BRB No. 03-0241 BLA

HERMAN K. FIELDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 09/29/2003
	)	
and	)	
	)	
TRANSCO ENERGY 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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, PSC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5014) of Administrative Law Judge Joseph E. Kane denying benefits on a duplicate claim[1] filed pursuant to the provisions

[1]Claimant's initial claim was filed on August 26, 1996. Director's Exhibit 24. On

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).[2] The administrative law judge credited claimant with nineteen years and six months of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge initially found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] With regard to the merits of the case, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). 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.[4]

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*

January 14, 1999, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order denying benefits, *id*., which the Board affirmed, *Fields v. Leeco*, BRB No. 99-0452 BLA (Jan. 24, 2000)(unpub.). Judge Roketenetz's denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant's most recent claim was filed on January 24, 2001. Director's Exhibit 1.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The revisions to the regulations at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001.

[4]Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§725.309 (2000) and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that Dr. Baker's opinion, considered in conjunction with the exertional requirements of his usual coal mine employment, is sufficient to establish total disability. The administrative law judge considered the relevant opinions of Drs. Anderson, Baker, Broudy, Fino, Myers, Vuskovich and Wicker. The administrative law judge stated that "[o]nly Dr. Baker, in his March 1993 opinion, concluded that [c]laimant lacked the respiratory capacity to perform his usual coal mine work or comparable employment." Decision and Order at 21. The administrative law judge stated that "[t]his opinion contradicts [Dr. Baker's] later opinion located in the newly submitted evidence." *Id.* In a March 31, 1993 report, Dr. Baker opined that claimant is not physically able, from a pulmonary standpoint, to do his usual coal mine employment. Director's Exhibit 24. However, in a subsequent report dated February 20, 2001, Dr. Baker opined that claimant retains the respiratory capacity to perform the work of a coal miner. Director's Exhibit 5. Similarly, Drs. Anderson, Broudy, Fino, Myers, Vuskovich and Wicker opined that claimant retains the pulmonary or respiratory capacity to perform the work of a coal miner. Director's Exhibit 24; Employer's Exhibits 4-6. The administrative law judge permissibly discredited the March 31, 1993 opinion of Dr. Baker because he found that opinion to be inconsistent with a subsequent opinion rendered by Dr. Baker.[5] *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Baker's opinion.

Further, since the administrative law judge properly discredited Dr. Baker's opinions, the only opinions of record that could support a finding of total disability, on the ground that they were inconsistent, *Fagg*, 12 BLR at 1-79; *Surma*, 6 BLR at 1-802, he was not required to make a comparison of Dr. Baker's opinions with the exertional requirements of claimant's usual coal mine employment, *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Thus, 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 Dr. Baker's reports. In addition, 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(b)(2)(iv). The fact that a miner would not be hired does not support a

[5]The administrative law judge stated, "I accord Dr. Baker's opinions less weight…due to the inconsistent opinions he produced." Decision and Order at 21. The administrative law judge found that "Dr. Baker's later report provides no explanation for the reversal in his opinion." *Id*.

finding of total disability.[6] *See Ramey v. Kentland-Elkhorn*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Therefore, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since claimant failed to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

[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(b)(2)(iv).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge