BRB No. 05-0730 BLA

ALVIN SHORT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ALVIN SHORT TRUCKING	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 04/26/2006
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5177) of Administrative Law Judge Daniel J. Roketenetz rendered 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). The administrative law judge found that

employer was the responsible operator and credited claimant with thirty-two years of coal mine employment.[1] Decision and Order at 4-5. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 6. After determining that the instant claim is a subsequent claim,[2] the administrative law judge found that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Decision and Order at 9-15. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement that was previously adjudicated against him, and denied the subsequent claim pursuant to 20 C.F.R. §725.309(d). Decision and Order at 15.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (a)(4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.[3]

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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4, 6.

[2] Claimant's initial claim for benefits, filed on October 8, 1997, was finally denied on December 7, 1998 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed this claim on July 2, 2002. Director's Exhibit 3.

[3] The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

Where a miner files a claim 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 either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either the existence of pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

Pursuant to Section 718.202(a)(1), the administrative law judge considered five readings of three new x-rays in light of the readers' radiological qualifications. Decision and Order at 8. The administrative law judge properly found that the "1/0" reading of the November 19, 2002[4] x-ray by Dr. Simpao, who has no special radiological qualifications, was countered by a negative reading for pneumoconiosis by Dr. Wheeler, a B-reader and Board-certified radiologist. Director's Exhibit 15; Employer's Exhibit 1. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 8. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *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); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

[4] The administrative law judge misdated the November 19, 2002 x-ray as dated November 11, 2002. Decision and Order at 8; Director's Exhibit 15; Employer's Exhibit 1.

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in rejecting the opinion of Dr. Simpao that diagnosed coal workers' pneumoconiosis. Claimant's Brief at 4. Contrary to claimant's contention, the administrative law judge did not reject Dr. Simpao's opinion. The administrative law judge acknowledged Dr. Simpao's qualifications as a Board-certified internist and pulmonologist and found his opinion well-reasoned and documented, based on claimant's physical examination, symptoms, x-ray, pulmonary function and blood gas studies, electrocardiogram, and smoking and work histories. Decision and Order at 11. The administrative law judge, however, permissibly found Dr. Simpao's opinion outweighed by the equally well-reasoned and documented contrary opinions of Drs. Dahhan and Broudy, who are also Board-certified internists and pulmonologists. Decision and Order at 11-12; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999). Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv),[5] claimant alleges that Dr. Simpao's opinion that claimant did not have the respiratory capacity to perform the work of a coal miner or comparable work due to coal workers' pneumoconiosis, "may be sufficient for invoking the presumption of total disability." Claimant's Brief at 6. Contrary to claimant's allegation, claimant is not entitled to a presumption of disability as the record contains no evidence of complicated pneumoconiosis and the claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); *Kabachka v. Windsor Power House Coal Corp.*, 11 BLR 1-1171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Director's Exhibit 15; Claimant's Exhibit 2. Rather, claimant must establish each element of entitlement by a preponderance of the evidence. *Trent*, 11 BLR at 1-27.

Claimant alleges that the opinion of Dr. Simpao is well reasoned and documented, and should not have been rejected by the administrative law judge as the Board has previously held that it is an error to reject a medical opinion solely because is based on non-conforming pulmonary functions studies. The administrative law judge acknowledged that Dr. Simpao based his disability assessment on claimant's symptoms and results of claimant's examination, x-ray, pulmonary function study and blood gas study. Decision and Order at 11, 14. Contrary to claimant's contention, the administrative law judge properly found Dr. Simpao's opinion, that claimant's mild respiratory impairment would not allow him to perform his last coal mine employment,

[5] The administrative law judge refers to 20 C.F.R. §718.204(c)(1)-(4) in his weighing of the evidence relevant to the issue of total disability. However, as the instant claim was filed after January 19, 2001, the proper regulatory citation is 20 C.F.R. §718.204(b)(2)(i)-(iv).

was not well reasoned because it was based in part on pulmonary function and blood gas studies that were not qualifying for total disability, and Dr. Simpao did not explain the specific symptomatology or clinical observations that he relied upon to opine that claimant was totally disabled. Decision and Order at 15; *see Fields v. Island Coal Co.*, 10 BLR 1-19, 1-21-22 (1987); Director's Exhibit 15; Claimant's Exhibit 2.

In addition, the administrative law judge permissibly found the contrary opinions of Drs. Broudy and Dahhan, that claimant retains the respiratory capacity to perform coal mine work, well reasoned and documented by the normal results of their pulmonary testing. Decision and Order at 14-15; *Fields*, 10 BLR 1-19, 1-21-22; Employer's Exhibit 1, 2, 4; Director's Exhibit 26. Accordingly, the administrative law judge rationally found that the opinions of Drs. Broudy and Dahhan outweighed Dr. Simpao's opinion and that claimant failed to establish total disability under Section 718.204(b)(2)(iv). *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

We also find no merit in claimant's assertion that the administrative law judge erred in not comparing the exertional requirements of claimant's coal mine employment in conjunction with Dr. Simpao's opinion of disability. Here, a comparison was not required, as the administrative law judge rationally determined that Dr. Simpao failed to explain the specific symptomatology or clinical observations that he relied upon to opine that claimant was totally disabled and his disability assessment was unexplained in light of the normal objective testing and was therefore not well reasoned or documented. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Lastly, claimant contends that since pneumoconiosis is a progressive and irreversible disease, it can "be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 8. With this assertion, claimant identifies no error in the administrative law judge's determination that claimant did not prove that he is totally disabled. For the reasons discussed above, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Therefore, we affirm the administrative law judge's finding that the newly submitted evidence did not establish either the existence of pneumoconiosis or that

claimant is totally disabled. Consequently, we affirm the administrative law judge's finding that claimant did not establish that one of the applicable conditions of entitlement changed since the denial of his prior claim, and we affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d). *See White*, 23 BLR at 1-7.

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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JUDITH S. BOGGS
Administrative Appeals Judge