BRB No. 03-0367 BLA

PEARL GLENN WHITE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW WHITE COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 01/22/2004
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (02-BLA-5085) of Administrative Law Judge Thomas F. Phalen, Jr., on a claim for benefits 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 credited claimant with 12.61 years of coal mine employment and noted that the instant case involves a subsequent claim. The administrative law judge found the evidence insufficient to establish that one of the applicable conditions of entitlement has changed since the denial of the prior claim. Accordingly, the administrative law judge denied benefits.

Claimant filed his initial application for benefits on February 26, 1973 which was finally denied by the claims examiner on November 14, 1979. The claims examiner denied benefits because the evidence did not show that claimant had pneumoconiosis, did not show that the disease was caused by coal mine employment, and did not show that claimant was totally disabled by the disease. Director's Exhibit 24-1.

The administrative law judge considered the newly submitted evidence and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b).[2] Accordingly, the administrative law judge denied this claim because he found that claimant failed to establish that one of the applicable conditions of entitlement has changed since the date of the prior denial.

On appeal, claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis and total disability.

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

[2] Although the administrative law judge refers to the regulations in 20 C.F.R. §718.204(c), under the amended regulations, total respiratory or pulmonary disability is established pursuant to 20 C.F.R. §718.204(b).

Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[3]

Claimant's second claim was filed on February 7, 2001, shortly after the amended regulations took effect. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d)...) has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d).[4]

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[3] We affirm the administrative law judge's finding of 12.61 years of coal mine employment and his finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iii), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] In defining the conditions of entitlement in a miner's claim, 20 C.F.R. §725.202(d) states:

> An individual is eligible for benefits under this subchapter if the individual:
>
> (1) Is a miner as defined in this section; and
> (2) Has met the requirements for entitlement to benefits by establishing that he or she:
>
> (i) Has pneumoconiosis (see §718.202), and
> (ii) The pneumoconiosis arose out of coal mine employment (see §718.203), and
> (iii) Is totally disabled (see §718.204(c)), and
> (iv) The pneumoconiosis contributes to the total disability (see §718.204(c)), and
>
> (3) Has filed a claim for benefits in accordance with the provisions of this part.

20 C.F.R. §725.202(d). Although the regulations refer to establishing that the miner is "totally disabled (see §718.204(c))," 20 C.F.R. §725.202(d)(2)(iii), total disability is established pursuant to 20 C.F.R. §718.204(b), while disability causation is established pursuant to 20 C.F.R. §718.204(c).

In determining whether claimant established the existence of pneumoconiosis, the administrative law judge detailed the evidence of record and, in the analysis portion of his decision, he specifically addressed the newly submitted x-ray evidence, and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge noted that the newly submitted x-ray evidence consists of five interpretations of three x-rays. After evaluating each film individually, the administrative law judge found that the "more numerous negative interpretations which were rendered by dually-qualified physicians, outweigh the one positive interpretation…."[5] Decision and Order at 14. The administrative law judge thus determined that the newly submitted x-ray evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations. The administrative law judge permissibly considered both the quality and the quantity of the newly submitted x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), and we affirm the administrative law judge's weighing of the x-ray evidence as it is supported by substantial evidence. In addition, we reject claimant's comment that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal selective analysis of the x-ray evidence.

Claimant also challenges the administrative law judge's finding that the newly submitted medical opinion evidence does not establish the existence of pneumoconiosis

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[5] The newly submitted x-ray evidence includes interpretations of three chest films. Dr. Dahhan, a B-reader, and Dr. Wheeler, a dually-qualified reader, each interpreted the March 28, 2002 film as negative for pneumoconiosis. Employer's Exhibits 1, 2. Dr. Barrett, a Board-certified radiologist, read the April 25, 2001 film as completely negative for pneumoconiosis, Director's Exhibit 15, and Dr. Baker, a B-reader, read this film as 1/0, Director's Exhibit 13. Dr. Hussain, who is neither a B-reader nor a Board-certified radiologist, interpreted the June 6, 2001 film as 1/1, Director's Exhibit 11, while Dr. Sargent, who is dually-qualified, deemed the film overexposed, Director's Exhibit 14. Although the administrative law judge did not note Dr. Sargent's interpretation, since it merely contains the notation that the film is overexposed, and does not provide a specific reading, the administrative law judge's omission is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

pursuant to 20 C.F.R. §718.202(a)(4).[6] In evaluating the medical opinion evidence, the administrative law judge found the opinions of Drs. Baker and Dahhan entitled to probative weight, and he accorded Dr. Hussain's opinion little probative weight. The administrative law judge determined that claimant has not established the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4).

Claimant asserts that the administrative law judge erred in finding that Dr. Hussain's opinion is not entitled to probative weight. Claimant maintains that it is error for the administrative law judge to "substitute his own conclusion for those of a physician, which [the administrative law judge] appears to have done in this instance." Claimant's Brief at 5. In addition, claimant asserts that Dr. Hussain's opinion is well reasoned and that it should not have been rejected.

The administrative law judge considered Dr. Hussain's two reports and their inconsistencies regarding the existence of pneumoconiosis, and he determined that Dr. Hussain's opinion had little probative value because Dr. Hussain did not provide an explanation for these inconsistencies. Decision and Order at 15-16. The administrative law judge permissibly accorded little weight to Dr. Hussain's reports based on their inconsistencies regarding the existence of pneumoconiosis. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). Further, we affirm, as unchallenged on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), the administrative law judge's finding that the remaining medical opinions are insufficient to carry claimant's burden of establishing the existence of pneumoconiosis at Section 718.202(a)(4) by a preponderance of the evidence, *see Ondecko*, 512 U.S. 267, 18 BLR 2A-1. Therefore, we affirm the administrative law judge's finding that the newly submitted evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Turning to the issue of total disability pursuant to Section 718.204(b), claimant argues that the administrative law judge erred by not comparing the exertional requirements of his usual coal mine employment with Dr. Baker's assessment of claimant's physical limitations. Claimant also contends that the administrative law judge

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[6] The newly submitted evidence contains the medical opinions of Dr. Baker, who opined that claimant suffers from coal workers' pneumoconiosis, Director's Exhibit 13, and Dr. Dahhan, who opined that the evidence is insufficient to justify a diagnosis of coal workers' pneumoconiosis, Employer's Exhibit 1. Dr. Hussain, in a June 6, 2001 report, diagnosed pneumoconiosis but opined that claimant had no occupational lung disease caused by dust exposure. Director's Exhibit 11. In a revised summary, in response to a letter from the claims examiner, Dr. Hussain opined that claimant has an occupational lung disease caused by his coal mine employment. Director's Exhibit 12.

erred by failing to consider claimant's age, education and work experience. In addition, claimant asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it must be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine employment or comparable and gainful work is adversely affected. Claimant's Brief at 7.

The administrative law judge noted that Dr. Baker opined that claimant is completely disabled from his usual coal mine employment, and the administrative law judge found this opinion probative and therefore entitled to weight. The administrative law judge also found probative Dr. Dahhan's opinion that claimant retains the physiological capacity to perform his usual coal mine employment. The administrative law judge found Dr. Hussain's opinion, that claimant has the respiratory capacity to perform the work of a miner in a dust-free environment, to be lacking probative value and therefore entitled to little weight.[7]

We reject claimant's assertions of error regarding the administrative law judge's disability finding. Since the administrative law judge found that Dr. Baker's opinion is supportive of claimant's burden of establishing a totally disabling respiratory impairment, and accorded this opinion probative weight, Decision and Order at 18, contrary to claimant's assertion, the administrative law judge did not err by failing to specifically compare the exertional requirements of claimant's usual coal mine employment with claimant's physical limitations. In addition, because claimant does not challenge the administrative law judge's specific findings regarding the opinions of Drs. Hussain and Dahhan on the issue of total disability, these findings are affirmed. *See Skrack*, 6 BLR 1-710. Further, contrary to claimant's assertion, the administrative law judge is not required to consider claimant's age, education and work experience. These issues are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).[8]

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[7] Dr. Baker opined that claimant has a class II impairment noting the results of portions of his pulmonary function study showing a function of 60-80% of the predicted values. Dr. Baker also suggested that persons with pneumoconiosis should limit their exposure to the offending agent, which "would imply the [claimant] is 100% occupationally disabled for work in coal mine industry." Director's Exhibit 13. Dr. Hussain opined that claimant suffers from a mild impairment, but indicated that claimant has the respiratory capacity to do work in a dust free environment. Director's Exhibits 11, 12. Dr. Dahhan opined that from a respiratory standpoint, claimant retains the physiological capacity to perform his previous coal mine employment. Employer's Exhibit 1.

Consequently, we affirm the administrative law judge's finding that the newly submitted evidence does not establish total disability pursuant to Section 718.204(b), as this finding is supported by substantial evidence. Although the administrative law judge did not render findings on the two other "requirements for entitlement," *see* n.4, *supra*, claimant has not raised any further allegations of error. We, therefore, affirm the administrative law judge's finding that this claim fails pursuant to Section 725.309 because claimant has not established that one of the applicable elements of entitlement has changed since the date of the denial of the prior claim, and we affirm the administrative law judge's concomitant denial of benefits.

[8] Claimant further asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected. Claimant's Brief at 7. We reject claimant's argument, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b).

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