BRB No. 04-0627 BLA

JACK BREWER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
K.T.K. MINING & CONSTRUCTION COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 02/24/2005
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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Jack Brewer, Kermit, West Virginia, *pro se*.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (01-BLA-1142) of Administrative Law Judge Richard A. Morgan rendered on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal

[1] Claimant's initial application for benefits filed on November 3, 1992 was denied by Administrative Law Judge Joel R. Williams based on a finding that claimant did not establish the existence of pneumoconiosis. Director's Exhibit 28-63. On October 16, 2000, claimant filed his current application, which constitutes a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d) (2000).

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with "at least ten years" of coal mine employment pursuant to the parties' stipulation.[2] Decision and Order at 3. The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge concluded that claimant did not establish a material change in conditions as required by 20 C.F.R. §725.309(d) (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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 Co.*, 12 BLR 1-176, 1-177 (1989). 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 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 a finding of 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 there has been a material change in conditions. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit has held that pursuant to Section 725.309(d) (2000), the administrative law judge must consider all

[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Employer's Exhibit 5 at 7. 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*).

of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994). Claimant "must also demonstrate that this change rests upon a qualitatively different evidentiary record" than was considered in the previous claim. *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 479, 23 BLR 2-44, 2-63 (6th Cir. 2003)(Moore, J., concurring in the result). If claimant is successful, he has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence supports a finding of entitlement. *Flynn*, 353 F.3d at 480, 23 BLR at 2-66.

The only element of entitlement adjudicated against claimant in his previous claim was the existence of pneumoconiosis. Director's Exhibit 28-63. Consequently, in the current claim, claimant had to submit new evidence establishing the existence of pneumoconiosis.[3] *See* 20 C.F.R. §725.309(d) (2000); *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered twelve readings of four new x-rays. Because the October 28, 2003 and February 17, 2001 x-rays received only negative readings, the administrative law judge found that these two x-rays were negative for pneumoconiosis. Director's Exhibits 16, 22; Employer's Exhibits 8, 10. The administrative law judge additionally found the December 5, 2000 x-ray negative for pneumoconiosis because he chose to accord "more weight" to the two negative readings by "dually qualified" Board-certified radiologists and B-readers, than to the two positive readings by physicians who were qualified only as B-readers. Decision and Order at 22; Director's Exhibits 11-13, 26. This was a proper qualitative analysis of the x-rays. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Additionally, the administrative law judge permissibly found that the February 3, 2003 x-ray "neither preclude[d] nor establishe[d] the presence of pneumoconiosis," because it was read as positive by a B-reader, but negative by a dually qualified reader. Decision and Order at 22; *see Woodward*, 991 F.2d at 314, 17 BLR at 2-87; Claimant's Exhibit 1; Employer's Exhibit 12. Because the administrative law judge properly considered the readings and substantial evidence supports his findings, we affirm his finding that the new x-rays did not support the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

[3] Because the element of total disability was not adjudicated against claimant in the prior claim, the administrative law judge in this claim erred in considering whether claimant established a material change in conditions with respect to the total disability element. *Caudill v. Arch of Ky., Inc.*, 22 BLR 1-97, 1-102 (2000)(*en banc*). The error was harmless in view of the administrative law judge's decision to deny benefits. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The administrative law judge noted accurately that there was no biopsy evidence to be considered under 20 C.F.R. §718.202(a)(2), nor were any of the presumptions set forth at 20 C.F.R. §718.202(a)(3) applicable in this living miner's claim filed after January 1, 1982 in which there was no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that in the new medical reports, "[t]he physicians are in agreement that Mr. Brewer does not have legal or medical coal workers' pneumoconiosis." Decision and Order at 23. Substantial evidence supports this finding. Drs. Dahhan, Fino, and Rosenberg indicated that claimant has neither clinical nor legal pneumoconiosis. *See* 20 C.F.R. §718.201(a); Director's Exhibit 16; Employer's Exhibits 1-3, 8. Dr. Ranavaya examined and tested claimant and reported that claimant has no pulmonary impairment and that claimant's cardiopulmonary diagnosis is "None." Director's Exhibit 9 at 4. We therefore affirm the administrative law judge's finding that the new medical opinions did not support the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In claimant's Notice of Appeal filed without the assistance of counsel, he asserts that the administrative law judge erred by considering "duplicative" evidence submitted by employer. Claimant was represented by counsel at the September 25, 2003 hearing and raised no objection to employer's evidence. Tr. at 4, 5, 22. Because claimant did not raise this issue with the administrative law judge, the administrative law judge did not address it. Accordingly, claimant may not raise the issue now before the Board.[4] *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995). Additionally, claimant alleges that the administrative law judge failed to give greater weight to his treating physicians' opinions. Claimant does not identify his treating physicians, but as just discussed, no physician among those who submitted new medical opinions diagnosed claimant with pneumoconiosis. Moreover, the opinions of treating physicians "receive[] no additional weight" in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (2003). Thus, claimant presents no reason to disturb the administrative law judge's findings.

In sum, we affirm the administrative law judge's finding that the new medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, we also affirm his finding that claimant did not establish a

[4] Revised 20 C.F.R. §725.414, which limits the amount of specific types of evidence that the parties can submit into the record, applies only to claims filed after the January 19, 2001 effective date of the revised regulations. 20 C.F.R. §725.2(c). Because this claim was filed on October 16, 2000, revised 20 C.F.R. §725.414 is inapplicable.

material change in conditions as required by 20 C.F.R. §725.309(d) (2000). *See Ross*, 42 F.3d at 997-98, 19 BLR at 2-18.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge