BRB No. 06-0214 BLA

JAMES M. FULKERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREEN COAL COMPANY	)	DATE ISSUED: 05/25/2006
	)	
and	)	
	)	
GREEN CONSTRUCTION OF INDIANA	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

James M. Fulkerson, Hartford, Kentucky, *pro se*.

W. Blaine Early, III (Stites & Harbison PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denial of Benefits (04-BLA-6075) of Administrative Law Judge Robert L. Hillyard 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).[1] Claimant's prior application for benefits, filed on August 30, 1995, was finally denied on February 9, 1996 because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. On June 14, 2002, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order – Denial of Benefits issued on November 7, 2005, the administrative law judge credited claimant with sixteen years of coal mine employment,[2] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance. 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] 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 found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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 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., 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). The administrative law judge determined that claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Consequently, claimant had to submit new evidence establishing one of these two elements. 20 C.F.R. §725.309(d)(2), (d)(3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him). The administrative law judge found that the new evidence associated with the subsequent claim established that claimant is now totally disabled by a respiratory impairment from performing his usual coal mine work, thereby establishing a change in an applicable condition of entitlement.

In evaluating the entire record, the administrative law judge initially noted that the evidence submitted in support of claimant's prior claim was between ten and twelve years old, and, therefore, was generally a poor indication of claimant's current condition, given the progressive nature of pneumoconiosis. *See Workman v. Eastern Associated Coal Corp*., 23 BLR 1-22 (2004)(Motion for Recon.)(*en banc*); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Turning first to the x-ray evidence relevant to the existence of pneumoconiosis, the administrative law judge correctly noted that while four of the five x-ray readings[3] associated with the prior claim were positive for the existence of pneumoconiosis, only one was by a B reader. By contrast, the sole negative reading was by a physician qualified as both a Board-certified radiologist and B reader, qualifications that may be accorded greater weight. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4, 17 BLR 2-77, 2-79-80 n.4 (6th Cir. 1993); Director's Exhibit 1; Decision

[3] The record contains an additional reading for quality only (Quality 1), by Dr. Barrett, of the February 10, 1995 x-ray. Director's Exhibit 1.

and Order at 7-8. The administrative law judge then noted that the more probative x-ray evidence, submitted with claimant's current claim, consists of five readings of two x-rays.[4] Decision and Order at 4, 8. A September 9, 2002 x-ray was read once as positive by Dr. Simpao, a physician with no radiological qualifications, and once as negative by Dr. Selby, a B reader.[5] Director's Exhibit 11; Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be negative based on Dr. Selby's superior qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward*, 991 F.2d at 316 n.4, 17 BLR at 2-79-80 n.4; *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Director's Exhibit 11; Employer's Exhibit 1; Decision and Order at 11. A July 24, 2003 x-ray was read twice as negative by Dr. Murphy, whose qualifications are not in the record, and Dr. Broudy, a B reader. Director's Exhibit 13. The administrative law judge permissibly found this x-ray to be negative based on Dr. Broudy's B reading. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Director's Exhibit 13; Decision and Order at 11. The administrative law judge then found that the preponderance of the more probative chest x-ray evidence does not establish the presence of pneumoconiosis. Decision and Order at 11. As the administrative law judge properly considered both the quantity, quality and relative recency of the x-ray readings of record, and permissibly concluded, based on the weight of the negative x-ray readings, that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence, s*ee Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29 (2004); *Workman*, 23 BLR at 1-22; *Cranor*, 22 BLR at 1-7; Decision and Order at 12, 16, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge also found, correctly, that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 12.

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[4] The record contains an additional reading for quality only (Quality 1), by Dr. Barrett, of the September 9, 2002 x-ray. Director's Exhibit 12.

[5] The September 9, 2002 film was additionally read by Dr. Burton, whose qualifications are not in the record, but it is unclear whether the reading was for the purpose of diagnosing pneumoconiosis. Dr. Burton concluded that the x-ray revealed chronic appearing changes with no active cardiopulmonary disease. Director's Exhibit 11.

Finally, the administrative law judge considered the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge noted that, in connection with the prior claim, the record contains medical opinions from Drs. Simpao and Bentsen, whose credentials are not in the record. Decision and Order at 8-9. In a report dated March 4, 1994, Dr. Simpao diagnosed coal workers' pneumoconiosis based on x-ray, as well as mild restrictive, and moderate obstructive, airways disease, due to coal dust exposure. Director's Exhibit 1. In a report dated October 2, 1995, Dr. Bentsen also diagnosed coal workers' pneumoconiosis based on x-ray and history of coal dust exposure, as well as chronic bronchitis due to coal dust exposure and smoking. Director's Exhibit 1. Following a review of additional medical evidence, however, Dr. Bentsen completed a supplemental report in which he concluded that claimant has no occupational lung disease causally related to coal mine employment, but instead has a moderate impairment due to smoking. Director's Exhibit 1. The administrative law judge further noted that the evidence associated with claimant's current claim for benefits, which the administrative law judge accorded greater probative value as a better indication of claimant's current condition, consists of a new report from Dr. Simpao, and reports from Drs. Broudy and Selby. The administrative law judge found that Dr. Simpao conducted a physical examination and objective testing and in a report dated September 9, 2002, diagnosed coal workers' pneumoconiosis, and opined that claimant has mild restrictive and severe obstructive airways disease, due in part to coal dust exposure. Director's Exhibit 11; Decision and Order at 7, 13. The administrative law judge further found that, by contrast, Dr. Broudy, a Board-certified internist and pulmonologist, also conducted a physical examination and objective testing but opined in a report dated July 24, 2003, that there was no evidence that claimant had coal workers' pneumoconiosis or silicosis, or any significant pulmonary disease or respiratory impairment arising out of coal mine employment. Director's Exhibit 13; Decision and Order at 6. Similarly, Dr. Selby, also a Board-certified internist and pulmonologist, based on a review of medical evidence, concluded in a report dated July 14, 2004 that claimant does not have pneumoconiosis or any respiratory condition, disease, deficit or impairment as a result of coal mine dust or coal mine employment.[6] Employer's Exhibit 1; Decision and Order at 6-7.

In evaluating the conflicting medical opinions, the administrative law judge acted within his discretion in finding Dr. Simpao's opinion to be unreasoned and undocumented, and, therefore, of little probative value, because Dr. Simpao based his diagnosis in part on a positive x-ray reading which was re-read as negative by a more

[6] Dr. Selby submitted an additional report dated March 10, 2005 in which he discussed the validity of the September 9, 2002 pulmonary function study performed by Dr. Simpao. Employer's Exhibit 1.

highly qualified reader, *Hutchens v. Director, OWCP*, 8 BLR 1- 16 (1985), and did not explain his conclusion that claimant's condition is due to coal dust exposure, especially in light of claimant's extensive fifty pack-year smoking history. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985); Director's Exhibit 11; Decision and Order at 13. By contrast, the administrative law judge found the opinions of Drs. Broudy and Selby, that claimant does not suffer from any coal dust related respiratory or pulmonary condition, to be well-reasoned and well-documented, and, therefore, entitled to greater weight. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-149; *Fields*, 10 BLR at 1-19; Director's Exhibit 13; Employer's Exhibit 1; Decision and Order at 13.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6, and permissibly discredited the opinion of Dr. Simpao, the only physician supportive of a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We, therefore, affirm the administrative law judge's finding that the existence of pneumoconiosis, an essential element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a), and, consequently, affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge