BRB No. 02-0128 BLA

WALTER BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	
	)	
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Lenore Ostrowsky (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0308) of Administrative Law Judge Robert L. Hillyard denying benefits on a duplicate 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] This case is before the Board for the third time. The Board previously affirmed the

[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

Decision and Order of Administrative Law Judge J. Michael O'Neill denying claimant's request for modification.[2] *Brock v. Nally & Hamilton Enterprises*, BRB No. 97-1230 BLA (May 28, 1998) (unpublished). On August 19, 1999, claimant filed a second request for modification that was denied by the district director as untimely on September 15, 1999. Director's Exhibit 37. Thereafter, on October 12, 1999, claimant filed the instant duplicate claim. Director's Exhibit 1. The case was assigned to Administrative Law Judge Robert L. Hillyard (the administrative law judge).

The administrative law judge credited claimant with twenty-seven years of coal mine employment and found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). The administrative law judge, thus, determined that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings at Sections 718.202(a)(1),

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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]The Board affirmed Judge O'Neill's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.202(c)(1)-(4)(2000) and declined to address claimant's contentions relevant to the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4), as any errors in Judge O'Neill's findings would be harmless. *Brock v. Nally & Hamilton Enterprises*, BRB No. 97-1230 BLA (May 28, 1998) (unpublished). The prior procedural history is set forth in the Board's Decision and Order of May 26, 1998. *Id.*

(4) and 718.204(b)(2). In response, employer argues that the administrative law judge's Decision and Order is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief on the merits of this appeal.[3]

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).

[3]We affirm as unchallenged the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis and total disability under 20 C.F.R. §§718.202(a)(2) and (a)(3), 718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 725.309(c)(2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim.[4] 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). If claimant establishes the existence of that element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all the evidence, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id.*

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffers from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement. *Id.*

[4]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2

After consideration of the administrative law judge's Decision and Order, the issues on appeal and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error. Contrary to claimant's assertion, the administrative law judge did not selectively analyze the x-ray evidence. The administrative law judge found that the record contains thirteen newly submitted interpretations of nine chest x-rays dated since May 28, 1998, the date of the prior denial. The administrative law judge correctly found that of the eight x-ray interpretations by dually qualified physicians,[5] only Dr. Barrett's interpretation of the October 28, 1999 x-ray was positive.[6] Decision and Order at 10. Consequently, because the administrative law judge reasonably relied on the "numerous" negative interpretations by "the more highly qualified readers," we affirm his finding that the preponderance of newly submitted x-ray evidence did not establish the existence of pneumoconiosis. *Id; Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Under Section 718.202(a)(4), claimant initially argues that the administrative law judge failed to consider the medical records from Primary Care Associates. We reject claimant's contentions. The records from Primary Care Associates were submitted with claimant's request for modification filed on August 19, 1999. Director's Exhibit 37. The district director denied claimant's request for modification because it was filed more than a

[5]A dually qualified physician is a B reader and a Board-certified radiologist. A "B- reader" is a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51(b)(2); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A designation of "Board-certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(1)(ii)(C).

[6]The x-ray taken on October 28, 1999 was also interpreted as positive for pneumoconiosis by Dr. Baker, a B reader, and negative for pneumoconiosis by Dr. Sargent, a dually qualified physician. Director's Exhibits 10, 11. Furthermore, the administrative law judge found that the most recent x-rays of August 3, 2000 and July 14, 2000 were interpreted as negative for pneumoconiosis. Decision and Order at 10; Director's Exhibits 25, 28.

year after the claim was ultimately denied by the Board on May 28, 1998. *Id.* The instant duplicate claim was subsequently filed on October 12, 1999. Director's Exhibit 1. The Primary Care Associates records are progress notes dated from July 25, 1995 through December 7, 1995, and therefore cannot show a worsening of claimant's condition since the last denial on 1998. As a result, the administrative law judge correctly considered the new medical opinions submitted with this duplicate claim to determine whether claimant established a material change in conditions pursuant to Section 725.309. *Ross*, *supra*.

Claimant also argues that the administrative law judge erred in rejecting the opinion of Dr. Baker diagnosing the existence of pneumoconiosis. The administrative law judge considered the conflicting medical opinions by Drs. Dahhan and Baker and gave greater weight to the contrary opinion of Dr. Dahhan. Dr. Baker diagnosed, *inter alia*, coal workers' pneumoconiosis, chronic bronchitis and mild resting hypoxemia due at least in part to coal dust exposure. Director's Exhibit 10. The administrative law judge further found that Dr. Baker had noted that the basis for his diagnosis was claimant's October 28, 1999 abnormal chest x-ray and the significant duration of coal dust exposure. Decision and Order at 11; Director's Exhibit 10. The administrative law judge acknowledged that Dr. Baker's opinion recorded claimant's symptoms, occupational, medical, smoking and family histories, the results of claimant's physical examination, a pulmonary function study, a blood gas study and a positive x-ray. Decision and Order at 8; Director's Exhibit 10.

The administrative law judge found that Dr. Dahhan was a Board-certified internist, and pulmonologist, who examined claimant on August 3, 2000, and subsequently issued a consultation report on May 15, 2001, after reviewing the medical evidence available. The administrative law judge reasonably accorded greater weight to the contrary opinion of Dr. Dahhan because, in contrast to Dr. Baker's limited assessment of the medical evidence, Dr. Dahhan's opinion was supported by his "careful analysis of all available medical data," as well as the most recent examination of claimant, and the opinion was reasoned and documented. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002)*; Clark v. Karst-Robbins Coal Co.; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Ogazalek v. Director, OWCP*, 5 BLR 1-309 (1982); Decision and Order at 11. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Under Section 718.204(b)(2)(iv), claimant alleges that the administrative law judge erred because he failed to consider the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's medical opinion that claimant had "a mild breathing impairment."[7] Claimant's Brief at 7. The administrative law judge found that neither Dr.

[7]Additionally, claimant argues because pneumoconiosis is a progressive and irreversible disease, it can be concluded that during the considerable amount of time that

Dahhan nor Dr. Baker opined that claimant's respiratory or pulmonary condition prevented him from engaging in his usual coal mine work as a heavy equipment operator or comparable work. Decision and Order at 10. Dr. Baker opined that claimant's impairment was "minimal with decreased PO2 and chronic bronchitis." Director's Exhibit 10. He categorized claimant's impairment as "[n]o impairment" and responded "yes" to the question "[d]oes the miner have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment?"[8] *Id*. Because Dr. Baker and Dahhan both opined that claimant retains the respiratory capacity to perform his usual coal mine work or similar arduous manual labor, the administrative law judge properly considered the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon*, 9 BLR 1-104 (1986); Decision and Order at 12; Director's Exhibits 10, 25; Employer's Exhibit 1. Moreover, 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.[9] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal* Co., 19 BLR 1-18 (1994); *see also Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Inasmuch as the administrative law judge reasonably found that the newly submitted medical evidence of record is insufficient to establish the existence of pneumoconiosis or

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has passed since the initial diagnosis of pneumoconiosis "claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable gainful work." Claimant's Brief at 7. Contrary to claimant's contention, there is no new evidence in the record to support this allegation.

[8]On Department of Labor Form CM-988, Dr. Baker provided claimant's job title and its physical requirements: "heavy equipment operator, run dozer & drill." Director's Exhibit 10. Dr. Dahhan noted that claimant's work involved operating a bolt machine, a loading machine and a "dozer." Director's Exhibit 25; Employer's Exhibit 1.

[9]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).

total disability at Sections 718.202(a) and 718.204(b)(2), we affirm his finding that claimant has failed to establish a material change in conditions pursuant to Section 725.309(d), and affirm the denial of benefits. *See Ross, supra*. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge