BRB No. 04-0565 BLA

ARTHUR D. HOSKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STRAIGHT CREEK MINING COMPANY	)	
	)	DATE ISSUED: 04/26/2005
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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

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

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

Jeffrey S. Goldberg (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 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 (02-BLA-5498) of Administrative Law Judge Mollie W. Neal denying benefits on a 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] This case involves a subsequent claim filed on February 26, 2001.[2] After noting that the parties stipulated to the fact that claimant had fourteen years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(i)-(iv). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits.[3] The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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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]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on October 10, 1991. Director's Exhibit 1. The district director denied the claim on March 24, 1992 and May 27, 1992. *Id.* Claimant filed a second claim on April 23, 1993. *Id.* Because claimant's second claim was filed within one year of the denial of his first claim, the Department of Labor considered claimant's 1993 claim to be a request for modification pursuant to 20 C.F.R. §725.310 (2000). *Id.* The district director denied claimant's request for modification on May 26, 1993. *Id.* There is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a third claim on February 26, 2001. Director's Exhibit 3.

[3]By letter dated October 15, 2004, counsel for employer, Lois A. Kitts, of the law firm Baird & Baird, P.S.C., notified the Board that her firm was withdrawing as employer's counsel. By Order dated November 23, 2004, the Board noted the withdrawal of Lois A. Kitts as counsel for employer. *Hoskins v. Straight Creek Mining Co.*, BRB No. 04-0565 BLA (Nov. 23, 2004) (Order) (unpublished).

[4]On November 12, 2004, the Director, Office of Workers' Compensation Programs (the Director), filed a motion to hold this case in abeyance. By Order dated

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant's 2001 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1991 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[5] has changed since the date upon which the order denying the prior claim became final. *Id.* The district director denied benefits on claimant's 1991 claim because he found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 1.

Claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[6] The newly submitted x-ray evidence consists of interpretations of three x-rays taken on April 25, 2001, June 6, 2001 and August 7, 2001. In considering whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within her discretion in according the greatest weight to the x-ray interpretations rendered by physicians dually

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November 29, 2004, the Board granted the Director's motion and held the case in abeyance for sixty days pending the Director's determination of whether a surety bond covered the claim against employer. *Hoskins v. Straight Creek Mining Co.*, BRB No. 04-0565 BLA (Nov. 29, 2004) (Order) (unpublished). On January 28, 2005, the Director filed a status report indicating that a surety bond had been issued by Aetna Casualty and Surety Company that covers the claim in this appeal. No responses to the Director's status report were received. By Order dated March 1, 2005, the Board lifted its abeyance and informed the parties that the briefing schedule was closed. *Hoskins v. Straight Creek Mining Co.*, BRB No. 04-0565 BLA (Mar. 1, 2005) (Order) (unpublished).

[5]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

[6]Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

qualified as B readers and Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 5-6. Of the five x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists, three are negative for pneumoconiosis. Director's Exhibits 11, 13, 14; Claimant's Exhibits 2, 3; Employer's Exhibit 1. Because it is supported by substantial evidence,[7] we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in finding the newly submitted opinions of Drs. Baker and Hussain insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In his April 25, 2001 report, Dr. Baker diagnosed chronic bronchitis based on history. Director's Exhibit 9. Although Dr. Baker indicated that claimant's lung disease was not the result of exposure to coal dust, he subsequently indicated that any pulmonary impairment was the result of coal dust exposure. *Id.* Dr. Baker stated that:

> [Claimant] is a never [sic] smoker and has chronic bronchitis. It is thought that his bronchitis is most likely caused by his coal dust exposure.

Director's Exhibit 9.

The administrative law judge permissibly found that Dr. Baker's statement, that claimant's chronic bronchitis was "most likely" caused by his coal dust exposure, was too equivocal to constitute a diagnosis of legal pneumoconiosis.[8] *See* 20 C.F.R.

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[7]In challenging the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* In this case, the administrative law judge permissibly considered both the quality and the quantity of the 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); *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). Moreover, claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

[8]The administrative law judge noted that the record also contains Dr. Baker's treatment records from November 20, 2001 through March 10, 2003. *See* Director's

§718.201(a)(2); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 15; Director's Exhibit 13.

Claimant contends that the administrative law judge erred in failing to accord greater weight to Dr. Baker's opinion based upon his status as claimant's treating physician. Claimant's contention has no merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[9] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* As previously discussed, the administrative law judge properly discredited Dr. Baker's opinion because she found that it was equivocal. *See Justice*, *supra*.

In a report dated June 6, 2001, Dr. Hussain diagnosed pneumoconiosis. Director's Exhibit 10. Dr. Hussain indicated that he based his diagnosis on his positive interpretation of a June 6, 2001 x-ray and on claimant's "history of exposure." Director's Exhibit 10. The administrative law judge, however, noted that Dr. Hussain "failed to disclose or discuss the extent of [c]laimant's coal dust exposure and the nature and length of [claimant's] coal mine employment." Decision and Order at 8. The administrative law judge permissibly discredited Dr. Hussain's opinion because the doctor failed to

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Exhibit 12; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge found that these records, for the most part, are illegible. Decision and Order at 7. The administrative law judge, however, noted that the records indicate that claimant has "cwp 0/1," chronic bronchitis, shortness of breath and asthma. *Id.* In "Progress Notes" dated June 11, 2002, November 12, 2002 and March 10, 2003, Dr. Baker circled "CWP" and noted "cwp 1/0 – 0/1." Employer's Exhibit 3. However, Dr. Baker does not provide any explanation for his findings. Consequently, Dr. Baker's treatment records are insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[9]Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The United States Court of Appeals for the Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

provide any indication that he was aware of the length or extent of claimant's coal mine employment.[10] *See generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis.[11] We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Claimant next contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[12] Claimant argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. Dr. Baker opined that:

> The patient has a Class I impairment with the FEV1 and vital capacity both being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 9.

Because Dr. Baker failed to explain the severity of such a diagnosis or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class I impairment is insufficient to support a

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[10]In his consideration of the x-ray evidence, the administrative law judge also found that the June 6, 2001 x-ray that Dr. Hussain interpreted as positive for pneumoconiosis was interpreted by Dr. Wiot, a better qualified physician, as negative for pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 6; Director's Exhibits 10, 11.

[11]The record does not contain any other newly submitted medical opinion evidence supportive of a finding of pneumoconiosis. *See* Director's Exhibit 14; Employer's Exhibits 2, 5, 6.

[12]Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack*, *supra*.

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*).

Claimant also argues that the administrative law judge erred in finding that Dr. Hussain's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Although Dr. Hussain opined that claimant suffered from a mild pulmonary impairment, he indicated that claimant retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 10. Claimant argues that the administrative law judge erred in failing to address whether Dr. Hussain's diagnosis of a mild pulmonary impairment supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The law is clear that even a mild impairment may be totally disabling, depending upon the exertional requirements of a miner's usual coal mine employment. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). However, in this case, Dr. Hussain, despite finding a mild pulmonary impairment, opined that claimant retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 10. Consequently, the administrative law judge permissibly found that Dr. Hussain's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge also properly found that Drs. Dahhan and Renn opined that claimant retained the respiratory capacity to perform his usual coal mine employment.[13] Decision and Order at 12. Because it is based upon substantial evidence, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.[14]

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[13]In a report dated September 10, 2001, Dr. Dahhan opined that there were no objective findings to indicate any pulmonary impairment or disability. Director's Exhibit 14. Dr. Dahhan further opined that from a respiratory standpoint, claimant retained the physiological capacity to continue his coal mining work. *Id.* Dr. Dahhan reiterated his opinions during an August 28, 2003 deposition. Employer's Exhibit 6.

In a report dated November 17, 2002, Dr. Renn opined that claimant did not suffer from any ventilatory impairment. Employer's Exhibit 2. Dr. Renn opined that claimant, from a respiratory standpoint, was "not totally and permanently disabled to any extent." *Id.* Dr. Renn also opined that claimant would be able to perform any of his previous coal mining jobs. *Id.* Dr. Renn reiterated his opinions during an August 7, 2003 deposition. Employer's Exhibit 5.

[14]Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable elements of entitlement has changed since the date of the denial of the 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

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assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).