BRB No. 05-0897 BLA

JEFFERSON NEACE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/05/2006
	)	
LEATHERWOOD ENERGY CORPORATION, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-6179) of Administrative Law Judge Joseph E. Kane rendered 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). This case involves a subsequent claim filed on July 9, 2001.[1] 20 C.F.R. §725.309; Director's Exhibit 4. After crediting claimant with ten years of coal mine employment,[2] the administrative law judge found that the medical evidence developed since the previous denial of benefits did not establish either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that none of the applicable conditions of entitlement had changed since the denial of claimant's 1998 claim. Accordingly, the administrative law judge denied benefits pursuant to 20 C.F.R. §725.309(d).

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation, and he asserts that, in any event, any defect in the Director's pulmonary evaluation regarding the existence of pneumoconiosis cannot affect the disposition of this claim, because there is no credited evidence that claimant is totally disabled.[3]

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[1] Claimant's initial claim for benefits, filed on November 24, 1998, was denied by the district director on March 9, 1999, because claimant failed to establish any element of entitlement pursuant to Part 718. Director's Exhibit 1. There is no indication that claimant took any further action on his 1998 claim. Claimant filed a second application for benefits on December 5, 2000, but withdrew it on August 6, 2001. Director's Exhibit 2.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 1, 2, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has ten years of coal mine employment, and did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 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 both because he failed to establish the existence of pneumoconiosis and a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (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).

Pursuant to Section 718.202(a)(1), the administrative law judge considered six readings of four new x-rays in light of the readers' radiological qualifications.[4] The administrative law judge considered the positive reading of the July 21, 2001 x-ray by Dr. Baker, who was not a B-reader at the time of x-ray reading, but also considered that Dr. Baker's reading was countered by the negative reading of Dr. Wiot, a Board-certified radiologist and B-reader. Director's Exhibits 14, 30. Additionally, the administrative law judge correctly found that Dr. Hussain's "0/1" reading of the October 24, 2001 x-ray did not constitute a positive interpretation of that x-ray. 20 C.F.R. §718.102(b); Director's Exhibit 13. The remainder of the interpretations, all negative for pneumoconiosis, were provided by physicians who are either B-readers or dually-

[4] An additional reading by Dr. Sargent was obtained solely to assess the quality of the October 24, 2001 x-ray. Director's Exhibit 13.

qualified as B-readers and Board-certified radiologists. Decision and Order at 4, 9; Director's Exhibit 30; Employer's Exhibits 1, 6.

Finding "the negative readings by the dually-qualified physician and those by B-readers to be worthy of the greatest weight," the administrative law judge determined that the existence of pneumoconiosis was not established by the new x-ray evidence. Decision and Order at 9. This was a proper qualitative analysis of the x-ray evidence. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered five new medical opinions. Drs. Baker, Chaney, and Hussain diagnosed claimant with pneumoconiosis, while Drs. Dahhan and Repsher concluded that he does not have pneumoconiosis. Director's Exhibits 13, 13A, 14, 24, 25; Employer's Exhibits 1, 3, 4, 7. The administrative law judge found that the opinions of Drs. Dahhan and Repsher outweighed those of Drs. Baker, Chaney, and Hussain. Specifically, the administrative law judge found that Dr. Chaney provided "no reasoning for his opinion" and thus found that his opinion was not well-reasoned or well-documented. Decision and Order at 10. The administrative law judge also discounted the opinions of Drs. Baker and Hussain because both physicians relied on their own positive chest x-ray readings to diagnose pneumoconiosis, when the administrative law judge found that these x-rays were negative for pneumoconiosis. Additionally, the administrative law judge noted that Dr. Hussain relied upon an "0/1" x-ray reading, which was a negative reading under the regulations. Further, the administrative law judge found that neither Dr. Hussain nor Dr. Baker "adequately explain[ed] how they are able to attribute any pulmonary condition suffered by the Claimant to his coal mine dust exposure, apart from their reliance on the years he spent in the mines and their x-ray readings." Decision and Order at 10. The administrative law judge found that, by contrast, Drs. Dahhan and Rosenberg explained in "detailed and well-reasoned medical opinions . . . the etiology of Claimant's medical conditions." Decision and Order at 11. He therefore accorded their opinions "greater weight" and found that claimant did not establish the existence of pneumoconiosis by a preponderance of the new medical opinion evidence. *Id.*

Claimant contends that Dr. Baker's opinion was documented and reasoned, and that the administrative law judge provided an invalid reason for discounting Dr. Baker's diagnosis of pneumoconiosis. Claimant's Brief at 4-5. We reject this argument. The administrative law judge permissibly found that Dr. Baker's diagnosis of pneumoconiosis

did not constitute a documented and reasoned medical opinion because the physician relied primarily upon his own positive x-ray interpretation, which was re-read as negative by a physician with superior radiological qualifications. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). In addition, the administrative law judge properly discounted Dr. Baker's opinion because Dr. Baker failed to otherwise explain his conclusion that claimant suffers from pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Moreover, the administrative law judge found the medical opinion of Dr. Baker, as well as those of Drs. Hussain and Chaney, outweighed by the contrary opinions of Drs. Dahhan and Rosenberg, which he properly found were better reasoned and documented. Decision and Order at 10, 11; Director's Exhibits 13, 14, 24; Employer's Exhibits 1, 3, 4, 7. We therefore affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker and Chaney, stating that claimant is totally disabled, and the opinions of Drs. Hussain, Dahhan, and Rosenberg, stating that claimant is not totally disabled. The administrative law judge found that Dr. Baker's opinion was not a diagnosis of total disability, because Dr. Baker merely advised against a return to a dusty environment. Additionally, the administrative law judge found that Dr. Chaney's opinion "clearly cannot assist the claimant in establishing a totally disabling respiratory or pulmonary impairment," because Dr. Chaney stated that claimant does not suffer from a pulmonary impairment, yet opined that he lacks the respiratory capacity to perform his coal mine employment. Decision and Order at 12; Director's Exhibit 24. Finding the opinions of Drs. Hussain, Dahhan, and Rosenberg to be "supported . . . by the objective laboratory data," the administrative law judge determined that the new medical opinions did not establish that claimant is totally disabled.

Claimant initially asserts 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 work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 8, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a miner operator and mechanic. 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, as

> well as the medical opinions of Dr. Baker, 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 8. 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.[5] *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).

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, because 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 1-7 n.8. We therefore affirm the administrative law judge's finding that claimant did not establish that he is totally disabled Section 718.204(b)(2)(iv).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Hussain'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 5-6. The Director responds that a remand for Dr. Hussain to clarify his opinion regarding the existence of pneumoconiosis would serve no purpose,

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[5] Moreover, with respect to the existence of an impairment, Dr. Baker reported two conclusions. He first indicated that claimant "has a Class I impairment with the FEV1 and FVC both being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 13. Dr. Baker then stated that:

> Patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 13. However, the *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), define a Class I impairment as involving no impairment to the whole person.

because Dr. Hussain concluded that claimant is not totally disabled, a finding credited by the administrative law judge. Director's Brief at 2-3.

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 a medical opinion incomplete," or 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).

The record reflects that Dr. Hussain 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. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 13. The administrative law judge did not find nor does claimant allege that Dr. Hussain's opinion was incomplete. Although the administrative law judge found that Dr. Hussain relied on an "0/1" x-ray reading considered negative under the regulations to support his diagnosis of pneumoconiosis, on the issue of total disability the administrative law judge credited Dr. Hussain's opinion that claimant is not totally disabled. Decision and Order at 10, 12. Review of the record as a whole, including the evidence submitted with claimant's prior claim, reveals no medical evidence supportive of a finding of total disability. Director's Exhibits 1, 13, 24; Employer's Exhibits 1, 3, 6, 7. Because Dr. Hussain's opinion regarding total disability was complete and the administrative law judge did not find that it lacked credibility, and this record as a whole contains no evidence of total disability, a remand to the district director for Dr. Hussain to clarify his opinion regarding the existence of pneumoconiosis is not required. *See Hodges*, 18 BLR at 1-88 n.3.

Because the administrative law judge's finding that the new evidence did not establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or a totally disabling respiratory impairment pursuant to Section 718.204(b)(2), is supported by substantial evidence and in accordance with law, claimant has not established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18. Consequently, we affirm the denial of benefits in this subsequent claim.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge