BRB No. 02-0353 BLA

JUDY BOWLING (On Behalf of the Estate of CHARLIE BOWLING)	)	
Claimant-Petitioner	)	
v.	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED:
and	)	
ACCORDIA EMPLOYER SERVICE CORPORATION	)	
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0275) of Administrative Law Judge Robert L. Hillyard denying claimant's request for modification of the denial of a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health

[1] Claimant, Charlie Bowling, filed the present application for benefits on November 4, 1994. Director's Exhibit 1. All three of claimant's prior claims, filed on January 27, 1976,

and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] This case is before the Board for the third time. In the Board's prior decision, the Board affirmed the findings of Administrative Law Judge Donald W. Mosser that because claimant failed to establish the existence of pneumoconiosis or total respiratory disability, he failed to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Accordingly, the Board affirmed the denial of benefits. *Bowling v. Mountain Clay, Inc.*, BRB No. 97-1162 BLA (Mar. 26, 1998) (unpub.); Director's Exhibit 47. The Board summarily denied claimant's Motion for Reconsideration. *Bowling v. Mountain Clay, Inc.*, BRB No. 97-1162 BLA (Jun. 3, 1998)(unpub. Order); Director's Exhibit 50. Thereafter, claimant filed additional evidence on April 28, 1999 which the district director treated as a request for modification and denied. Director's Exhibits 19, 51, 54, 59, 65. Claimant requested a formal hearing on February 9, 2000. However, claimant died on April 6, 2000, and accordingly, claimant's surviving spouse reinstituted his request for a formal hearing. On June 6, 2001, Administrative Law Judge Robert L. Hillyard (administrative law judge) conducted a formal hearing on modification. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with sixteen years of qualifying coal mine employment, but found that because claimant failed to establish the existence of pneumoconiosis and total respiratory disability, he failed to establish a basis for modification

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June 21, 1985, and July 28, 1988, were finally denied. Director's Exhibit 77. Due to claimant's death on April 6, 2000, claimant's surviving spouse, Mrs. Judy Bowling, is pursuing this claim on behalf of claimant's estate. *See* Director's Exhibit 11.

[2] 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.

of the denial of his duplicate claim. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Section 718.202(a)(1) and (a)(4) and total respiratory disability under Section 718.204(b). Employer/carrier respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the x-ray interpretations and by relying exclusively on the qualifications of the physicians providing the x-ray interpretations because an administrative law judge is not required to defer to the physician with superior qualifications.

Section 718.202(a)(1) provides, in pertinent part, "...where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1). Accordingly, the administrative law judge considered the radiological expertise of the physicians, and within a proper exercise of his discretion, accorded greater weight to the negative interpretations of thirteen physicians who are Board-certified radiologists and B-readers, and therefore, possessed superior radiological qualifications than Dr. Baker, who provided the sole positive x-ray interpretation. Decision and Order at 17;

[3] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 17, 19-20.

Director's Exhibits 13, 15, 16, 51, 52, 55, 57, 58, 62, 63; Employer's Exhibits 1-3, 5. Consequently, we affirm the administrative law judge's determination that the existence of pneumoconiosis was not established at Section 718.202(a)(1) as this determination is rational and supported by substantial evidence. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. 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); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Relevant to Section 718.202(a)(4), claimant avers that the administrative law judge erred by failing to credit the opinion of Dr. Baker, who diagnosed the presence of pneumoconiosis. Specifically, claimant asserts that the administrative law judge erred in finding Dr. Baker's opinion less probative because it was based on a positive x-ray interpretation, contrary to the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis and because the record contains subsequent negative x-ray readings. In addition, claimant contends that because Dr. Baker obtained the miner's medical history, symptomotology, and conducted a physical examination, his opinion is adequately documented.

Contrary to claimant's argument, however, an administrative law judge may consider evidence which calls into question the reliability of the evidence upon which a physician's opinion is based because such evidence is relevant in assessing whether a report is documented and reasoned. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *cf. Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Church v. Eastern Association Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). The administrative law judge permissibly accorded less weight to Dr. Baker's opinion of "coal workers' pneumoconiosis, category 1/0, on the basis of the 1980 ILO Classification - based on abnormal x-ray and significant duration of exposure" because it was a mere restatement of an x-ray opinion, and therefore, could not establish the existence of pneumoconiosis under Section 718.202(a)(4). *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp Coal Co.*, 12 BLR 1-111, 1-113 (1989); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). We affirm the administrative law judge's finding that the opinions of Drs. Broudy, Repsher, and Rosenberg, that claimant did not have coal workers' pneumoconiosis, were well reasoned and documented, and therefore, outweighed the opinion of Dr. Baker as this determination is rational and supported by substantial evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 18-19. We, therefore, affirm the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(4).

Claimant next asserts that, in rendering his finding that claimant was not totally disabled, the administrative law judge erred by failing to consider the exertional requirements of his usual coal mine work or to consider that the miner's condition would preclude him from engaging in his usual employment. The administrative law judge properly found that the newly submitted medical opinion evidence was insufficient to demonstrate total respiratory disability because Drs. Broudy, Repsher, and Rosenberg opined that claimant retained the respiratory capacity to perform his duties in the coal mining industry or similarly arduous work prior to his death. Decision and Order at 20; Director's Exhibits 36, 56; Employer's Exhibits 1, 7-9, 12. Contrary to claimant's assertion, consideration of the exertional requirements of his usual coal mine work was "unnecessary" because the administrative law judge rationally credited the reports of Drs. Broudy, Repsher, and Rosenberg, physicians who found that claimant did not suffer from a respiratory or pulmonary impairment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83, 1-87 (1988); *cf. Cornett, supra*. Accordingly, we affirm the administrative law judge's determination that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W. G. Moore & Son*, 9 BLR 1-4 (1986) (*en banc*).

Consequently, because we affirm the administrative law judge's determinations that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability pursuant to Section 718.204(b) as these findings are rational, contain no reversible error, and are supported by substantial evidence, we must affirm the administrative law judge's determination that claimant failed to establish a basis for modification of the denial of the miner's duplicate claim. *See* 20 C.F.R. §725.309 (2000); *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see also Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge