BRB No. 99-1177 BLA

EARNEST G. CENTERS Claimant-Petitioner v. BILLY RAY CARROLL CONSTRUCTION COMPANY and TRAVELERS INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Denying Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

J. Logan Griffith (Wells, Porter, Schmitt and Jones), Paintsville, Kentucky, for employer.

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 Modification (99-BLA-0165) of Administrative Law Judge Joseph E. Kane 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). Claimant filed a claim for benefits on October 17, 1994. In a Decision and Order dated September 20, 1996, Administrative Law Judge Richard E. Huddleston credited claimant with twenty and one-quarter years of coal mine employment and properly considered the claim under the permanent regulations at 20 C.F.R. Part 718.

Finding the evidence insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.204(c)(1)-(4), Judge Huddleston denied benefits. Claimant appealed. The Board affirmed Judge Huddleston's finding that the evidence was insufficient to establish total disability under Section 718.204(c)(1)-(4) and, holding it was thus unnecessary to review Judge Huddleston's findings under Section 718.202(a), affirmed the denial of benefits. *Centers v. Billy Ray Carroll Construction Co.*, BRB No. 96-1789 BLA (July 30, 1997)(unpublished). Claimant thereafter filed a request for modification. In his Decision and Order dated July 26, 1999, Administrative Law Judge Joseph E. Kane (the administrative law judge)[1] considered all of the evidence of record and found it insufficient to establish the existence of pneumoconiosis and total disability under Sections 718.202(a)(1)-(4) and 718.204(c)(1)-(4). The administrative law judge thus found that claimant did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and, accordingly, denied benefits.[2] On appeal, claimant challenges the administrative law judge's findings

[1]The case was assigned to Administrative Law Judge Joseph E. Kane after claimant requested a hearing on modification because Administrative Law Judge Richard E. Huddleston was unavailable. Judge Kane held a hearing on April 22, 1999.

[2]In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). While the administrative law judge noted this requirement, Decision and Order at 11, it is evident that he weighed the previously submitted evidence together with

under Section 718.202(a)(1) and (a)(4), and generally contends that the administrative law judge erred in not finding total disability established under Section 718.204(c)(4). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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

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the new evidence in determining that claimant failed to establish entitlement to benefits under 20 C.F.R. Part 718. Inasmuch as we herein affirm the administrative law judge's findings on the merits and the consequent denial of benefits, the administrative law judge's consideration of the evidence of record as a whole without an independent assessment of the newly submitted evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-710 (1983).

In challenging the administrative law judge's weighing of the x-ray evidence of record under Section 718.202(a)(1), claimant argues that the administrative law judge erred in crediting the numerous negative x-ray readings of record over the five positive x-ray readings of record by relying on the qualifications of the physicians reading the films and the numerical superiority of the negative readings. Claimant's contention is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that these factors must be considered by a fact-finder when weighing the x-ray evidence. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). As accurately summarized by the administrative law judge, the x-ray evidence of record includes twenty-nine negative readings, all of which were submitted by B readers and/or Board-certified radiologists.[3] Decision and Order at 4-6; Director's Exhibits 8, 9, 23-27, 29-31, 33, 43. The administrative law judge also correctly found that none of the five positive interpretations of record was submitted by a physician possessing equal qualifications.[4] Decision and Order at 11-12; Director's Exhibits 22, 41. The administrative law judge properly found that, because the negative readings constituted the majority of interpretations and are verified by more highly-qualified physicians, the x-ray evidence was insufficient to establish, by a preponderance of the evidence, a finding of pneumoconiosis. *See Staton, supra; Woodward, supra*; *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985); Decision and Order at 7-8. Inasmuch as it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[5] *Staton, supra; Woodward, supra; Edmiston v. F & R Coal Co.*,

[3]The administrative law judge correctly noted that the record contains films dated January 22, 1995, February 20, 1995, February 28, 1995, April 21, 1995, August 2, 1995 and June 23, 1998. The administrative law judge noted that, additionally, Dr. Bushey referred to an x-ray in a medical report dated May 12, 1998, but did not indicate the date of the film to which he was referring. Decision and Order at 6, 11-12; Director's Exhibit 41. Dr. Bushey indicated that the film was positive for pneumoconiosis. Director's Exhibit 41.

[4]The record reflects that Dr. Anderson, who read the January 21, 1995 and February 20, 1995 films as positive for pneumoconiosis, is neither a B reader nor a Board-certified radiologist. Director's Exhibit 22. Similarly, Dr. Myers, who read the April 21, 1995 film as positive, and Dr. Lane, who read the February 20, 1995 film as positive, lack these special qualifications in radiology. *Id*. Additionally, the record does not indicate that Dr. Bushey, who referred to a positive x-ray in his medical report dated May 12, 1998 but did not indicate the date of the film, is a B reader or Board-certified radiologist. Director's Exhibit 41.

[5]Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence, thereby committing error. Claimant provides no support for his contention, however, and the administrative law judge's Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 4-6, 11-12. Thus, we reject claimant's suggestion.

14 BLR 1-65 (1990); Decision and Order at 11-12; Director's Exhibits 8, 9, 22-27, 29-31, 33, 41, 43.

In challenging the administrative law judge's findings with regard to the medical opinion evidence under Section 718.202(a)(4), claimant argues that the administrative law judge erred in rejecting Dr. Bushey's report, dated May 12, 1998. Specifically, claimant asserts that the administrative law judge erred in discounting Dr. Bushey's report on the ground that it was based upon a positive x-ray reading which conflicted with the administrative law judge's determination that the weight of the x-ray evidence was negative. Claimant suggests that the administrative law judge thereby improperly substituted his opinion for Dr. Bushey's opinion, and asserts that it was error for the administrative law judge not to find Dr. Bushey's report to be reasoned and documented in view of the fact that the doctor based his diagnosis of pneumoconiosis not only upon a positive x-ray reading, but also upon a physical examination, pulmonary function study, and medical and work histories. Claimant's contentions lack merit. Whether a medical opinion is sufficiently reasoned and documented is for the administrative law judge, as fact-finder, to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). In the instant case, the administrative law judge properly discounted Dr. Bushey's report because Dr. Bushey did not make it clear whether the 2/1 x-ray reading he reported was his own interpretation, or that of another physician. *Id*.; Decision and Order at 12; Director's Exhibit 41. The administrative law also properly found that Dr. Bushey diagnosed pneumoconiosis 2/2 later in the same, May 12, 1998 report and did not provide a reason for the discrepancy. *Id*. Moreover, the administrative law properly accorded greater weight to Dr. Broudy's opinion that claimant does not suffer from pneumoconiosis because Dr. Broudy possesses superior qualifications as a pulmonary specialist, Board-certified in internal medicine with a subspecialty in pulmonary diseases.[6] *See Roberts, supra*; Decision and Order at 8, 11-12; Director's Exhibits 23, 43. The administrative law judge also properly accorded greater weight to Dr. Broudy's opinion on the basis that, unlike Dr. Bushey, Dr. Broudy examined claimant in the past, reviewed medical evidence contained in the record, and thoroughly documented the reasons for his conclusions.[7] *See Clark, supra; Tackett, supra;* Decision and Order at 12; Director's Exhibits 23, 43. Claimant does not further challenge the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish the presence of pneumoconiosis. We affirm, therefore, the administrative law judge's finding

[6]The administrative law judge correctly found that Dr. Bushey's qualifications are not contained in the record. Decision and Order at 12.

[7]Dr. Broudy examined claimant on August 2, 1995, as well as on June 23, 1998. Director's Exhibits 23, 43. In both examinations, Dr. Broudy found no radiological evidence of pneumoconiosis, and reported that claimant's pulmonary function and arterial blood gas studies were normal. *Id*. Additionally, Dr. Broudy stated in the June 23, 1998 report that he reviewed the x-rays of record, his own 1995 report, and "some medical records from doctors in Pineville, Kentucky." Director's Exhibit 43.

that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[8]

With regard to total disability, claimant asserts that the administrative law judge erred in failing to discuss the exertional requirements of claimant's last usual coal mine employment as an endload operator and drill operator before making his determination that claimant is not totally disabled. Claimant's contention lacks merit. The administrative law judge properly found that the record does not contain any medical opinion evidence which could, if credited, support a finding of total disability under Section 718.204(c)(4). The administrative law judge correctly stated that Dr. Bushey did not address whether claimant is totally disabled, and claimant does not argue otherwise. Decision and Order at 14; Director's Exhibit 41. The administrative law judge also correctly found that Drs. Anderson, Myers and Broudy all opined that, from a pulmonary standpoint, claimant was capable of returning to his usual coal mine employment or similarly arduous, manual labor. Decision and Order at 14; Director's Exhibits 20, 23, 41. Finally, the administrative law judge properly found that Dr. Baker's opinion that claimant's impairment was "minimal or none" is insufficient to establish total disability. Decision and Order at 14; Director's Exhibit 6. Such an opinion need not be discussed in terms of claimant's former job duties. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We thus affirm the administrative law judge's finding that claimant failed to establish total disability under Section 718.204(c)(4).[9] Additionally, as claimant does not challenge the administrative law judge's finding that there is no evidence of record indicating that claimant is totally disabled pursuant to Section 718.204(c)(1)-(3), this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-

[8]We further affirm the administrative law judge's findings that claimant did not establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), as claimant does not challenge these findings on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 12.

[9]While claimant further contends that the administrative law judge erred in failing to consider claimant's age, education and work experience in determining that he was not totally disabled, those factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4). *See* 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

710 (1983); Decision and Order at 13. We thus affirm the administrative law judge's finding that claimant failed to establish modification pursuant to Section 725.310. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge