BRB No. 04-0214 BLA

SHIRLEY GIBSON (o/b/o WILLIAM A. GIBSON) Claimant-Petitioner v. RYANS CREEK COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/28/2004 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Shirley Gibson, Stearns, Kentucky, *pro se*.

Mark Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denial of Benefits (02-BLA-5308) of Administrative Law Judge Robert L. Hillyard rendered on a subsequent 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).

The administrative law judge found eight years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. In considering this subsequent claim, the administrative law judge concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, elements of entitlement previously adjudicated against claimant. The administrative law judge, therefore, found that a material change in conditions was not established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.[1]

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this 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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The instant claim, filed February 7, 2001, Director's Exhibit 3, constitutes a subsequent claim under the revised regulation at 20 C.F.R. 725.309(d). As such, this claim must be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since Administrative Law Judge Rudolf A. Jansen's August 30, 1995 denial of benefits became final. 20 C.F.R. §725.309(d). Judge Jansen denied benefits based on claimant's

[1] Claimant filed his first claim for benefits on July 21, 1976, which was denied on remand by Administrative Law Judge Edward Murty on November 8, 1982. Director's Exhibit 30. The Board dismissed claimant's appeal on March 18, 1983 as untimely filed. Director's Exhibit 1. Claimant's second claim, which was filed on July 27, 1983, was treated as a request for modification and denied by the district director on September 23, 1983 and July 16, 1985. *Id*. Claimant appealed, and Administrative Law Judge Bernard J. Gilday Jr.'s denial of modification on August 15, 1989, was affirmed by the Board on December 16, 1992. *Id*. Claimant filed a third claim for benefits on November 12, 1993, which was denied by the district director, and by Administrative Law Judge Rudolf A. Jansen on August 30, 1995 based on claimant's failure to establish the existence of pneumoconiosis. *Id*. Claimant filed the instant subsequent claim on February 7, 2001, which was denied by the district director on January 13, 2002. Director's Exhibits 3, 20, 26. At claimant's request, the claim was referred to the Office of the Administrative Law Judges on August 8, 2002, and a hearing was held before the administrative law judge on April 2, 2003.

failure to establish the existence of pneumoconiosis. *See* Director's Exhibit 1. Claimant, therefore, must establish the existence of pneumoconiosis in the instant subsequent claim.

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

After consideration of the administrative law judge's Decision and Order and the evidence of record, we hold that the administrative law judge's findings are in accordance with law and supported by substantial evidence, and thus, that the administrative law judge's Decision and Order contains no reversible error. The administrative law judge found the new x-ray evidence insufficient to establish the existence of pneumoconiosis based on the numerical superiority of the negative readings by physicians with superior qualifications. There are four readings of three new x-rays. The May 4, 2001 x-ray was read as negative by Dr. Broudy, a B-reader. Director's Exhibit 16. The March 30, 2001 x-ray was read as negative by Dr. Sargent, a physician dually qualified as a B-reader and Board-certified radiologist, Director's Exhibit 12, and by Dr. Baker who is neither a B-reader nor Board-certified radiologist, Director's Exhibit 12. Dr. Gomez, whom the administrative law judge indicated was a B reader, see Decision and Order at 6, read the x-ray dated February 11, 1999 as showing "COPD", Director's Exhibit 17.[2] Director's Exhibits 12, 16, 17. Given this record, we affirm as rational the administrative law judge's finding at 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); Decision and Order at 10.

The administrative law judge also correctly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. 718.202(a)(2) and (3) as there is no biopsy or autopsy evidence in the record, this claim was filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 10.

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[2] The administrative law judge mistakenly characterized Dr. Gomez' February 10, 2001 CAT scan report in which he found emphysema, as an x-ray reading in which Dr. Gomez diagnosed emphysema. *See* Director's Exhibit 17; Decision and Order at 6. The error is harmless as the administrative law judge duly considered this CAT scan at page 8 of his Decision and Order. Moreover, because neither Dr. Gomez' x-ray interpretation nor CAT scan support claimant's burden at 20 C.F.R. §718.202(a), any error by the administrative law judge is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Considering the new medical opinion evidence of record at 20 C.F.R. §718.202(a)(4), the administrative law judge properly accorded little weight to the opinion of Dr. Rodrigues because he diagnosed pneumoconiosis by history and never independently diagnosed the disease. *Eastover Mining v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003). The administrative law judge also noted that Dr. Rodrigues relied on CAT scan interpretations showing "emphysema typically seen in moderate involvement following chronic tobacco exposure." Director's Exhibit 17. The administrative law judge thus properly accorded Dr. Rodrigues' opinion little weight as it was not well documented, and was poorly reasoned and internally inconsistent. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'g*, 865 F.2d 916 (7th Cir. 1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Further, Dr. Baker diagnosed "COPD due to cigarette smoking/? Coal dust exposure," and yet also found that claimant did not have an occupational lung disease caused by coal mine employment. Director's Exhibit 12. The administrative law judge properly accorded little weight to Dr. Baker's opinion as the physician failed to clearly state his findings and reasoning on the issue of the existence of pneumoconiosis, and thus, his opinion was equivocal and vague. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Worhach*, 17 BLR at 1-110; *Clark*, 12 BLR at 1-155; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields*, 10 BLR at 1-22.

The administrative law judge further permissibly accorded greater weight to Dr. Broudy's opinion, that the miner did not have pneumoconiosis, over the contrary opinions of Drs. Rodrigues and Baker. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Specifically, the administrative law judge found that Dr. Broudy's opinion was better reasoned, documented, and supported by the objective evidence and by the consulting opinions of Drs. Branscomb and Fino. Director's Exhibits 14, 16; Employer's Exhibit 1.

Based on the foregoing, we affirm the administrative law judge's finding that the new evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4).

Because claimant failed to establish the existence of pneumoconiosis, claimant has not met his burden to establish a change in the applicable condition of entitlement and the instant subsequent claim must be denied under 20 C.F.R. §725.309(d). We thus further affirm the administrative law judge's denial of benefits in this case.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge