BRB No. 98-1643 BLA

ELMER R. OVERTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BURLIN HOWARD TRUCKING	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE 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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Elmer R. Overton, Middlesboro, Kentucky, *pro se*.

John D. Maddox (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (97-BLA-1568) of Administrative Law Judge Robert L. Hillyard on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

[1] Claimant is Elmer R. Overton, who filed his first application for benefits with the Social Security Administration on February 28, 1973, which was finally denied by the Department of Labor on July 25, 1980. Director's Exhibit 49. Claimant did not appeal this

Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Noting that this is a duplicate claim, the administrative law judge considered all of the newly submitted evidence since the prior denial of the claim and found that claimant failed to establish both the existence of pneumoconiosis under 20 C.F.R. §718.202(a) and total respiratory disability under 20 C.F.R. §718.204(c). Therefore, the administrative law judge determined that claimant failed to establish a material change in condition pursuant to 20 C.F.R. §725.309, and accordingly, denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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 Co.*, 12 BLR 1-176 (1989). 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 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).

The United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, articulated the standard for adjudicating duplicate claims pursuant to Section 725.309, holding that "to assess whether a material change in condition is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him." *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-18 (6th Cir. 1994). In this case, the previous denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. *See* Director's Exhibit 49.

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denial. Subsequently, claimant filed a second application for benefits on May 20, 1996, which is the subject of this appeal. Director's Exhibit 1.

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence, contains no reversible error, and therefore, it is affirmed. Relevant to Section 718.202(a)(1), the x-ray evidence submitted since the previous denial consists of one positive and nine negative interpretations of two x-ray films. Director's Exhibits 25-27, 29-24. The administrative law judge, within a proper exercise of his discretion, found the sole positive reading entitled to less weight because this reading was rendered by a B-reader, whereas the negative interpretations were provided by physicians who are both Board-certified radiologists and B-readers, and therefore, have superior radiological expertise.[2] *See* 20 C.F.R. §718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9. Inasmuch as the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Relevant to Section 718.202(a)(2), the administrative law judge properly found that the newly submitted evidence contains no autopsy or biopsy reports. 20 C.F.R. §718.202(a)(2). Additionally, under Section 718.202(a)(3), the administrative law judge correctly noted that the presumption at Section 718.304 is inapplicable because there is no evidence of complicated pneumoconiosis and, as this is a living miner's claim filed after

[2] A review of the record reveals that of the nine negative readings, eight were rendered by dually-qualified radiologists and one was provided by a B-reader. Director's Exhibits 25, 26, 29-34. The administrative law judge erroneously found that there were seven negative readings by dually-qualified radiologists rather than eight; nevertheless, we deem this error harmless inasmuch as the administrative law judge correctly cited the proper radiological qualifications of all of the physicians and their corresponding interpretations in his summary of the x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 6.

January 1, 1982, none of the presumptions referenced in Section 718.202(a)(3) are applicable. 20 C.F.R. §718.202(a)(3). Hence, we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2) and (a)(3) inasmuch as these determinations are rational and supported by the evidentiary record. *See* 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306; Decision and Order at 9.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), there are two medical opinions submitted since the previous denial. Diagnosing coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis, Dr. Baker opined that all three conditions arose out of claimant's coal mine employment and that the latter two are also due to cigarette smoking. Director's Exhibit 22. On the contrary, Dr. Dahhan reported that claimant has no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure. Director's Exhibit 21. The administrative law judge noted that Dr. Dahhan relied on a length of coal mine employment that greatly exceeded his determination, but nevertheless, permissibly credited Dr. Dahhan's opinion because he found this physician's opinion to be better reasoned and supported by the objective medical evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9-10. Furthermore, the administrative law judge, within a proper exercise of his discretion, discredited Dr. Baker's opinion inasmuch as Dr. Baker's physical examination of claimant was normal, his diagnosis of chronic bronchitis was based on a non-qualifying pulmonary function study, and he failed to explain why he attributed claimant's chronic bronchitis and chronic obstructive pulmonary disease to coal dust exposure. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 10.[3] Inasmuch as the administrative law judge reasonably found that Dr. Dahhan's opinion outweighed Dr. Baker's opinion, we affirm the administrative law judge's determination that claimant failed to establish the existence of

[3] In discrediting Dr. Baker's opinion, the administrative law judge initially stated that Dr. Baker based his diagnosis of coal workers' pneumoconiosis on a positive x-ray interpretation, contrary to the administrative law judge's determination that the x-ray evidence was negative for the presence of pneumoconiosis. Decision and Order at 10. Although an administrative law judge may not reject a medical opinion because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record, *see Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984), the administrative law judge properly weighed the medical opinion evidence by providing alternate, valid reasons for discrediting Dr. Baker's opinion. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988).

pneumoconiosis pursuant to Section 718.202(a)(4).[4]

[4] Because claimant failed to establish the existence of pneumoconiosis under Section 718.202(a), the administrative law judge properly determined that claimant also failed to establish causality pursuant to Section 718.203(b). 20 C.F.R. §718.203(b); Decision and Order at 10.

We next affirm the administrative law judge's finding that total disability is not established pursuant to Section 718.204(c)(1)-(3) as this determination is rational and supported by substantial evidence. The administrative law judge properly determined that neither of the two newly submitted pulmonary function studies produced qualifying values, therefore, we affirm his finding that total disability is not demonstrated pursuant Section 718.204(c)(1).[5] *See* 20 C.F.R. §718.204(c)(1); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 10-11; Director's Exhibits 19, 20. Likewise, the administrative law judge properly determined that neither of the two arterial blood gas studies yielded qualifying values, hence, we affirm his finding that total disability is not demonstrated pursuant Section 718.204(c)(2). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 11; Director's Exhibits 23, 24. Similarly, because the administrative law judge properly found that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, we affirm his determination that total disability cannot be demonstrated under Section 718.204(c)(3). 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989); Decision and Order at 11.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(c)(1), (2).

With respect to Section 718.204(c)(4), the administrative law judge found that claimant also failed to demonstrate total disability on the basis of the medical opinion evidence. Relevant to total disability, Dr. Baker diagnosed a "mild" impairment and Dr. Dahhan opined that claimant has the respiratory capacity to continue his previous coal mine work. Director's Exhibits 21, 22. The administrative law judge compared the exertional requirements of claimant's most recent coal mine work as a truck driver to Dr. Baker's assessment of claimant's working capability, and, within a reasonable exercise of his discretion, found that Dr. Baker's opinion failed to affirmatively demonstrate that claimant is unable to perform his usual coal mine employment. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984); Decision and Order at 11. Inasmuch as the administrative law judge properly found Dr. Dahhan's opinion entitled to "substantial weight," we affirm the administrative law judge's determination that claimant failed to demonstrate total disability on the basis of the medical opinion evidence at Section 718.204(c)(4). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986); *Lucostic*, *supra*.[6]

Inasmuch as the administrative law judge properly considered all of the newly submitted evidence of record to determine that claimant failed to establish the existence of pneumoconiosis and total disability, elements that were previously adjudicated against claimant, we affirm the administrative law judge's finding that claimant also failed to establish a material change in condition, the threshold requirement for consideration of all of the evidence on the merits. *See* 20 C.F.R. §725.309; *Ross*, *supra*.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[6] The administrative law judge additionally weighed the new pulmonary function study, blood gas study, and medical opinion evidence as a whole and found that the evidence is not supportive of a finding of total respiratory disability under Section 718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon en banc*, 9 BLR 1-236 (1987); Decision and Order at 11.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge