BRB No. 06-0806 BLA

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| ELLIS L. BROWN | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| MANALAPAN MINING COMPANY, INCORPORATED | ) | DATE ISSUED: 04/26/2007 |
| | ) | |
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| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| | ) | DECISION and ORDER |
| Party-in-Interest | | |

Appeal of the Decision and Order-Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2004-BLA-6219) of Administrative Law Judge Joseph E. Kane on this 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 that the record established a coal mine employment history of at least eighteen years, and that the

instant claim constituted a subsequent claim pursuant to 20 C.F.R. §725.309.[1] Decision and Order at 4. Reviewing the newly developed evidence, the administrative law judge found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b), elements of entitlement previously adjudicated against claimant. Decision and Order at 8-12. Consequently, the administrative law judge found that claimant did not establish that one of the applicable conditions of entitlement had changed since the denial of his prior claim, *see* 20 C.F.R. §725.309. The administrative law judge, therefore, denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis or total disability. Claimant also contends that the Department of Labor has failed to provide him with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, urging that the Board reject claimant's argument that claimant was not provided with a complete and credible pulmonary evaluation.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

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

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[1] Claimant filed his first claim for benefits on October 12, 1995. The claim was denied by Administrative Law Judge Robert L. Hillyard in a Decision and Order issued on November 28, 1997. The basis for Judge Hillyard's denial of benefits was his determination that the evidence of record was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. The Board affirmed the denial of benefits. *Brown v. Manalapan Mining Co.*, BRB No. 98-0429 BLA (Dec. 16, 1998)(unpub.). Claimant filed this subsequent claim for benefits on January 6, 2003. Director's Exhibit 1.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 element of entitlement precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant asserts that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis. Claimant specifically contends that the administrative law judge improperly relied on the qualifications of the physicians interpreting the x-rays as negative and the numerical superiority of the negative x-ray interpretations. Contrary to claimant's assertion, the administrative law judge is to consider the qualifications of the physicians in weighing conflicting x-ray evidence and determining the weight to be assigned the x-ray interpretations. 20 C.F.R. §718.202(a)(1).[3] In considering the newly submitted x-ray evidence, the administrative law judge found that such evidence consisted of six interpretations of two chest x-rays taken in 2003 and 2004: Dr. Simpao, a physician with no particular expertise in interpreting x-rays, read the April 18, 2003 film as positive, Director's Exhibit 8; Dr. Sargent, a B reader and Board-certified radiologist,[4] read the same film for quality only, Director's Exhibit 9; Dr. Alexander, a B reader and Board-certified radiologist, read the film as positive, Director's Exhibit 13; while Dr. West, a B reader and Board-certified radiologist, read the film as negative, Director's Exhibit 11. Dr. Dahhan, a B reader and Board-certified radiologist, and Dr. Halbert, a physician with the same qualifications, read a June 7, 2004 film as negative, Employer's Exhibits 2, 5.

[3] 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 [emphasis added].

20 C.F.R. §718.202(a)(1).

[4] A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

Considering this evidence, the administrative law judge found that the x-ray evidence failed to affirmatively establish the existence of pneumoconiosis because the preponderance of x-ray readings by physicians with superior qualifications was negative for the disease. This was proper. Decision and Order at 6, 10-11; 20 C.F.R. §§718.102(c), 718.202(a)(1); *Staton v. Norfolk & Western Railway 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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).[5] Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected, as claimant points to no evidence or finding by the administrative law judge that supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Regarding the administrative law judge's weighing of the new evidence relevant to 20 C.F.R. §718.204(b)(2)(iv), claimant asserts generally that, in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine employment in conjunction with medical opinions regarding claimant's physical abilities. Claimant's Brief at 4-5. Claimant also maintains that:

> The claimant's usual coal mine work included being a [*sic*] equipment repairman, foreman, continuous miner operator and shuttle car operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5.

In addressing the medical opinion evidence relevant to total respiratory disability, the administrative law judge found that while Dr. Simpao opined that claimant had a

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

"mild" respiratory impairment, Dr. Simpao did not provide any opinion about the level of exertion claimant could perform or his ability to return to his last coal mine employment. Decision and Order at 12; Director's Exhibit 8. Regarding the opinions of Drs. Dahhan and Rosenberg, the administrative law judge noted that both physicians found no pulmonary impairment whatsoever and believed that claimant had the respiratory ability to return to his last coal mine employment. Employer's Exhibits 1, 6. The administrative law judge also found that the hospital reports and notes did not provide any relevant evidence bearing on the issue. Decision and Order at 12. The administrative law judge concluded, therefore, that because the opinions of Drs. Dahhan and Rosenberg were essentially uncontradicted, the medical opinion evidence did not establish total respiratory disability . 20 C.F.R. §718.204(b)(2)(iv).

Weighing the medical opinion evidence along with the newly submitted pulmonary function and blood gas study evidence, all of which was non-qualifying,[6] the administrative law judge found that claimant failed to establish a totally disabling respiratory impairment by a preponderance of the evidence. This was proper. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp*., 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). We, therefore, affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2), and affirm the administrative law judge's finding that total respiratory disability has not been established. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Claimant's contention that he can no longer work in areas of heavy dust concentration is also insufficient to establish the presence of a totally disability respiratory impairment. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). In addition, claimant's argument that, because pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and, has, accordingly adversely affected his ability to perform his usual coal mine work or comparable and gainful work, is without merit. *See White*, 23 BLR at 1-7 n.8.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "non-qualifying" study exceeds those values.

Finally, claimant asserts that the Director has failed to fulfill his statutory obligation of providing claimant with a complete, credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b). Specifically, claimant alleges that since the administrative law judge found that Dr. Simpao's opinion was based on an erroneous x-ray reading, because Dr. Simpao offered no explanation for his diagnosis of pneumoconiosis, because Dr. Simpao did not discuss claimant's coal mining duties, and because Dr. Simpao did not offer a diagnosis regarding the level of claimant's pulmonary disability, the Director failed to fulfill his statutory duty of providing claimant with a complete and credible pulmonary evaluation. The Director contends, however, that while, under certain circumstances, Dr. Simpao's failure to specify whether claimant suffers from a totally disabling respiratory impairment could require remand of the case for clarification and/or corrections,[7] and Dr. Simpao's opinion may be insufficient to diagnose the existence of legal pneumoconiosis, because Dr. Simpao offered a reasoned and documented opinion on clinical pneumoconiosis, which the administrative law judge found outweighed, remand of the case for clarification on the issue of disability would be pointless.

As set forth by Section 413(b) of the Act, 30 U.S.C. §923(b), the Department of Labor (the Department) has a statutory obligation to provide each miner who files a claim for benefits with an opportunity to substantiate his claim by means of a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Section 413(b) of the Act is implemented by 20 C.F.R. §725.406. Therein, the Department is charged with making arrangements for the miner to be given a complete pulmonary evaluation and for assessing the adequacy of the evaluation provided. *See* 20 C.F.R. §725.406. As the promulgator of the Black Lung regulations and the administrator of the Act, it is the Director's duty to ensure the proper enforcement and fair administration of the Black Lung program. *See generally* 20 C.F.R. §725.465(d); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc* order); *Capers v. The Youghiogheny and Ohio Coal Co.*, 6 BLR 1-1234, 1-1237 n.4 (1984). Thus, we defer to the Director on the issue of whether the statutory obligation of the Department to provide claimant with a complete and credible pulmonary evaluation has been fulfilled. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Newman*, 745 F.2d 1166, 7

[7] We note that, even if the administrative law judge had found that Dr. Simpao's opinion sufficient to establish total respiratory disability, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the administrative law judge found that the weight of the evidence, *i.e.*, the non-qualifying pulmonary function and blood gas studies and the opinions of Drs. Dahhan and Rosenberg, failed to establish total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987).

BLR 2-31; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). We, therefore, decline to remand this case for a complete pulmonary evaluation.

The administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment is, therefore, affirmed, 20 C.F.R. §§718.202(a); 718.204(b)(2), and we affirm the administrative law judge's finding that claimant has not, therefore, established that an applicable condition of entitlement has changed since the denial of his prior claim. 20 C.F.R. §725.309.

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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BETTY JEAN HALL
Administrative Appeals Judge