

BRB No. 04-0288 BLA

B. P. MILLER)
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 Claimant-Petitioner)
)
 v.)
)
 J & D COAL COMPANY)
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF-) DATE ISSUED: 09/15/2004
 INSURANCE FUND)
)
 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-Denying Benefits of Rudolf L. Jansen,
Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2003-BLA-5526) of Administrative Law Judge Rudolf L. Jansen on a subsequent¹ 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 parties' stipulated to, and the administrative law judge credited claimant with, thirteen years of coal mine employment. The administrative law judge further found that the newly submitted evidence failed to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(2)(b) and, thus a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings under Section 718.202(a)(1), (4) and 718.204(b)(2)(iv). Employer did not file a response brief. The Director, Office of Workers' Compensation Programs has filed a letter stating that he will not file a response brief on the merits of this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR

¹ The administrative law judge noted that on August 13, 1997 the Office of Workers Compensation Programs denied the claimant's previous claim because the evidence failed to establish the existence of pneumoconiosis and total disability. Decision and Order-Denying Benefits at 8; Director's Exhibit 2. Subsequently, on March 15, 2001, claimant filed this subsequent claim. Director's Exhibit 3.

² The parties do not challenge the administrative law judge's decision to credit claimant with thirteen years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3), 718.204(b)(2)(i)-(iii) and 725.414. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially contends that the administrative law judge “selectively analyzed” the x-ray evidence, and that he erred in finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). These contentions are without merit. The administrative law judge noted that the newly submitted x-ray evidence of record consists of five interpretations of four x-rays. The administrative law judge found the only positive interpretations were by Drs. Hussain and Baker, neither of whom possessed any special radiological qualifications. Decision and Order-Denying Benefits at 9; Director’s Exhibits 9, 11; Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge reasonably exercised his discretion in finding that a preponderance of the newly submitted x-ray interpretations by the better qualified physicians was negative for the existence of pneumoconiosis.³ Decision and Order Denying Benefits at 11; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, we affirm the administrative law judge’s finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Under Section 718.202(a)(4), claimant argues that the administrative law judge erred in rejecting the newly submitted well documented and reasoned medical reports of Drs. Baker and Hussain. Claimant contends that contrary to the administrative law judge’s finding, Drs. Baker and Hussain based their diagnoses of pneumoconiosis on a positive x-ray, physical examination, claimant’s symptoms, the results of blood gas and pulmonary function studies and the review of claimant’s medical and work histories.

The administrative law judge acknowledged that Drs. Baker and Hussain examined claimant, that their opinions recorded claimant’s occupational and smoking histories and the results of claimant’s physical examination, x-ray, pulmonary function and blood gas studies. Decision and Order-Denying Benefits at 6, 7. However, the administrative law judge permissibly discredited the diagnoses of coal workers’ pneumoconiosis rendered by Drs. Baker and Hussain because he found that they were merely restatements of x-ray opinions, noting that neither physician offered any explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation

³ The remainder of the x-ray interpretations were negative for the existence of pneumoconiosis and were provided by physicians who are either B readers or dually qualified as B readers and Board-certified radiologists. Decision and Order at 9. Employer’s Exhibit 1, 2.

and claimant's length of coal dust exposure.⁴ Decision and Order-Denying Benefits at 10; Director's Exhibits 9, 11; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Further, although Dr. Baker additionally diagnosed "chronic obstructive airway disease with mild obstructive defect-based on pulmonary function testing", the administrative law judge reasonably accorded the opinion less weight because it was "poorly documented and reasoned." Decision and Order at 10. Director's Exhibit 9. *Id.*

Moreover, because claimant does not assert any additional error in the administrative law judge's weighing of the medical evidence, we affirm, as unchallenged on appeal, the administrative law judge's finding that the remaining medical opinions are insufficient to carry claimant's burden of establishing the existence of pneumoconiosis at Section 718.202(a)(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Therefore, we affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a).

Under Section 718.204(b)(iv), claimant argues that Dr. Baker's single opinion, that claimant was "100% occupationally disabled," is well reasoned and documented and "may be sufficient for invoking the presumption of total disability." Claimant's Brief at 6, 7. Claimant asserts that in addition to claimant's work history, Dr. Baker based his opinion on claimant's medical history, x-rays, physical examination, pulmonary function and blood gas studies. *Id.* Claimant argues that the administrative law judge made no mention of claimant's usual coal mine work in conjunction with Drs. Baker and Hussain's opinions of total disability. Claimant's Brief at 10. Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant notes that the administrative law judge did not mention claimant's age or work experience in conjunction with his assessment that claimant was not totally disabled.

The administrative law judge acknowledged that Dr. Baker recorded claimant's occupational and smoking histories and the results of claimant's physical examination, x-ray, pulmonary function and blood gas studies. Decision and Order-Denying Benefits at

⁴ Dr. Baker diagnosed "Coal Worker's Pneumoconiosis Category 1/0, on basis of 1980 ILO Classification...x-ray evidence of pneumoconiosis and a long history of coal dust exposure and no other condition to account for these x-ray changes." Director's Exhibit 9. Dr. Hussain stated that the basis of his diagnosis was "x-ray findings, history." Director's Exhibit 14.

7. The administrative law judge, however, rationally found that Dr. Baker's statement that claimant "should limit further exposure" to coal dust and that "such a limitation would 'imply'" total disability, is not a finding of total disability.⁵ *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); Decision and Order-Denying Benefits at 11; Director's Exhibit 9. The administrative law judge rationally found that the other physicians of record, Drs. Broudy, Dahhan and Hussain opined that claimant has the respiratory capacity to perform the work of a coal miner and found their opinions well documented and supported by the normal results of the objective evidence of record. See *Collins v. J. & L. Steel*, 21 BLR 1-181 (1999). *Clark*, 12 BLR 1-149; Decision and Order-Denying Benefits at 11, 12; Director's Exhibits 11, 13; Employer's Exhibit 2. Accordingly, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish that claimant is totally disabled pursuant to Section 718.204(b)(2)(iv).

We reject claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the physicians' assessments of claimant's physical limitations. This analysis is required in situations where a physician details a claimant's physical limitations, but does not provide an opinion regarding the extent of any disability from which the claimant suffers. See *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); see also *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). Herein, the administrative law judge rationally found that the medical opinions of record either opined that claimant has the respiratory capacity to perform the work of a coal miner or the opinion was not equivalent to a finding of total disability.⁶ Moreover,

⁵ Dr. Baker opined:

Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 9.

⁶ Additionally, claimant argues that because pneumoconiosis is a progressive and irreversible disease, it can "be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or

claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.⁷ See 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).

Because the administrative law judge properly found that the newly submitted medical evidence of record is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(b)(2), we affirm the administrative law judge's finding that claimant has failed to establish a material change in conditions pursuant to Section 725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); Decision and Order-Denying Benefits at 12.

comparable gainful work." Claimant's Brief at 8, 9. Contrary to claimant's contention, there is no evidence in the record to support this allegation. *Workman v. Eastern Associated Coal Corp.*, BRB No. 02-0727 BLA, BLR (Aug. 19 2004)(Motion for Recon.)(*en banc*).

⁷ Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. See also 20 C.F.R. §718.204(b)(1), (b)(2).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge