BRB No. 07-1002 BLA

E. K. Claimant-Petitioner v. ELKHORN JELLICO COAL COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE GROUP Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/15/2008 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

E. K., Vansant, Virginia, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order – Denial of Benefits (04-BLA-6696) of Thomas F. Phalen, Jr. rendered on a subsequent

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985)(Order).

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).[2] The administrative law judge credited claimant with 25.91 years of coal mine employment[3] based on the parties' stipulation. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge 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)(2), an element of entitlement that was previously adjudicated against claimant. The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In considering the claim on the merits, however, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer did not file a response brief. The Director, Office of Workers' Compensation Programs, indicated that he will not file a substantive response to claimant's 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 Co.*, 12 BLR 1-176, 1-177 (1989). 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).

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[2] Claimant previously filed several claims for benefits, all of which were finally denied. His most recent prior claim, filed on November 18, 1996, was denied by an administrative law judge on March 23, 2001, because claimant did not establish the existence of pneumoconiosis and that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1 at 26. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*E.K.*] *v. Elkhorn Jellico Coal Co.*, BRB No. 01-0614 BLA (Feb. 7, 2002)(unpub.); Director's Exhibit 1 at 19. Claimant filed the instant claim on March 13, 2003. Director's Exhibit 3.

[3] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 7, 8, 20. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *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).

In this case, substantial evidence supports the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered thirty-four readings of eight x-rays taken between 1997 and 2003, and considered the readers' radiological credentials.[4] The administrative law judge accurately noted that the x-rays dated September 16, 1997, June 15, 1998, and July 15, 1998, received only negative readings for pneumoconiosis, all by Board-certified radiologists and B readers. Director's Exhibit 1. The administrative law judge next considered that Dr. Cappiello, who is a Board-certified radiologist and B reader, and Dr. Reddy, whose radiological qualifications are not of record, read the October 16, 1997 x-ray as positive for pneumoconiosis. However, because Drs. Sargent, Duncan, Soble, Laucks, and Ahmed, who are all Board-certified radiologists and B readers, read the same x-ray as negative for pneumoconiosis, the administrative law judge reasonably found the October 1, 1997 x-ray to be negative for pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Further, the administrative law judge accurately noted that Dr. Alexander, a Board-certified radiologist and B reader, read the April 29, 2002 x-ray as positive for pneumoconiosis, and that Dr. Wheeler, who possesses the same credentials, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 6; Claimant's Exhibit 3; Employer's Exhibit 4. In view of these conflicting readings by two "dually qualified" physicians, the administrative law judge reasonably found that the April 29, 2002 x-ray was inconclusive for the existence of pneumoconiosis. *See Woodward*, 991 F.2d at 321, 17 BLR at 2-87. The next x-ray, dated March 26, 2003, was read as positive for pneumoconiosis by Dr. Aycoth, a B reader, and as negative for pneumoconiosis by Dr.

[4] The administrative law judge reasonably determined that nine older x-rays of record taken between 1987 and 1990 and associated with claimant's earliest claim, filed in 1987, merited little weight in determining claimant's current condition. *See Cooley v. Island Creek Coal Co*., 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). The record reflects that of the forty readings of those x-rays, two readings were positive for pneumoconiosis and thirty-eight were negative. Director's Exhibit 1.

Wheeler. Director's Exhibit 16; Employer's Exhibit 6. Based upon Dr. Wheeler's superior radiological credentials, the administrative law judge permissibly found the March 26, 2003 x-ray to be negative for pneumoconiosis. *See Woodward*, 991 F.2d at 321, 17 BLR at 2-87.

Additionally, the administrative law judge accurately noted that Dr. Ahmed, a Board-certified radiologist and B-reader, read the May 5, 2003 x-ray as positive for pneumoconiosis, and Dr. Baker, a B-reader, read the same x-ray as negative for pneumoconiosis.[5] Director's Exhibit 13; Claimant's Exhibit 2. Based upon Dr. Ahmed's superior qualifications, the administrative law judge reasonably found the May 5, 2003 x-ray to be positive for pneumoconiosis. *See Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Finally, the administrative law judge considered that Dr. Ahmed read the May 9, 2003 x-ray as positive for pneumoconiosis, and that Dr. Dahhan, a B reader, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 15, 17; Claimant's Exhibit 1. In view of Dr. Ahmed's superior credentials, the administrative law judge found the May 9, 2003 x-ray to be positive for pneumoconiosis.[6]

Based on the foregoing analysis of each x-ray, the administrative law judge determined that five x-rays were negative for pneumoconiosis, two were positive for pneumoconiosis, and one was inconclusive. The administrative law judge reasonably found that the preponderance of the x-ray evidence was negative for pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *White*, 23 BLR at 1-4-5. Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2),(3), the administrative law judge accurately determined that the record contains no biopsy evidence and no evidence of complicated pneumoconiosis, in this living miner's claim filed after January 1, 1982. Decision and Order at 17. We therefore affirm the administrative law judge's finding that claimant

[5] Dr. Barrett read the May 5, 2003 x-ray to assess its film quality only. Director's Exhibit 14.

[6] In so finding, the administrative law judge failed to consider the negative reading of the May 9, 2003 x-ray by Dr. Wheeler, which was properly designated by employer and admitted into the record as Director's Exhibit 17. The administrative law judge's oversight was harmless, in view of his finding that the preponderance of the x-ray evidence did not establish the existence of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Sundaram, Wicker, Jarboe, Baker, Dahhan, Alam, Fino, and claimant's medical treatment records. Drs. Sundaram, Baker, and Alam diagnosed claimant with pneumoconiosis, while Drs. Wicker, Jarboe, Dahhan, and Fino concluded that he does not have pneumoconiosis but suffers from lung disease due to smoking. The administrative law judge permissibly discounted Dr. Sundaram's diagnosis of clinical coal workers' pneumoconiosis that was based on Dr. Sundaram's positive x-ray reading, because the October 16, 1997 x-ray upon which Dr. Sundaram relied was reread as negative for pneumoconiosis by more highly qualified physicians. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Director's Exhibit 33. Dr. Sundaram also diagnosed chronic obstructive pulmonary disease (COPD), and stated that claimant had a disabling pulmonary impairment that was due to twenty-six years of coal dust exposure. Director's Exhibit 33. To the extent that Dr. Sundaram opined that claimant's COPD was legal pneumoconiosis,[7] the administrative law judge permissibly found that Dr. Sundaram's opinion was not well-reasoned, because although Dr. Sundaram noted that claimant was smoking one-half pack of cigarettes a day, Dr. Sundaram nowhere indicated that he knew the duration of claimant's smoking history. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Dr. Baker diagnosed "COPD with moderate obstructive ventilatory defect based on PFTS," but indicated that the pulmonary function study was "not reproducible," and he diagnosed chronic bronchitis based upon a "history of cough, sputum production & wheezing." Director's Exhibit 13 at 18. Dr. Baker attributed both diagnoses to cigarette smoking and coal dust exposure. *Id*. The administrative law judge acted within his discretion to find that Dr. Baker's opinion was not well-reasoned or well-documented, because the pulmonary function study that Dr. Baker relied upon to diagnose COPD was invalid, and because Dr. Baker diagnosed chronic bronchitis based solely upon a history that was provided to him by claimant. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

In two reports dated January 23, 2004 and February 14, 2006, Dr. Alam, who is claimant's treating physician, diagnosed clinical coal workers' pneumoconiosis based upon an unspecified chest x-ray, and chronic bronchitis due to twenty-six years of coal dust exposure. Director's Exhibit 16(a) at 2; Claimant's Exhibit 4. With respect to

[7] "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

claimant's smoking history, in the first report Dr. Alam stated both that claimant had quit smoking, and was smoking one to two cigarettes a day. In the second report, Dr. Alam opined that because claimant had quit smoking, it was more likely that the worsening of his symptoms was due to pneumoconiosis The administrative law judge rationally accorded no weight to Dr. Alam's diagnosis of clinical coal workers' pneumoconiosis, because Dr. Alam did not identify the x-ray he relied upon. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). With respect to Dr. Alam's diagnosis of legal pneumoconiosis, the administrative law judge found that Dr. Alam's description of claimant's smoking history was inconsistent and contradicted by claimant's testimony at the July 27, 2006 hearing that he was still smoking. Hearing Tr. at 22. Under these circumstances, since Dr. Alam relied on the lack of smoking to support his opinion, the administrative law judge permissibly found that Dr. Alam's diagnosis of legal pneumoconiosis was not well-reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Stark v. Director, OWCP*, 9 BLR 1-36, 37 (1986).

Further, the administrative law judge permissibly discounted a nurse practitioner's diagnosis of coal workers' pneumoconiosis that was listed in claimant's treatment records, as it was not a diagnosis by a physician and it was undocumented. *See* 20 C.F.R. §718.202(a)(4); Director's Exhibit 16.

The administrative law judge found that, by contrast, Drs. Dahhan and Fino had rendered well-reasoned and well-documented opinions explaining how objective evidence indicated that claimant does not have clinical or legal pneumoconiosis, but has COPD, emphysema, and chronic bronchitis due to smoking. Director's Exhibit 15; Employer's Exhibits 1-3, 5. The administrative law judge acted within his discretion to find that, given the reasoning and explanation of their opinions, and their qualifications as internists and pulmonologists, the opinions of Drs. Dahhan and Fino were more persuasive and merited "substantial probative weight."[8] Decision and Order at 25; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). As substantial evidence supports the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the finding is affirmed.

[8] The administrative law judge reasonably determined that the older medical opinions from claimant's first claim, dating back to 1987, merited less weight due to their remoteness in time. *See Cooley*, 845 F.2d at 624, 11 BLR at 2-149; *Coffey*, 5 BLR at 1-407; Decision and Order at 17 n.27. Moreover, the record reflects that the few diagnoses of pneumoconiosis contained in those earlier reports were rendered by physicians who did not possess the credentials in Pulmonary Disease that the administrative law judge noted were held by Drs. Dahhan and Fino. Director's Exhibit 1.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

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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BETTY JEAN HALL
Administrative Appeals Judge