BRB No. 06-0502 BLA

HARRISON MELTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PINE COAL CORPORATION	)	DATE ISSUED: 12/12/2006
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

John T. Chafin (Chafin Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, 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 (04-BLA-5454) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying benefits on a 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 credited claimant with ten years and three months of coal mine employment and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] However, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) on the merits. The administrative law judge also found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R.

[1]Claimant filed his first claim on January 3, 1997. Director's Exhibit 1. On August 20, 1998, Administrative Law Judge Joseph E. Kane (the administrative law judge) issued a Decision and Order denying benefits. *Id*. The administrative law judge's denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. In a letter dated September 19, 1998, claimant appealed the administrative law judge's denial of benefits to the Board. *Id*. In the same letter, claimant attached new medical evidence in support of his appeal. *Id*. The Board acknowledged claimant's Notice of Appeal but considered claimant's letter and attached medical evidence to be a request for modification. *Melton v. Pine Coal Corp*., BRB No. 98-1630 BLA (Sept. 25, 1998)(unpub. Order). Consequently, the Board remanded the case to the district director for consideration of claimant's request for modification. *Id*. On December 22, 1998, the district director denied claimant's request for modification, on the grounds that claimant failed to establish a change in conditions and a mistake in a determination of fact. Director's Exhibit 1. The district director therefore administratively closed the claim. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on August 8, 2002. Director's Exhibit 3.

[2]In considering the evidence pursuant to 20 C.F.R. §725.309, the administrative law judge stated:

> As will be noted below, all the physicians now agree [c]laimant is totally disabled. While the physicians disagree as to etiology of that disability, their agreement on this issue does establish one of the elements that was decided against [c]laimant in the prior denial. Accordingly, I will review the entire record to determine entitlement to benefits.

2006 Decision and Order at 7.

§718.204(c) on the merits. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also contends that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Lastly, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director filed a limited response in a letter brief, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address claimant's contention that the Director failed to provide him with a complete, credible pulmonary evaluation, arguing that "the ALJ concluded that Dr. Baker's report was based merely upon an erroneous smoking history, and that said physician failed to discuss the claimant's extensive cardiac problems." Claimant's Brief at 4. The Director responds that the statutory obligation to provide claimant with a complete pulmonary evaluation has been fulfilled.

With regard to Sections 718.202(a)(4) and 718.204(b), the administrative law judge considered the opinions of Drs. Baker, Broudy and Dahhan. In a report dated October 16, 2002, Dr. Baker diagnosed coal workers' pneumoconiosis and chronic bronchitis related to coal dust exposure. Director's Exhibit 9. Dr. Baker also opined that claimant's coal workers' pneumoconiosis and chronic bronchitis contributed to his moderate impairment. *Id.*

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[3]Since the administrative law judge's findings that the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), that the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) on the merits are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In a questionnaire dated May 20, 2003, Dr. Baker checked the box marked "Yes" to indicate that claimant has a chronic dust disease of the lung caused by the inhalation of coal mine dust. Director's Exhibit 14. In support of Dr. Baker's opinion that claimant does not have the respiratory capacity to perform his usual coal mine job of a roofbolter or comparable work in a dust free environment, Dr. Baker noted coal workers' pneumoconiosis and chronic bronchitis. *Id.*

In contrast, Dr. Broudy, in a November 1, 2002 report, opined that claimant does not have coal workers' pneumoconiosis or any chronic lung disease caused by the inhalation of coal mine dust.[4] Director's Exhibit 13. Dr. Broudy also opined that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. *Id.* Further, Dr. Broudy opined that chronic cardiac disease and cigarette smoking are the primary causes of claimant's respiratory impairment. *Id.* During a deposition dated January 10, 2005, Dr. Broudy reiterated his prior opinion that claimant does not have a disease or impairment significantly caused or contributed to by coal dust inhalation. Employer's Exhibit 3.

Similarly, Dr. Dahhan, in an October 28, 2002 report, opined that claimant has no coal workers' pneumoconiosis. Director's Exhibit 27. Although Dr. Dahhan diagnosed chronic obstructive airway disease, he opined that this condition was caused by cigarette smoking. *Id.* In addition, Dr. Dahhan opined that claimant does not retain the physiological capacity to continue his previous coal mining work or job of comparable physical demand because of his obstructive airway disease. *Id.* During a deposition dated January 13, 2005, Dr. Dahhan reiterated his prior opinion that claimant does not have a disease or impairment significantly caused or contributed to by coal dust inhalation. Employer's Exhibit 2.

The administrative law judge properly accorded greater weight to Dr. Broudy's opinion than to Dr. Baker's contrary opinion, on the basis that Dr. Broudy's opinion is better reasoned and documented.[5] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en*

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[4]Dr. Broudy stated that there is no evidence of chronic obstructive pulmonary disease. Director's Exhibit 13.

[5]The administrative law judge stated that "Dr. Broudy noted in particular that [c]laimant's results on pulmonary testing showed changes from the earliest tests, specifically, the results showed marked reductions in [c]laimant's pulmonary capacity since the earliest tests in 1997." 2006 Decision and Order at 10. The administrative law judge also stated that "Dr. Broudy noted, however, that the carboxyhemoglobin values were still elevated, demonstrating continued exposure to smoke." *Id.* Further, the administrative law judge found that "Dr. Broudy discussed more completely [c]laimant's extensive cardiac problems and history of treatment than the report of Dr. Baker." *Id.* In contrast, the administrative law judge stated that "[w]hile Dr. Baker cited the results of pulmonary function testing in support

banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Further, the administrative law judge properly accorded greater weight to Dr. Broudy's opinion, on the basis that it is supported by Dr. Dahhan's opinion.[6] *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). In addition, the administrative law judge properly discounted Dr. Baker's opinion because Dr. Baker relied upon an inaccurate smoking history.[7] *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Based on his discounting of Dr. Baker's opinion,[8] the administrative law judge concluded that claimant failed to establish that he suffers from pneumoconiosis at 20 C.F.R. §718.202(a)(4), and failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

In response to claimant's assertion, the Director contends that "the ALJ simply found the opinions of Drs. Broudy and Dahhan to be more persuasive than Dr. Baker's opinion." Director's Letter Brief at 2. The Director also contends that "[t]he ALJ did not find Dr. Baker's opinion to be wholly without weight." *Id.* The Director states that "[the ALJ] noted that Drs. Broudy and Dahhan relied upon carboxyhemoglobin tests that indicated the

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of his findings, he did not discuss these test results in detail, he did not consider the results of a carboxyhemoglobin test, and he did not discuss the changes on the test results between 1997 and 2002." *Id.* The administrative law judge additionally stated that "Dr. Baker did not discuss [c]laimant's extensive cardiac problems as thoroughly as Dr. Broudy." *Id.* at 11.

[6]The administrative law judge stated, "I am persuaded by the carboxyhemoglobin test results relied upon by Dr. Broudy and Dr. Dahhan which indicate that [c]laimant is still smoking." 2006 Decision and Order at 10. The administrative law judge noted that "Dr. Dahhan explained at his deposition that the elevated values are too high to reflect exposure to secondhand smoke, but rather indicate a significant smoking habit up to two packs a day." *Id.* Hence, the administrative law judge concluded, "[s]ince Dr. Broudy's opinion is supported by both the carboxyhemoglobin test as well as Dr. Dahhan's analysis of [c]laimant's pulmonary condition, I find it more persuasive than Dr. Baker's contrary opinion which relies upon the subjective statement of [claimant] that he ceased smoking in 1997 that has been disproved by the objective test results." *Id.* at 10-11.

[7]The administrative law judge stated, "in light of [Dr. Baker's] reliance upon [c]laimant's erroneous smoking history, I find his discussion of his examination findings and test results less persuasive since he failed to consider a current and significant smoking history." 2006 Decision and Order at 11.

[8]The administrative law judge did not discredit Dr. Baker's opinion entirely. Rather, the administrative law judge merely found that Dr. Baker's opinion was outweighed by the contrary opinions of Drs. Broudy and Dahhan.

[c]laimant is still smoking." *Id*. In addition, the Director states that "[the ALJ] found these physicians more persuasive than Dr. Baker because the latter relied upon the [c]laimant's statement that he ceased smoking in 1977." *Id*. Further, the Director states that "the ALJ gave additional weight to the reports of Drs. Broudy and Dahhan, each of whom found the [c]laimant's pulmonary system to be normal, because they were well-documented and reasoned and more thorough than Dr. Baker's report." *Id*. at 2-3. The Director argues that "[b]ecause Dr. Baker's opinion was merely found less credible than the contrary opinions, there is no violation of the Director's duty to provide claimant with a credible examination." *Id*. at 3. We agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), that the Director has fulfilled his obligation to provide claimant with a pulmonary evaluation. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992).

Next, we address claimant's contentions on the merits. Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Baker, Broudy and Dahhan.[9] Dr. Baker opined that coal dust exposure contributed to claimant's disabling respiratory impairment, Director's Exhibits 9, 14, while Drs. Broudy and Dahhan opined that coal dust exposure did not contribute to claimant's disabling respiratory impairment, Director's Exhibits 13, 27; Employer's Exhibits 2, 3.

As discussed *supra*, the administrative law judge properly accorded greater weight to Dr. Broudy's disability causation opinion than to Dr. Baker's contrary disability causation opinion, on the basis that Dr. Broudy's opinion is better reasoned and documented. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. Further, the administrative law judge properly accorded greater weight to Dr. Broudy's opinion, on the basis that it was supported by Dr. Dahhan's opinion. *Newland*, 6 BLR at 1-1289. In addition, the administrative law judge properly discounted Dr. Baker's opinion because Dr. Baker relied upon an inaccurate smoking history. *Maypray*, 7 BLR at 1-686. Thus, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[10]

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[9]The administrative law judge stated, "I will review the entire record to determine entitlement to benefits." 2006 Decision and Order at 7. The administrative law judge further stated that "[t]he evidence submitted in the prior denial is set forth in my denial determination dated August 20, 1998 and that evidence is incorporated by reference herein." *Id*.

[10]In light of the administrative law judge's finding that the newly submitted evidence

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[11] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

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was sufficient to establish total disability at 20 C.F.R. §718.204(b), we decline to address claimant's contentions at 20 C.F.R. §718.204(b)(2)(iv). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[11]In view of our disposition of the case at 20 C.F.R. §718.204(c) on the merits of entitlement, we decline to address claimant's contentions at 20 C.F.R. §718.202(a)(1). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge