BRB Nos. 06-0836 BLA
and 06-0836 BLA-A

REDMON UTLEY)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
ISLAND CREEK COAL COMPANY)
) DATE ISSUED: 04/30/2007
Employer-Respondent)
Cross-Petitioner)
)
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 Jeffrey S. Tureck, Administrative Law Judge, United States Department of Labor.

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

Martin E. Hall (Jackson Kelley PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (05-BLA-5711) of Administrative Law Judge Jeffrey S. Tureck in 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).[1] The administrative law judge credited claimant with twenty-six years of coal mine employment and noted that the claim before him was a subsequent claim pursuant to 20 C.F.R. §725.309(d).[2] Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found the new evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Therefore, the administrative law judge found that claimant failed to demonstrate that one of the applicable conditions of entitlement has changed since the previous denial under Section 725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the new evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Additionally, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Claimant further asserts that the Director, Office of Workers'

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[1] Claimant's first claim for benefits was filed on June 9, 1973, and was denied on April 25, 1980. Director's Exhibit 1-36, 1-67. Claimant filed his second claim for benefits on February 14, 1983, but the claim was ultimately dismissed at claimant's request on February 21, 1986. Director's Exhibit 1-2, 1-4, 1-127. Claimant filed a third claim on September 11, 1998, which was denied on January 11, 1999. Director's Exhibit 2-2, 2-62. The instant claim was filed on March 1, 2004. Director's Exhibit 4. A formal hearing was held on November 8, 2005. Decision and Order at 2. Based on the Board's decision in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006), the administrative law judge issued an order reopening the record so the employer could withdraw two of its three readings of the March 10, 2005 CT scan as exceeding the evidentiary limitations in 20 C.F.R. §725.414. *Id.* Employer objected to the order, but withdrew Employer's Exhibits 2 and 6. *Id.*

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

[3] Claimant's counsel cites to 20 C.F.R. §718.204(c) as the applicable regulation for addressing whether claimant established total disability. 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

Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. The Director responds, arguing that remand for a complete and credible pulmonary evaluation is not needed in this case.

In its cross-appeal, employer contends that the administrative law judge erred in excluding certain x-ray and CT scan interpretations as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer also maintains that the limitations on the admission of evidence are invalid, but acknowledges that these issues need not be reached if the Board affirms the administrative law judge's Decision and Order Denying Benefits. The Director responds, urging the Board to reject employer's arguments concerning the validity of the evidentiary limitations. Claimant has not submitted a response to employer's cross-appeal.[4]

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, 363 (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 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 "one of the applicable conditions of entitlement . . . has changed

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found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

[4] The parties do not challenge the administrative law judge's findings that the evidence obtained since the previous denial of benefits does not establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). These findings are therefore affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d) (2000); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or a totally disabling pulmonary or respiratory impairment. Decision and Order at 3; Director's Exhibit 2-2. Consequently, in the current claim, claimant had to submit new evidence establishing at least one of these elements of entitlement. *See* 20 C.F.R. §725.309(d); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994) (holding under former provision that claimant must establish with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

The radiological evidence submitted in the present claim for consideration pursuant to Section 718.202(a)(1) consisted of four readings of three x-rays, taken on September 3, 2004, March 10, 2005, and June 6, 2005.[5] Director's Exhibit 13; Employer's Exhibits 1, 3, 4. Dr. Simpao read the September 3, 2004 x-ray as positive for the existence of pneumoconiosis, but Dr. Wiot interpreted this x-ray as negative. Director's Exhibit 13; Employer's Exhibit 3. Drs. Shelby and Repsher also provided negative diagnoses based on their interpretations of the March 10, 2005 and June 6, 2005 x-rays, respectively. Employer's Exhibits 1, 4.

The administrative law judge noted that Dr. Simpao is in general practice and has no special radiological expertise in the interpretation of x-rays, while Dr. Wiot is a Board-certified radiologist and B reader. Decision and Order at 4. In weighing the conflicting interpretations of the September 3, 2004 x-ray, the administrative law judge accorded greater weight to Dr. Wiot's negative reading based on the physician's superior qualifications, and found that this x-ray does not support a finding of pneumoconiosis. *Id*. In reviewing the sole interpretations of the March 10, 2005 and June 6, 2005 x-rays, the administrative law judge noted that the interpreting physicians, Drs. Selby and Repsher, are both B readers. *Id.* Because all of the B readers interpreted claimant's x-

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[5] Although the administrative law judge states that the x-ray interpreted by Dr. Selby was taken on May 10, 2005, a review of the record indicates that the x-ray was actually taken on March 10, 2005. Decision and Order at 4; Employer's Exhibit 1. The March 16, 2004 x-ray contained in the record is a digital x-ray interpreted by Drs. Simpao and Wiot. Director's Exhibit 12 at 24; Employer's Exhibit 3. Recognizing that digital x-rays are not to be addressed pursuant to Section 718.202(a)(1), the administrative law judge considered the interpretations of the March 16, 2004 digital x-ray as "other medical evidence." Decision and Order at 4.

rays as negative, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id.*

Claimant generally contends that the administrative law judge erred in finding the new x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant argues specifically that the administrative law judge erred in relying "almost solely on the qualifications of the physicians" in weighing the x-ray evidence, in placing "substantial weight on the numerical superiority of the x-ray readings," and in selectively analyzing the x-ray evidence. Claimant's Brief at 3. These arguments have no merit.

Section 718.202(a)(1) provides, in pertinent part, that "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)(emphasis added). The administrative law judge considered the physicians' radiological expertise and permissibly accorded greater weight to the negative interpretations provided by B readers, while according less weight to the sole positive interpretation rendered by the physician who possessed no special radiological expertise. 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 280 (6th Cir. 1995); *Trent*, 11 BLR at 1-127-28 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 345 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 213 (1985); Decision and Order at 4; Director's Exhibit 13; Employer's Exhibits 1, 3, 4, 5 at 3. We also reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence inasmuch as claimant has not provided any support for this assertion, nor does a review of the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. *See White*, 23 BLR at 1-4. Therefore, we affirm the administrative law judge's finding that the new x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) based on the new medical evidence.

Regarding total disability under Section 718.204(b)(2)(iv), the administrative law judge considered the newly-submitted medical reports of Drs. Simpao, Selby and Repsher. Director's Exhibit 12; Employer's Exhibits 1, 7. Dr. Simpao examined claimant on March 16, 2004 and conducted a resting arterial blood gas study and a

pulmonary function test, each of which produced non-qualifying results.[6] Director's Exhibit 12. Describing claimant's testing effort as good, Dr. Simpao opined that the pulmonary function test indicated that claimant had a moderate obstruction. Director's Exhibit 12 at 3, 9; Employer's Exhibit 5 at 15-16. Dr. Simpao concluded that claimant had a moderate impairment that would limit him to sedentary jobs. Director's Exhibit 12 at 4; Employer' Exhibit 5 at 17-18.

Dr. Selby examined claimant on March 10, 2005 and conducted an arterial blood gas study and a pulmonary function test, each of which produced non-qualifying results. Employer's Exhibit 1. The physician questioned claimant's cooperation based on the variation he observed in claimant's pre-bronchodilator pulmonary function test results, and determined that the test was invalid. *Id.* Explaining that although the post-bronchodilator pulmonary function test was technically invalid because there were only two trials rather than three, Dr. Selby said he believed that the test accurately reflected claimant's pulmonary function. *Id.* Dr. Selby opined that, assuming the post-bronchodilator study was accurate, it reflected only a mild obstruction that was not clinically significant. *Id*. After reviewing the reports of Drs. Repsher and Simpao, Dr. Simpao's deposition transcript, re-readings by Dr. Wiot of the two x-rays obtained by Dr. Simpao, and CT scan reports by Drs. Wiot and Perkins, Dr. Selby opined that, at worst, claimant has a slight obstruction that is not disabling. Employer's Exhibit 7 at 10, 21-22. Dr. Selby concluded that claimant has the respiratory and pulmonary capacity to perform any of his previous coal mine jobs. Employer's Exhibit 1 at 4, 7 at 26.

Dr. Repsher examined claimant on June 6, 2005. Employer's Exhibit 4. The physician opined that although the arterial blood gas study conducted indicated mild hypoxemia, the study yielded non-qualifying results. *Id.* Like Dr. Selby, Dr. Repsher questioned claimant's cooperation in pulmonary function tests conducted prior to the administration of bronchodilator medication, and noted that although claimant may have very mild and clinically insignificant chronic obstructive pulmonary disease, his pulmonary function may actually be normal. Employer's Exhibit 8 at 15-16. Acknowledging that claimant's results are non-qualifying, the physician opined that claimant had no respiratory or pulmonary impairment and retained the capacity to perform coal mine jobs requiring sustained heavy exertion. *Id*. Before his deposition on October 27, 2005, Dr. Repsher reviewed the reports and deposition testimony of Drs. Simpao and Selby, x-ray and CT scan interpretations by Dr. Wiot, and a CT scan interpretation by Dr. Perkins. *Id.* at 10-11. Dr. Repsher reiterated his opinion that

[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 the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

claimant does not have pneumoconiosis and has no respiratory or pulmonary impairment. *Id.* at 21.

In weighing the examining physicians' medical opinions pursuant to Section 718.204(b)(2)(iv), the administrative law judge observed that Drs. Selby and Repsher are both highly qualified pulmonary specialists, whereas Dr. Simpao is in general practice. Decision and Order at 7. The administrative law judge noted that Drs. Selby and Repsher each reviewed all of the evidence produced since the previous denial of benefits, whereas Dr. Simpao had only his own examination upon which to rely. *Id.* Observing that Drs. Selby and Repsher both explained their opinions in great detail at their depositions, and that their opinions were consistent with each other and the evidence of record, the administrative law judge credited their opinions over the conflicting opinion of Dr. Simpao, to find that claimant does not have a totally disabling respiratory or pulmonary impairment. *Id.*

Claimant generally argues that the administrative law judge erred in finding that claimant is not totally disabled. Claimant specifically argues that:

> The claimant's usual coal mine work included being a pay load 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. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Moreover, the administrative law judge permissibly accorded the opinions of Drs. Selby and Repsher greater probative weight than Dr. Simpao's opinion because he determined that these physicians have greater expertise than Dr. Simpao, their opinions are better reasoned and documented, and that they are better supported by the evidence of record. *See Gray v. SLC Coal Co.,* 176 F.3d 382, 388, 21 BLR 2-615, 626 (6th Cir. 1999); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp*., 8 BLR 1-46, 1-47 (1985); Decision and Order at 5; Employer's Exhibits 7, 8. Therefore, because the administrative law judge permissibly credited the medical reports in which the physicians concluded that claimant has no impairment, it was unnecessary for him to compare the exertional requirements of claimant's job duties with the medical reports. *Lane v. Union Carbide Corp*, 104 F.3d

166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. The Act provides no such presumption and an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-6-7.

As claimant does not otherwise challenge the administrative law judge's findings at Section 718.204(b)(2)(iv), we affirm this finding and his determination that claimant did not establish that he is totally disabled pursuant to Section 718.204(b)(2). *Cox*, 791 F.2d at 446-447, 9 BLR at 2-48; *Sarf*, 10 BLR at 1-120.

The administrative law judge's findings that the newly-submitted evidence of record is insufficient to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(b) are supported by substantial evidence and are in accordance with law. *O'Keeffe*, 380 U.S. at 363. Because claimant has failed to establish any element of entitlement previously adjudicated against him, we affirm the denial of benefits in this subsequent claim.[7] *See* 20 C.F.R. §725.309(d); *White*, 23 BLR 1-1, 1-3.

Lastly, however, we must address claimant's contention that the Director did not provide him with a complete and credible pulmonary evaluation as required under the Act. Claimant contends that because the administrative law judge did not credit the diagnosis of pneumoconiosis contained in Dr. Simpao's medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Act requires that "[e]ach miner who files a claim … be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

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[7] As discussed, *supra*, in its brief in support of its cross-appeal, employer requests that we reach its arguments therein only in the event that the administrative law judge's Decision and Order Denying Benefits is not affirmed. Consequently, we do not reach the issues raised by employer on appeal.

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibits 12, 13; Employer's Exhibit 5; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did not find that Dr. Simpao's report was incomplete. On the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis of "CWP, 2/2," was based on the physician's x-ray interpretation, which the administrative law judge found outweighed by the negative readings of physicians with superior radiological credentials. Decision and Order at 4-5. Additionally, the administrative law judge chose to give greater weight to the documented and reasoned opinions of Drs. Selby and Repsher pursuant to Section 718.202(a)(4). *Id.* Because Dr. Simpao's report was complete as to the issue of the existence of pneumoconiosis and the administrative law judge merely found it outweighed by contrary x-ray interpretations and medical opinions, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR at 1-88 n.3.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge