BRB No. 04-0157 BLA

DENNIS ROBINSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTLAND-ELKHORN COAL CORPORATION	)	DATE ISSUED: 09/15/2004
	)	
and	)	
	)	
THE PITTSTON COMPANY	)	
	)	
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 - Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Dennis Robinson, Mouthcard, Kentucky, *pro se*.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for 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 – Denial of Benefits (02-BLA-5241) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on a subsequent claim[1] 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).[2] The administrative law judge initially credited claimant with thirty-three years of coal mine employment and found employer to be the responsible operator. The administrative law judge also determined that claimant met the requirements of 20 C.F.R. §725.309(d) by establishing that he is a "miner" within the meaning of the Act and by filing a new claim for benefits. Adjudicating the merits of this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 but insufficient to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's decision denying benefits.[3] The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive brief in this appeal, but argues that it

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[1] Claimant first filed for benefits on October 26, 1989; this claim was finally denied by the district director on March 20, 1990. Director's Exhibit 1. Claimant filed a second claim on February 3, 1997; this claim was denied by the district director on May 16, 1997, no element of entitlement having been established. Director's Exhibit 2. Claimant filed the current claim on February 8, 2001. Director's Exhibit 4. Based on a finding that claimant had complicated pneumoconiosis, the district director awarded benefits. Director's Exhibits 42, 44. Employer controverted the district director's determination and requested a hearing before the Office of Administrative Law Judges. A hearing was held before the administrative law judge on April 17, 2003 in Pikeville, Kentucky.

[2] 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, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Employer filed a cross-appeal on November 11, 2003, but failed to file a brief. The Board issued a Show Cause Order on March 9, 2004, and dismissed the appeal as abandoned on April 29, 2004. On May 4, 2004, employer filed its response brief, moving to allow withdrawal of its cross-appeal. The motion is moot, as the Board has dismissed the cross-appeal.

was harmless error for the administrative law judge to find that claimant satisfied the requirements of 20 C.F.R. §725.309(d) because he established that he was a "miner" and had filed a new claim. The Director notes that these facts do not constitute applicable conditions of entitlement upon which the prior denial was based.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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 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 prove 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 one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim shall be denied unless the claimant demonstrates that at least one of the applicable conditions of entitlement has changed since the denial of the prior claim. 20 C.F.R. §725.309(d). Claimant's prior claim was denied because the evidence failed to establish any element of entitlement. Director's Exhibit 2. Consequently, the new evidence must establish one of the applicable conditions of entitlement in order to meet the requirements of 20 C.F.R. §725.309(d) in the instant case.

With respect to the weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge correctly found that this record contains nineteen interpretations of thirteen x-rays; three of the x-rays were determined to be positive, but ten of the sixteen negative interpretations were rendered prior to 1995, the year of the first positive reading. *See* Director's Exhibits 1, 2, 12, 13, 23, 26; Claimant's Exhibit 5. According greater weight to the more recent positive x-rays, the administrative law judge permissibly found that the existence of pneumoconiosis was established at Section 718.202(a)(1). *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Further, because there were no biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that

claimant could not establish the existence of pneumoconiosis by the use of presumptions covering claims filed prior to January 1, 1982, or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.305, 718.306. Considering the evidence relevant to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge noted that Dr. Hussain interpreted the April 11, 2001 x-ray as 3/2 with Category B-sized large opacities, indicative of complicated pneumoconiosis. Since Dr. Hussain is neither a B-reader nor a radiologist, and no other x-ray noted complicated pneumoconiosis, the administrative law judge rationally found that claimant has not established that he has complicated pneumoconiosis. Specifically, the administrative law judge accorded greater weight to the negative interpretations rendered by readers with superior qualifications. *See Melnick v. Consolidation Coal Company*, 16 BLR 1-31 (1991)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge properly found that claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. *See* 20 C.F.R. §§718.202(a)(3), 718.304.

Considering the medical opinion evidence, the administrative law judge found Dr. Hussain's opinion, that claimant has an occupational lung disease caused by coal mine employment based on his x-ray and history of exposure, was not a reasoned medical opinion but a restatement of an x-ray reading. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Decision and Order at 18-19. Dr. Nichols also diagnosed pneumoconiosis by x-ray, and noted a mild lung impairment consistent with pneumoconiosis, but did not set forth any clinical findings upon which he relied. Claimant's Exhibit 2. The administrative law judge found this opinion also was not a reasoned medical opinion, and thus was entitled to lesser weight. Decision and Order at 19. Finding that there was no reasoned medical opinion diagnosing either clinical or legal pneumoconiosis, and that Dr. Dahhan's opinion that claimant has no evidence of pneumoconiosis was entitled to enhanced weight due to his credentials, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), the administrative law judge properly determined that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge further found, however, based on his consideration of the totality of the relevant evidence, that claimant established the existence of pneumoconiosis by x-ray evidence. The administrative law judge further found that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b).

Based on the foregoing, we affirm the administrative law judge's findings on the existence of pneumoconiosis arising out of coal mine employment as supported by substantial evidence. *See Orange v. Island Creek Coal Co.*, 786 F. 2d 724, 8 BLR 2-192, (6th Cir. 1986); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). Because claimant established the existence of pneumoconiosis, we also affirm the administrative

law judge's ultimate conclusion that claimant demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309.[4]

Turning to the issue of total respiratory or pulmonary disability, the administrative law judge correctly found that neither the pulmonary function studies nor the blood gas studies were qualifying, and did not, therefore, establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(ii). Director's Exhibits 1, 2, 12, 26; Employer's Exhibit 1.

Further, the administrative law judge correctly found that because the record does not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability cannot be established on that basis at 20 C.F.R. §718.204(b)(2)(iii).

Addressing the medical opinion evidence of record at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially found:

> The contrasting opinions of Drs. Hussain and Dahhan from 2001 are the two most probative opinions towards determining whether Claimant suffered from a totally disabling respiratory or pulmonary impairment. I accord controlling weight to Dr. Dahhan's opinion based upon the quality of his reasoning, and because his opinion is more adequately supported than Dr. Hussain's opinion. Dr. Hussain's opinion is reasoned and documented because he relied upon his physical examination of Claimant and Claimant's subjective complaints. Dr. Dahhan's opinion is better supported by the objective evidence of the record than Dr. Hussain's opinion, which relies primarily on Claimant's subjective complaints.

Decision and Order at 22. The administrative law judge thereby permissibly found Dr. Hussain's assessment of a severe pulmonary impairment entitled to lesser probative weight because it was not supported by adequate data. Decision and Order at 21. The administrative law judge thereby permissibly further found that Dr. Dahhan's opinion, that claimant has no impairment or disability, was entitled to controlling weight because his opinion was better supported by the objective evidence of record, inasmuch as all of the blood gas study and pulmonary function study evidence, as interpreted by every physician but Dr. Hussain, was determined to be within normal limits. *Id.* at 22. The

[4] Any error in the administrative law judge's finding at 20 C.F.R. §725.309 was harmless, as claimant has established the existence of pneumoconiosis arising out of coal mine employment in this subsequent claim. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge properly determined claimant's entitlement to benefits on the merits of the instant claim.

administrative law judge's weighing of the medical opinion evidence of record is rational, supported by substantial evidence, and comports with applicable law. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988).

Based on the foregoing, we affirm the administrative law judge's findings that the evidence fails to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i) through (b)(2)(iv). We affirm, therefore, the administrative law judge's denial of benefits on the merits of the instant subsequent claim.

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge 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