BRB No. 05-0520 BLA

RICHARD DEAN COLEMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RBM ENTERPRISES, INCORPORATED	)	
	)	
and	)	
	)	
KY COAL PRODUCERS S-I FUND	)	DATE ISSUED: 08/26/2005
	)	
Employer/Carrier-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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Richard Dean Coleman, Harold, Kentucky, *pro se*.

David H. Neeley (Neeley Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (03-BLA-6420) of Administrative Law Judge Joseph E. Kane rendered 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).[1] Claimant's prior application for benefits, filed on October 20, 1993, was finally denied on April 4, 1994 because claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c)(2000).[2] Director's Exhibit 1. On February 13, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 2.

In a Decision and Order dated February 24, 2005, the administrative law judge credited the miner with at least fifteen years of coal mine employment,[3] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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[1] 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.

[2] Subsequent to the denial of his prior claim by an Office claims examiner, claimant requested a hearing before the Office of Administrative Law Judges. However, prior to his hearing, by letter dated May 10, 1995, claimant's lay representative stated that claimant wished to abandon his claim. No objection was made. Accordingly, by Order dated May 31, 1995, claimant's appeal was dismissed and his claim was administratively closed and deemed abandoned. By letter dated January 9, 1998, claimant asked that his claim be reopened. The district director considered claimant's request to be one for modification of the prior denial, and in a decision dated February 3, 1998, denied the request as untimely. Director's Exhibit 1.

[3] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these two elements. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

In finding the new x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of six readings of three x-rays.[4] Decision and Order at 3, 6. A July 18, 2001 x-ray was read twice as negative by Dr. Halbert, a dually qualified B reader and Board-certified radiologist, and Dr. Fino, a B reader, and was read once as positive by Dr. Hussain, who possesses no special qualifications for the reading of x-rays. Director's Exhibits 16, 27, 29; Decision and Order at 6. The administrative law judge permissibly found this x-ray to be negative based on the preponderance of the readings by the more highly qualified readers. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55,

[4] The July 18, 2001 x-ray was also read for quality only (Quality 1) by Dr. Sargent, a Board-certified radiologist and B reader. Director's Exhibit 17.

59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 7. An August 30, 2002 x-ray was also permissibly found to be negative based on Dr. Fino's uncontroverted negative B reading. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Director's Exhibit 29; Decision and Order at 6. Finally, a November 20, 2002 x-ray was read once as negative by Dr. Halbert, a B reader and Board-certified radiologist, and was read once as positive by Dr. Baker, a B reader. Director's Exhibit 31; Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be negative based on Dr. Halbert's superior qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 8. As the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly concluded based on the weight of the negative x-ray readings that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence, *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 6, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge then found, correctly, that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 5 n.1.

Finally, the administrative law judge considered the medical reports of Drs. Annabathula, Baker, Hussain and Fino pursuant to 20 C.F.R. §718.202(a)(4). Review of the record indicates that Dr. Annabathula, claimant's treating physician, stated in a letter dated April 2, 2004 that claimant had been treated since 1994 for "chronic lung problems secondary to black lung," as well as for back pain and high blood pressure. Claimant's Exhibit 1; Decision and Order at 5. In a form report dated November 20, 2002, Dr. Baker diagnosed coal workers' pneumoconiosis and chronic bronchitis due to coal dust exposure, and in a form report dated July 18, 2001, Dr. Hussain diagnosed pneumoconiosis due to coal dust exposure. Director's Exhibits 13, 15; Decision and Order at 4-5. By contrast, in a narrative report dated October 9, 2002, Dr. Fino opined that there was insufficient objective evidence to diagnose either clinical pneumoconiosis or any coal dust related lung disease. Director's Exhibit 29; Decision and Order at 5.

The administrative law judge permissibly accorded greatest weight to the opinion of Dr. Fino as better-reasoned and better supported by the objective evidence of record than the reports of Drs. Annabathula, Hussain or Baker. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hutchens v. Director, OWCP*, 8 BLR 1- 16 (1985);

Claimant's Exhibit 1; Director's Exhibits 13, 29, 31; Decision and Order at 4-5, 7. As the administrative law judge permissibly analyzed the medical opinions of record based on the physicians' reasoning and the underlying bases of their diagnoses of pneumoconiosis and coal dust related pulmonary disease, *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993), we affirm his finding that the newly developed evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We further affirm the administrative law judge's finding that claimant failed to establish a total pulmonary or respiratory disability at 20 C.F.R. §718.204(b). Considering the new pulmonary function and blood gas study evidence of record, the administrative law judge properly found that as all of the pulmonary function and blood gas studies are non-qualifying,[5] claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). *See Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-14 (1991); Director's Exhibits 14, 15, 29; Decision and Order at 4, 8. In addition, the record contains no medical evidence that shows that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 8. Because substantial evidence supports the administrative law judge's findings regarding the pulmonary function and blood gas study evidence, we affirm the administrative law judge's finding that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).

Finally, the administrative law judge properly found that the only medical opinions of record supportive of a finding of total disability are those of Drs. Annabathula and Hussain. Decision and Order at 5, 8. The administrative law judge permissibly accorded no probative value to Dr. Annabathula's opinion, that due to "his lungs as well as his back pain" claimant is totally disabled, because the physician's report was without reference to supporting documentation or to results of objective testing and did not contain any explanation for his conclusion that claimant's disability was due to his lungs. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark*, 12 BLR at 1-149; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Claimant's Exhibit 1; Decision and Order at 5. The administrative law judge further permissibly discredited the opinion of Dr. Hussain, the only remaining opinion supportive of a finding of total disability, because his opinion, that claimant is totally disabled due to his moderate respiratory impairment, is outweighed by the better reasoned and documented opinions of Drs. Baker and Fino, whose opinions, that claimant

[5] A "qualifying" pulmonary function or blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

does not suffer from a totally disabling pulmonary or respiratory impairment, he found to be more consistent with the credible, objective medical data, including the non-qualifying pulmonary function and blood gas studies. *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Trumbo*, 17 BLR at 1-88-89 and n.4; Director's Exhibits 13, 29, 31; Decision and Order at 8. Based on the foregoing, we affirm the administrative law judge's finding that the medical opinion evidence fails to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments, we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he is that he is totally disabled pursuant to 20 C.F.R. §718.204(b). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Therefore, claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

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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JUDITH S. BOGGS
Administrative Appeals Judge