BRB No. 07-0159 BLA

K. L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 09/27/2007
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting 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 Denying Benefits (05-BLA-5555) of Administrative Law Judge Robert D. Kaplan on 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 noted employer's stipulation to fourteen years of coal mine employment, which he found supported by the evidence of record. The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b), and therefore did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis and total disability. Claimant further argues that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory duty to provide claimant with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director responds by letter, contending that the Board need not remand the case for clarification of Dr. Alam's opinion regarding disability.[2]

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 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*).

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[1] Claimant's initial application for benefits, filed on February 1, 1996, was denied on July 10, 1996, because the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by pneumoconiosis, and that claimant was totally disabled by the disease. Director's Exhibit 1. Claimant did not take any further action on that claim. Claimant filed this claim for benefits on January 30, 2002. Director's Exhibit 3.

[2] The administrative law judge's length of coal mine employment finding, his finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3), and his finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are not challenged on appeal. Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

If a miner files an application 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 because he failed to establish pneumoconiosis, that his pneumoconiosis was due to coal mine employment, and total disability due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement to obtain consideration of the merits of the subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge "need not defer to a doctor with superior qualifications" and "need not accept as conclusive the numerical superiority of x-ray interpretations." Claimant's Brief at 3. Claimant further suggests that the administrative law judge "may have" selectively analyzed the x-ray evidence of record. Claimant's Brief at 3. We find no merit in these assertions. The administrative law judge rationally found that claimant had not established the presence of pneumoconiosis by a preponderance of the x-ray evidence, as the administrative law judge considered the radiological qualifications of each reader, and the quality of each interpretation, and permissibly determined that the positive x-ray readings for pneumoconiosis did not outweigh the greater number of negative readings. Decision and Order at 7; Director's Exhibits 17, 27, 28; Claimant's Exhibits 1, 2, 4; Employer's Exhibits 1, 3, 4; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Further, claimant points to no evidence to support his suggestion that the administrative law judge selectively analyzed the x-ray evidence of record. *See Cox v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988).

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in rejecting Dr. Baker's opinion. The administrative law judge reviewed the medical opinions of Drs. Baker, Alam, and Delapena, who diagnosed pneumoconiosis, Director's Exhibits 16, 31; the medical opinions of Drs. Dahhan and Broudy, who opined that claimant does not have pneumoconiosis, Director's Exhibit 27; Employer's Exhibits 1, 2; and treatment notes from the East Bernstadt Medical Clinic, which did not address the existence of pneumoconiosis. Director's Exhibit 26. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

In assessing Dr. Baker's opinion pursuant to Section 718.202(a)(4), the administrative law judge determined that the opinion was entitled to diminished weight because it was undocumented and unreasoned, noting that the pulmonary function study

and blood gas study relied upon by Dr. Baker yielded non-qualifying values, and the chest x-ray relied upon by Dr. Baker was not a part of the record. The administrative law judge specifically found that Dr. Baker "failed to reconcile his diagnosis with the medical evidence." Decision and Order at 10. The administrative law judge's finding that Dr. Baker's opinion was undocumented and unreasoned was rational. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983)(holding that the determination as to whether physician's report is sufficiently reasoned and documented is a credibility matter for administrative law judge); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because this is the extent of claimant's assertions regarding the administrative law judge's weighing of the newly submitted evidence pursuant to Section 718.202(a)(4), we affirm the administrative law judge's finding that the new medical opinion evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Likewise, we reject claimant's contention that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Baker opined that, because a person who develops pneumoconiosis should limit further exposure to the offending agent, in this case, coal dust, claimant is 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 31. Because a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this portion of Dr. Baker's opinion did not support a finding of total disability. Decision and Order at 14. Dr. Baker also opined that:

> Patient has a Class II impairment based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, based on the FEV1 between 60% and 80% of predicted.

Director's Exhibit 31. Because Dr. Baker did not explain the severity of a Class II impairment, or "equate [it] to a degree of disability," the administrative law judge permissibly declined to find Dr. Baker's diagnosis of a Class II impairment sufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). In light of the foregoing, we reject claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion. Similarly, contrary to claimant's argument, it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education, and work experience, since these factors are not relevant to determining whether claimant is totally disabled from performing his usual coal mine work. *See* 20 C.F.R.

§718.204(b)(2)(iv); *White*, 23 BLR at 1-6-7. Additionally, contrary to claimant's assertion, total disability cannot be presumed on the basis of a diagnosis of simple pneumoconiosis. *See White*, 23 BLR at 1-7 n.8. Accordingly, substantial evidence supports the administrative law judge's finding that the new medical opinion evidence failed to establish total respiratory disability. The finding is therefore affirmed.

Finally, claimant asserts that the Director has failed to fulfill his statutory obligation of providing claimant with a complete, credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b). Specifically, claimant alleges that the administrative law judge "discredited Dr. Alam's report because said [report] was based upon an erroneous x-ray interpretation, because said physician failed to reconcile his diagnosis with the medical evidence . . . and because said physician relied upon non-qualifying [pulmonary function study] and [blood gas study] results." Claimant's Brief at 5. The Director responds that, in some circumstances, Dr. Alam's failure to adequately explain his diagnosis of a totally disabling respiratory impairment would require a remand of the case to the district director for clarification or correction of Dr. Alam's opinion. However, the Director asserts that a remand of the case for clarification of Dr. Alam's opinion on total disability is pointless, as the evidence is insufficient to establish the existence of pneumoconiosis, and Dr. Alam's opinion was found credible on that issue.[3]

As set forth by Section 413(b) of the Act, 30 U.S.C. §923(b), the Department of Labor (the Department) has a statutory obligation to provide each miner who files a claim for benefits with an opportunity to substantiate his claim by means of a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Section 413(b) of the Act is implemented by 20 C.F.R. §725.406. Therein, the Department is charged with making arrangements for the miner to be given a complete pulmonary evaluation and for assessing the adequacy of the evaluation provided. *See* 20 C.F.R. §725.406. As the promulgator of the Black Lung regulations and the administrator of the Act, it is the Director's duty to ensure the proper enforcement and fair administration of the Black Lung program. *See generally* 20 C.F.R. §725.465(d); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc* order); *Capers v. The Youghiogheny and Ohio Coal Co.*, 6 BLR 1-1234, 1-1237 n.4 (1984). We defer to the Director on the issue of whether the statutory obligation of the Department to provide

[3] Even if the administrative law judge had found Dr. Alam's opinion sufficient to support a finding of total disability, the evidence of record does not support a finding of the existence of pneumoconiosis at Section 718.202(a), one of the essential elements of entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

claimant with a complete and credible pulmonary evaluation has been fulfilled. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Newman*, 745 F.2d at 1166, 7 BLR at 2-31; *Hodges*, 18 BLR at 1-87; *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Further, contrary to claimant's assertion, in his evaluation of the evidence pursuant to Section 718.202(a)(4), the administrative law judge did not discredit Dr. Alam's opinion. *See* Decision and Order at 10. We, therefore, decline to remand this case for a complete pulmonary evaluation.

The administrative law judge's findings that the evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment are, therefore, affirmed, 20 C.F.R. §§718.202(a); 718.204(b)(2), and we affirm the administrative law judge's finding that claimant has not, therefore, established that an applicable condition of entitlement has changed since the denial of his prior claim. 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order Denying 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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BETTY JEAN HALL
Administrative Appeals Judge