BRB No. 04-0141 BLA

LLOYD ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 09/03/2004
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 of Richard T. Stansell-Gamm, 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, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5500) of Administrative Law Judge Richard T. Stansell-Gamm 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). This case involves a subsequent claim filed on April 3, 2001.[1] After noting that the parties stipulated to the fact that claimant had at

[1] The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on January 5, 1996. Director's Exhibit 1. The district director denied the claim on June 11, 1996. *Id.* There is no indication that claimant took any further action in regard to his 1996 claim.

least twenty-two and one-half years of coal mine employment, the administrative law judge found that the newly submitted medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted medical evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1996 claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Claimant's 2001 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1996 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[3] has changed since the date upon which the order denying the prior claim became final. *Id.* The district director denied benefits on claimant's 1996 claim because she found that the evidence was insufficient to establish

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Claimant filed a second claim on April 3, 2001. Director's Exhibit 3.

[2] Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

[3] The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

(1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 1.

Claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The newly submitted x-ray evidence consists of interpretations of three x-rays taken on March 21, 2001, May 21, 2001 and July 31, 2001. In his consideration of the newly submitted x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6. Although two physicians with no special radiological qualifications, Drs. Baker and Simpao, rendered positive interpretations of claimant's March 21, 2001 and May 21, 2002 x-rays respectively, Director's Exhibits 13, 14, the administrative law judge found that a better qualified physician, Dr. Wiot, interpreted each of these films as negative for the disease. Decision and Order at 6; Employer's Exhibit 4. The administrative law judge also found that claimant's most recent x-ray, a July 31, 2001 film, was uniformly interpreted as negative for pneumoconiosis.[4] Decision and Order at 6; Director's Exhibit 15; Employer's Exhibit 3. The administrative law judge, therefore, found that each of claimant's x-rays was negative for pneumoconiosis. Decision and Order at 6. Because it is supported by substantial evidence,[5] we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

[4] Dr. Broudy, a B reader, and Dr. Wiot, a B reader and Board-certified radiologist, interpreted claimant's July 31, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 3.

[5] In challenging the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* In this case, the administrative law judge permissibly considered both the quality and the quantity of the newly submitted x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Moreover, claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

Claimant also contends that the administrative law judge erred in finding the opinions of Drs. Baker[6] and Simpao[7] insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion is according less weight to the diagnoses of pneumoconiosis rendered by Drs. Baker and Simpao because the respective x-rays that they interpreted as positive for pneumoconiosis were interpreted by Dr. Wiot, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of their opinions. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984)*; Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 10-11; Director's Exhibits 13, 14.

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis.[8] We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

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[6] In a report dated March 21, 2001, Dr. Baker diagnosed "Coal Workers' Pneumoconiosis" based upon his positive interpretation of a March 21, 2001 x-ray and claimant's significant history of dust exposure. Director's Exhibit 14.

[7] In a report dated May 21, 2001, Dr. Simpao diagnosed "CWP 1/0." Director's Exhibit 13. Dr. Simpao based his findings on his positive interpretation of claimant's May 21, 2001 x-ray, symptomatology and physical findings. *Id.*

[8] The newly submitted medical opinion evidence also includes medical reports submitted by Drs. Broudy and Rosenberg. In a report dated February 19, 2002, Dr. Broudy opined that claimant "may have had simple coal workers' pneumoconiosis." Employer's Exhibit 2. The administrative law judge permissibly discredited this opinion because he found that it was too equivocal to support a finding of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 11. Moreover, Dr. Broudy, during a subsequent deposition taken on March 21, 2002, opined that claimant did not suffer from coal workers' pneumoconiosis. *See* Director's Exhibit 15. In a December 30, 2002 report, Dr. Rosenberg opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 5.

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant initially contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988) held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

Claimant also argues that the administrative law judge erred in finding Dr. Simpao's opinion insufficient to establish total disability. Dr. Simpao indicated that claimant did not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 13. However, the administrative law judge properly discredited Dr. Simpao's opinion because the doctor failed to provide any reasoning or rationale for his conclusion.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13.

Claimant further contends that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. Dr. Baker opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 14. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this aspect of Dr. Baker's

[9] Despite characterizing claimant's pulmonary function and arterial blood gas studies as normal, Dr. Simpao diagnosed a mild pulmonary impairment. Director's Exhibit 13. Dr. Simpao also checked a box indicating that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.* Although Dr. Simpao indicated that this finding was based upon claimant's x-ray, symtomatology and unspecified physical findings, the doctor failed to explain how this information supported his opinion that claimant was totally disabled from a pulmonary standpoint.

opinion was insufficient to support a finding of total disability.[10] Decision and Order at 13.

Dr. Baker also opined that:

> Patient has a Class I impairment based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, based on the FEV1 and vital capacity both being greater than 80% of predicted.

Director's Exhibit 21.

Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). The administrative law judge also properly found that Drs. Broudy and Rosenberg opined that claimant retained the respiratory capacity to perform his usual coal mine employment.[11] Decision and Order at 12-13.

[10] The administrative law judge noted that Dr. Baker's concern about claimant's additional coal dust exposure was based on the doctor's diagnosis of pneumoconiosis. *See* Decision and Order at 13. The administrative law judge found that Dr. Baker's "reasoning foundation" was inconsistent with his determination that the evidence was insufficient to establish the existence of pneumoconiosis. However, whether or not a miner suffers from pneumoconiosis is not relevant to the issue at 20 C.F.R. §718.204(c). Although the administrative law judge erred in questioning Dr. Baker's disability assessment on this basis, the error is harmless because Dr. Baker's recommendation against further coal dust exposure is insufficient, as a matter of law, to support a finding of total disability pursuant to 20 C.F.R. §718.204(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

[11] In reports dated July 31, 2001 and February 19, 2002, Dr. Broudy opined that claimant retained the respiratory capacity to perform the work of an underground coal miner. Director's Exhibit 15; Employer's Exhibit 2. Dr. Broudy reiterated his opinion during a March 21, 2002 deposition. Director's Exhibit 15.

In a report dated December 30, 2002, Dr. Rosenberg also opined that claimant retained the respiratory capacity to perform the work of an underground coal miner. Employer's Exhibit 5.

Because it is based upon substantial evidence, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.[12]

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable elements of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309.

[12] Claimant argues that the administrative law judge erred in not identifying claimant's usual coal mine work or the physical requirements of that work. The administrative law judge, however, noted that claimant "engaged in heavy manual labor as an hourly foreman due to the job requirements to operate mining equipment and work along with other miners." Decision and Order at 12. Moreover, contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988).

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