretations of Drs. Gomez, Gonsalez, and Antoun. Claimant asserts that an administrative law judge need not accept as conclusive the numerical superiority of x-ray interpretations and argues that, in the present case, the administrative law judge mechanically credited the negative readings of Drs. Baker, Barrett, and Sargent based upon their qualifications. Claimant's arguments are without merit. The administrative law judge accurately determined that the interpretations of Drs. Gomez, Gonsalez, and Antoun were insufficient to establish either the presence or absence of pneumoconiosis because they were not in substantial compliance with the provisions of 20 C.F.R. §718.102, in that the physicians, whose qualifications are not contained in the record, did not diagnose pneumoconiosis as defined in 20 C.F.R. §718.201 or classify the x-rays under the UICC or ILO-U/C systems. Decision and Order at 11; *McMath v. Director,* OWCP, 12 BLR 1-6 (1988); *Trent v. Director, OWCP,* 11 BLR 1-26 (1987). The administrative law judge permissibly accorded determinative weight to the negative interpretations by Drs. Baker, Barrett, and Sargent because he determined that they were properly classified in accordance with provisions of Section 718.102 and the physicians possessed superior qualifications as Board-certified radiologists and/or B readers. Decision and Order at 11; Director's Exhibits 14, 17, 18; *see McMath*, *supra*. The administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1) is supported by substantial evidence, in accordance with applicable law and, thus, is affirmed.

Claimant next challenges the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(4). Specifically, claimant relies upon the opinion of Dr. Baker, which claimant asserts is sufficient to meet the definition of legal pneumoconiosis. Director's Exhibits 14, 15. We disagree. Dr. Baker opined that claimant had "chronic obstructive pulmonary disease causally related to smoking and chronic obstructive airways disease" and concluded that coal dust exposure "would be minimal and possibly insignificant contribution to the formation of chronic obstructive airways disease." Director's Exhibit 14. Dr. Baker also stated that the cause of claimant's disease was "minimally, if any, related to coal dust." Director's Exhibit 15. Claimant must establish that chronic obstructive pulmonary disease is significantly related to, or substantially aggravated by, claimant's coal dust exposure. 20 C.F.R. §718.201; *see Wilburn v. Director, OWCP,* 11 BLR 1-135 (1988); *Shoup v. Director, OWCP*, 11 BLR 1-110 (1987). Inasmuch as Dr.

Baker did not reach the requisite conclusion regarding the relationship between claimant's pulmonary condition and coal dust exposure, we affirm the administrative law judge's determination that Dr. Baker's opinion does not support a finding of pneumoconiosis and, consequently, we also affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(4). *See Wilburn*, *supra*.

Claimant also challenges the administrative law judge's consideration of the newly submitted evidence at Section 718.204(c)(1). Claimant asserts that the administrative law judge erred by failing to adequately explain why he found that Dr. Vaezy's two non-qualifying pulmonary function studies outweighed Dr. Baker's qualifying test. Claimant's contention has no merit. The administrative law judge acted within his discretion in determining that total disability was not established pursuant to Section 718.204(c)(1), as the test obtained by Dr. Baker produced values disparately lower than the more recent studies obtained by Dr. Vaezy. Decision and Order at 14; Director's Exhibits 11, 12, 68; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath*, *supra*; *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). We affirm, therefore, the administrative law judge's findings at Section 718.204(c)(1).

With respect to the administrative law judge's determination under Section 718.204(c)(4), contrary to claimant's contention, the administrative law judge did not err in failing to render specific findings regarding the nature of claimant's usual coal mine employment. The administrative law judge determined correctly that none of the physicians of record termed claimant totally disabled or provided a description of physical limitations that the administrative law judge could compare to the exertional requirements of claimant's usual coal mine employment. Decision and Order at 14; *see generally Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*); *see also Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). Finally, we reject claimant's contention that the administrative law judge erred in failing to consider other factors, such as claimant's age, education, work experience and the progressive nature of pneumoconiosis, in determining claimant's ability to perform his usual coal mine employment inasmuch as these factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4). 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We affirm, therefore, the administrative law judge's finding at Section 718.204(c)(4), as it is supported by substantial evidence and is in accordance with applicable law. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence is

insufficient to establish a material change in conditions at Section 725.309(d), inasmuch as claimant has not proven at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Coal Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Thus, we must also affirm the denial of benefits. 20 C.F.R. §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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge